

**An assessment of South Africa's obligations under the United Nations Convention
Against Torture**

A mini-thesis submitted in partial fulfillment of the requirements for the degree of
Magister Legum (International Human Rights Law) in the Department of Law
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By

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KEYWORDS

- United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT)
- Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)
- South Africa
- Torture
- Cruel, inhuman and degrading treatment of punishment (CIDT)
- Prohibition
- Prevention
- Criminalization
- *Non-refoulement*
- Redress



ABSTRACT

An assessment of South Africa's obligations under the United Nations Convention Against Torture

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Mini-thesis for the Department of Law, University of the Western Cape

In this mini-thesis, I examine the international legal framework pertaining to torture and other forms of ill treatment as established under the United Nations Convention Against Torture (UNCAT), the United Nations Optional Protocol on the Convention Against Torture (OPCAT) and supported by other instruments of international human rights law. I establish that the international framework thus created, constitutes a sufficient, efficient and practical guideline which nations may use to implement the absolute prohibition against torture and to prevent and address the occurrence of torture and other cruel, degrading behaviour, on national level.

I attempt to analyze South Africa's legal position pertaining to torture, in relation to the international legal framework. Since it has been established that torture and cruel inhuman and degrading treatment (CIDT) usually occur in situations where persons are deprived of personal liberty, I examine legislation, policies and practices applicable to specific places of detention, such as correctional centres, police custody, repatriation centers, mental health care facilities and child and youth care centers. I establish that although South Africa has ratified the UNCAT and is a signatory to the OPCAT, our legal system greatly lacks in structure and in mechanisms of enforcement, as far as the absolute prohibition and the prevention of torture and other forms of cruel and degrading treatment or punishment are concerned.

I submit that South Africa has a special duty to eradicate torture, since many of its citizens and several of its political leaders are actually victims of torture, who suffered severe ill treatment under the apartheid regime. I argue that the South African legal system is sufficiently capable of adopting a zero-tolerance policy toward torture and to incorporate this with the general stance against crime. In many respects, South Africa is an example to other African countries and should strongly condemn all forms of human rights violations, especially torture, since acts of torture are often perpetrated by public

officials who abuse their positions of authority. I conclude by making submissions and recommendations for law reform, in light of the obstacles encountered within a South African context.

DECLARATION

I declare that An assessment of South Africa's obligations under the United Nations Convention Against Torture is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Marilize Ackermann

April 2010



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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AI	Amnesty International
APT	Association for the Prevention of Torture
CAT	Committee Against Torture
CIDT	Cruel, Inhuman and Degrading Treatment or Punishment
CSPRI	Civil Society Prison Reform Initiative
CSVV	Centre for the Study of Violence and Reconciliation
DCS	Department of Correctional Services
DHA	Department of Home Affairs
ECHR	European Convention on Human Rights
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate
ICTY	International Criminal Tribunal for the former Yugoslavia
LHR	Lawyers for Human Rights
NGO	Non-Governmental Organization
NPM	National Preventive Mechanisms
OMCT	Organisation Mondiale Contre la Torture
OPCAT	Optional Protocol to the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

SAPS	South African Police Services
SPT	Subcommittee on the Prevention of Torture
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
UNHCR	United Nations High Commissioner for Refugees



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CHAPTER ONE: INTRODUCTION

We who advocate peace are becoming an irrelevance when we speak peace. The government speaks rubber bullets, live bullets, tear gas, police dogs, detention, and death.

- Desmond Tutu, 8 June 1986

1.1 Background to the study

Following 40 years of apartheid, South Africa is left with a painfully sensitive history and an unfortunate record of human rights violations, abuse, torture and cruel, inhuman and degrading treatment. The then reigning nationalist government enacted a number of laws allowing the arbitrary and indefinite detention of any person suspected of a political offence.¹ After the fall of the segregationist rule in 1994, thousands of accounts of ill-treatment emerged - living testimonies by political activists who were subjected to various forms of intimidation, to arbitrary arrest, to prolonged periods of solitary confinement, to cruel treatment for purposes of extracting information, violent assaults and extreme humiliation.² Apartheid has since been classified as a form of state terrorism - violence perpetrated by the state against its own citizens. The apartheid regime is said to count amongst some of the worst examples of modern state terrorism, including the Nazi regime of Germany and the Amin regime of Uganda.³

The fall of apartheid led to the lifting of sanctions against South Africa and enabled the country to re-enter the international community. South Africa's political metamorphosis from a model of racial oppression to a democratic society required law reform on many levels.⁴ One aspect was South Africa's approach toward the treatment and prevention of torture and similar forms of ill-treatment. South Africa ratified the United Nations

¹ Under the Criminal Procedure Amendment Act No. 96 of 1965 a person required to give evidence in certain political criminal cases could be detained, possibly in solitary confinement, without a warrant or legal representation, for 180 days. Under the General Law Amendment Act No. 37 of 1963 an officer could detain any person suspected of a political offence, without a warrant or legal representation, for 90 days.

² African National Congress (1988) *Free Nelson Mandela, An account of the campaign to free Nelson Mandela and all other political prisoners in South Africa*, available at www.anc.org.za/ancdocs/history/campaigns/prisoner.html accessed on 3 February 2010.

³ Sagay, I.E. (1985) *Apartheid as an international crime, State Terrorism*, United Nations Centre against Apartheid, Notes and Documents Series No. 13/85, available at <http://anc.org.za/ancdocs/history/campaigns/legal/part3.html> accessed on 3 February 2010.

⁴ Dugard (2007) *International Law: A South African perspective*, 3rd Edition, Juta, South Africa, p. 336.

Convention Against Torture and other Cruel, Inhuman and Degrading Treatment⁵ or Punishment (UNCAT) on 10 December 1998. The accession to this instrument demonstrates South Africa's acceptance of international standards governing the manner in which torture and other forms of ill-treatment should be approached. However, 12 years after ratification, the State has done little to ensure compliance with its obligations under the UNCAT. The prohibition against torture and other forms of cruel, inhuman and degrading treatment or punishment (CIDT) appears in the South African Constitution, but is not contextualized or developed in any other piece of legislation. Of greater concern, is the absence of the crime of torture in South African criminal law. The South African government was several years late in submitting its initial report on adherence to its duties under the UNCAT to the Committee Against Torture (CAT). Worse still, the government seems to pay little attention to the recommendations made by the CAT, in response to this report. The second report to the CAT was due in December 2009, but since this has not been submitted yet, it would appear as if the issue of torture remains inadequately prioritized.

The irony of the matter is that South Africa's current president, as well as previous presidents and the majority of the members of cabinet, were political activists during the apartheid era. Most of them were at some point, incarcerated as political prisoners and most of them were, in some form or another, subjected to torture or abuse as a result of their political beliefs.⁶ For a country that suffered years of repression, a country which is governed and led by victims of torture who are living with first-hand memories of cruel and degrading treatment inflicted upon them, it is surprising and rather shocking that the issue of torture is so passively approached by the State.

A comprehensive review of the legal structures pertaining to the prevention, combating and treatment of torture and related forms of ill-treatment is long overdue. Law reform

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987

⁶ Goldberg, D., 12 October 1987, *ANC at the meeting of the Special Committee against Apartheid in observance of the Day of Solidarity with South African Political Prisoners*, available at www.anc.org.za/un/others/sp101287.html accessed on 3 February 2010.

must urgently be considered in order to strengthen and develop South Africa's legal position relative to torture. The State has committed itself to adhere to the UNCAT and must therefore honour its treaty obligations by complying with international standards and by enhancing accessibility to human rights law, so as to ensure a future without repetition of the past.

1.2 The Research Question

The research consists of an examination of the international legal framework pertaining to torture and other forms of cruel, inhuman and degrading treatment or punishment as established under the UNCAT and supported by other instruments and provisions of international human rights law. The question asked first, is whether the international legal framework thus created, enables nations to approach questions on the prevention and combating of torture and cruel treatment, in a practical, efficient and sufficient manner. Secondly, South Africa's compliance with international standards and specifically its obligations incurred under the UNCAT will be analyzed from a comparative point of view. The research question will consider the extent to which South African law is compliant with international standards to determine the areas in which it is deficient and to identify the obstacles barring full legal compliance. Forming part of this comparative study, is an in depth consideration of the latest draft version of the Combating of Torture Bill as published by the legislature during 2008. The research will conclude by presenting submissions and recommendations for law reform, with the eye on full compliance with the obligations imposed by the UNCAT.

1.3 Objectives of the study

The objective of the examination of the international position with regard to the prohibition against torture and CIDT is to consider the manner according to which the problem of torture should be approached and to ascertain whether the proposed model constitutes an adequate legal structure for this purpose. In other words, whether the international framework presents an acceptable guideline, with the ability to empower and enable States Parties, particularly South Africa, to address questions of torture and CIDT. The objective of the examination of South Africa's legal position is to establish the extent of protection provided under domestic law and to identify the areas which are in need of revision and reform. The essential objective of the study is to assess the manner

in which the international obligations imposed by the UNCAT are applied in South Africa, to provide commentary hereon and to make recommendations for improvement.

1.4 Significance of the study

Very little academic writing is available on South Africa's position in relation to the UNCAT and other instruments supportive of the prohibition against torture. The study will be significant insofar as it provides a comparison of South African law to the international standard imposed by the UNCAT and Optional Protocol to the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). The study is further significant for the fact that it will provide a basic summary of the manner in which the right not to be subjected to torture, as well as the right to redress, exists and functions within a South African context. The study will consider the possibilities of law reform by making practical suggestions, recommendations and outlining the steps which need to be taken toward realizing full legal compliance.

1.5 Research Methods

Academic papers, articles and international case law, particularly originating from the European Court of Human Rights and the African Commission on Human and Peoples Rights (African Commission) were consulted to describe the international legal framework pertaining to torture. Other valuable sources include the general comments, recommendations and observations made by the CAT, General Comments issued by the Human Rights Council,⁷ as well as publications by the Special Rapporteur on Torture.⁸ To ascertain the South African legal position on torture, an intensive study was made of legislation, case law, policy papers and reported practices relative to public sectors involved with the detention or custody of persons.

⁷ The Human Rights Council is a body created by a resolution of the United Nations General Assembly with the main purpose of addressing situations of human rights violations and to issue recommendations. The Human Rights Council used to exist as the United Nations Commission on Human Rights, which it replaced on 15 March 2006. The Human Rights Council conducts a four-yearly universal periodic review of all member States' human rights situations. The Human Rights Council must be distinguished from the Human Rights Committee, which body monitors adherence to the ICCPR.

⁸ Created by the United Nations, the Special Rapporteur on Torture is tasked with conducting investigations into allegations of torture. The Rapporteur functions independently of the CAT, although the two do cooperate with each other. The findings and publications of the Special Rapporteur are instrumental in the establishment of the international framework pertaining to torture and the interpretation of the provisions of the UNCAT and OPCAT. The mandate of the Special Rapporteur is discussed in more detail in section 2.7.1.4.

1.6 Literature

A highly comprehensive and informative commentary on the UNCAT was published in 2008 by the Oxford University Press.⁹ This commentary contains an in-depth examination of the international position on torture and other forms of cruel treatment. There are many sources of information on the international legal structure. Some of the first publications on the topic include works by Ingelse,¹⁰ Boulesbaa,¹¹ as well as Burgers and Danelius,¹² all of which discuss the drafting process of the UNCAT and the mechanisms of prevention created thereby. Very few publications exist on the South African position surrounding torture and CIDT. No academic commentary has been published on torture and CIDT relative to South Africa. There is some literature available on the Constitutional prohibition against torture and CIDT and there are a few practical guides to the UNCAT in the South African context, for example the CSPRI guide¹³ and the CSVR booklet.¹⁴ It appears that no academic evaluations of the draft Bill on the Combating of Torture of 2008 exists and general information about the draft Bill is not readily available. Similarly, there are no academic publications dealing with the legal position of victims of torture in South Africa. There are only a few court cases, Constitutional or otherwise, dealing with matters pertaining to torture. Calls for law reform in this area has been made by several non-governmental organizations (NGO) – mostly in the forms of shadow reports to the CAT, however, it no formal proposal for law reform is currently being investigated by the Department of Justice and South African Law Reform Commission.¹⁵

Publications on the websites of the following organizations were highly useful: The Association for the Prevention of Torture (APT), the Organisation Mondiale Contre la

⁹ Nowak, M. and McArthur, E. (2008) *The United Nations Convention against Torture: A Commentary*, Oxford University Press, United Kingdom.

¹⁰ Ingelse, C. (2001) *The UN Committee Against Torture: An Assessment*, Kluwer Law International, The Netherlands.

¹¹ Boulesbaa, A. (1999) *The UN Convention on Torture and the Prospects for Enforcement*, Martinus Nijhoff Publishers, The Netherlands.

¹² Burgers, H.J. & Danelius, H. (1988) *The UN Convention against Torture: A Handbook on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, The Netherlands.

¹³ Muntingh, L. (2008) *Guide to the UN Convention against Torture in South Africa*, CSPRI & Community Law Centre.

¹⁴ Muntingh, L. (2008) *Preventing and Combating Torture in South Africa: A framework for action under CAT and OPCAT*, Centre for the Study of Violence and Reconciliation and Civil Society Prison Reform Initiative.

¹⁵ Issues subject to law reform in South Africa are initially investigated by the South African Law Reform Commission, after which suggestions are communicated to Government. See the list of Current Investigations and Progress Report of the South African Law Reform Commission, available at <http://www.justice.gov.za/salrc/projects.htm> accessed on 16 March 2010.

Torture (OMCT), the Civil Society Prison Reform Initiative (CSPRI), the Centre for the Study of Violence and Reconciliation (CSV), the Community Law Centre at the University of the Western Cape, Redress, the University of Minnesota, Amnesty International (AI), Lawyers for Human Rights (LHR) and Human Rights Watch (HRW). In addition hereto, textbooks, human rights journals, several commentaries on the South African Constitution were consulted.

1.7 Outline of chapters

Chapter 1 contains background information about the research question, including the objectives and significance of the study, as well as the methodology of the study.

Chapter 2 contains an introduction to and an examination of the characteristics of the absolute prohibition against torture and CIDT under international human rights law. Since the prohibition essentially forms the premise of the UNCAT and the international legal framework pertaining to torture, it is imperative to understand the history, nature and scope of the prohibition, so as to ultimately implement the duties created by the UNCAT. This Chapter examines the international legal framework pertaining to torture and CIDT, as established under the UNCAT and supported by provisions of international human rights law. The purpose of this examination is to determine whether the international legal framework enables nations to approach the question of prevention and combating of torture and ill-treatment in a practical, efficient and adequate manner.

Chapter 3 is a comparative analysis of South African law in relation to the international requirements imposed on it by the international framework and particularly, by the UNCAT. This chapter analyses such sector-orientated policies, practices, jurisprudence and legislation and provides comment thereon in light of the constitutional prohibition against torture and international norms and standards. The purpose of this analysis is to discover the extent to which South African law is compliant with international standards, to identify the areas in need of reform, as well as the obstacles barring full legal compliance.

Forming part of this comparative study is an in depth consideration of the draft Bill on the Combating of Torture, as published during 2008. Chapter 4 will look at the extent to

which the proposed Bill is insufficient in comparison with international standards and in the light of problems specific to South Africa.

Following the conclusions derived from the foregoing Chapters, Chapter 5 concludes with recommendations for law reform to ensure that South Africa complies with its international commitments.



CHAPTER 2: THE INTERNATIONAL LEGAL FRAMEWORK

2.1 Brief history of the United Nations Convention against Torture

The history of the use of torture is just about as old as that of human kind.¹⁶ Over the years, and with the development of ideological concepts such as democracy, equality and freedom, the term 'torture' has become less synonymous with religious inquisitions, medieval witch hunts or the slave trade, and more associated with the idea of terrorism, hegemony or political authoritarian practices.¹⁷ Yet, the arbitrary and harmful nature of such acts remains unchanged.

The Second World War brought global attention to the issue of torture. After the war, nations united widely to condemn and reject all acts constituting gross violations of human rights. The idea of codifying a ban on torture was initially discussed at the First International Conference on the Abolition of Torture, convened by Amnesty International in 1973.¹⁸ During 1975, the United Nations General Assembly adopted the non-binding, but significant Declaration against Torture.¹⁹ At this point, the global prevalence of torture was being investigated and reported on by groups such as Amnesty International, who released their second report documenting torture in 98 countries during 1984.²⁰ The intention of the parties involved with the drafting process was to convert the Declaration against Torture into a binding, multi-lateral convention, the Declaration acting as a guideline and draft framework for the final convention.²¹ The United Nations General

¹⁶ Scott, G.R. (2003) *The History of Torture throughout the Ages*, Kessinger Publishing, Montana, USA. This source documents the use of torturous practices in chronological order, starting from its use by ancient Greek and Roman civilizations, followed by Holy Inquisitions such as the Spanish Inquisition, the increased application of torture as a method of judicial punishment, to the use of torture in the slave trade, modern-day warfare and human trafficking.

¹⁷ Reference is made to recent reports of torture as practiced by US militia upon prisoners of war at Guantanamo Bay and in the Middle East. In this regard see *China Daily*, 22 May 2004, "US Human Rights Hypocrisy Attacked" available at http://english.people.com.cn/200405/22/eng20040522_144070.html accessed on 2 March 2010 and Steiner, H.J., Alston, P. and Goodman, R. (2008) *Regulating Detention, Case Study: Guantanamo detainees – process for determining status and grounds for detention*, p.404-410.

¹⁸ Joseph, S., Mitchell, K. and Gyorki, L. (2006) *Seeking remedies for torture victims: A handbook on the individual Complaints Procedures of the UN Treaty Bodies*, Organisation Mondiale Contre la Torture Handbook Series Volume 4, Geneva, p.45.

¹⁹ The Declaration on the Protection of all Persons from Being Subjected to Torture or other Cruel, Inhuman and Degrading Treatment and Punishment adopted by the General Assembly on 9 December 1975 in terms of General Assembly Resolution 3452 (XXX) available at <http://www2.ohchr.org/english/law/declarationcat.htm> accessed on 30 March 2010.

²⁰ Amnesty International (1984) *Torture in the Eighties*, Amnesty International Publications, London. Another example is Amnesty International (1978) *Political Imprisonment in South Africa*, Amnesty International Publications, London.

²¹ Ingelse, C. (2001) p. 74.

Assembly instructed the Commission on Human Rights²² to study the question of torture and to draft a convention. A Working Group on the Torture Convention²³ was set up during 1978 and the draft convention presented by Sweden formed the basis of its discussions.²⁴ The United Nations subsequently adopted the UNCAT on 10 December 1984²⁵ and the treaty entered into force on 26 June 1987, upon receiving the requisite number of ratifications. As at the time of writing, 146 nations have ratified the UNCAT and 76 countries are signatories thereto.²⁶

Following the adoption of the UNCAT, efforts were focused on the promotion of a universal visiting system as a mechanism to implement the Convention. The initial proposal and draft document were presented to the United Nations by Costa Rica, after which the Commission on Human Rights established a Working Group tasked with discussing, studying and drafting the Optional Protocol.²⁷ The first session of the Working Group was held during 1992 and the Protocol was finally adopted on 18 December 2002.²⁸

2.2 International framework prior to adoption of UNCAT

The Universal Declaration of Human Rights (UDHR) teaches that all human rights are indivisible, interdependent and therefore no one right is more important than the other.²⁹ Yet, the characteristics and attributes of the right not to be subjected to torture and other forms of cruel, inhuman and degrading treatment or punishment indicate that this is one

²² The UN Commission on Human Rights was a functional commission within the overall framework of the United Nations from 1946 until it was replaced by the UN Human Rights Council in 2006. It was a subsidiary body of the UN Economic and Social Council (ECOSOC). It used to be the UN's principal mechanism and international forum concerned with the promotion and protection of human rights

²³ United Nations Working Groups are often employed to study, negotiate and discuss treaty law. Working Groups are composed of delegations of representatives from either member, or observing States Representatives. NGO's, international associations and additional experts are able to present their views to Working Groups. The Working Group presents its work to the General Assembly for adoption.

²⁴ Danelius, H. (1984) *The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, New York, 10 December 1984, United Nations, available at <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html> accessed on 17 February 2010.

²⁵ General Assembly Resolution 39/46.

²⁶ <http://www2.ohchr.org/english/bodies/ratification/9.htm> accessed on 29 March 2010.

²⁷ Boeglin, N. (2005) *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment: A manual for prevention*, "Chapter 2: History of the UN Convention against Torture", Association for the Prevention of Torture & Inter-American Institute of Human Rights available at http://www.apr.ch/component/option,com_docman/task,doc_view/gid,42/Itemid,59/lang,en/ accessed on 3 March 2010.

²⁸ General Assembly Resolution 57/199.

²⁹ National Coordinating Committee for the UDHR, 28 August 1998, *What are the most important human rights described in the Universal Declaration?* The Franklin & Eleanor Roosevelt Institute, available at <http://www.udhr.org/Introduction/question8.htm> accessed on 10 October 2009.

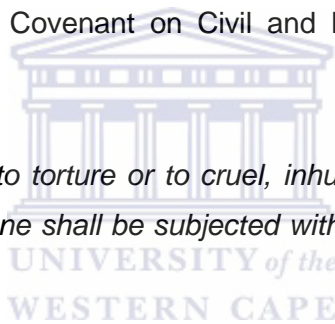
of the most basic and crucial human rights to be respected and observed.³⁰ Essentially, the commission of an act of torture constitutes a violation of a person's right to dignity, freedom and life.³¹ These are the fundamental rights which underlie the international legal framework pertaining to torture and other forms of CIDT.

The prohibition against torture is contained in several instruments of international and regional human rights law, including section 5 of the Universal Declaration of Human Rights (UDHR)³² and section 3 of the European Convention on Human Rights (ECHR)³³ which shares the exact same wording:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Section 7 of the International Covenant on Civil and Political Rights (ICCPR) states that:³⁴

7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.



Section 5 of the American Convention on Human Rights (ACHR):³⁵

5(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

³⁰ Steiner, H.J., Alston, P. & Goodman, R. (2008) *International Human Rights in Context: Law Politics Morals*, 3rd Edition, Oxford University Press, Torture Revisited, p. 224.

³¹ Lippman, M. (1994) "The development and drafting of the United Nations Convention against Torture or other Cruel, Degrading and Inhuman Treatment or Punishment", 17 Boston College, *International and Comparative Law Review* 275, p.296.

³² The Universal Declaration of Human Rights was adopted by the General Assembly of the UN on 10 December 1948.

³³ The European Convention on Human Rights was adopted by the Council of Europe on 4 November 1950 and entered into force on 3 September 1953.

³⁴ The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976.

³⁵ The American Convention on Human Rights was adopted by the Nations of the Americas on 22 November 1969 and entered into force on 18 July 1978.

Section 5 of the African Charter of Human and Peoples' Rights (African Charter):³⁶

5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Despite differences of wording, the underlying values of the prohibition as contained in every one of the sections quoted above, embodies the intention and objectives of the UNCAT. These instruments confirm the inherent right to dignity, bodily integrity and freedom, dictating that torture shall not be tolerated. Given the common goals of sections 3 of the ECHR and section 5 of the African Charter, both the European Court and Commission on Human Rights, as well as the African Commission, have interpreted and developed the application of the absolute prohibition against torture in case law. These forums have contributed richly as sources of persuasive jurisprudence on the subject of torture and CIDT in international human rights law.³⁷

Finally, the prohibition is exclusively dealt with by the UNCAT. Interestingly enough, the text of the UNCAT does not contain an express prohibition against torture *per se*, but incorporates the prohibition by way of reference to the relevant sections of the United Nations Charter, the UDHR and the ICCPR in its preamble. By pronouncing its goal to be “the desire to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment”³⁸ the UNCAT assumes that acts of torture and other CIDT are being committed throughout the world and that the prohibition thereof is generally recognized as a prominent and urgent means of upholding a human right.

2.3 Characteristics of the prohibition against torture

One of the most prominent characteristics of the prohibition against torture and cruel, inhuman or degrading treatment is the preemptory nature thereof. This prohibition is

³⁶ The African Charter was adopted by the Organization of African Unity (since replaced by the African Union) on 25 June 1981 and entered into force on 21 October 1986.

³⁷ As such, this paper will employ the jurisprudence of these forums as sources contributing to the development of international law in respect of torture and CIDT.

³⁸ Preamble to the UNCAT.

considered part of customary international law or *jus cogens*,³⁹ which means that it is a fundamental principle of international law, or rather a norm that is recognized and accepted as a binding rule by all nations. Peremptory norms are generally considered universal and non-derogable, as confirmed by article 53 of the Vienna Convention on the Laws of Treaties (Vienna Convention) where the concept of *jus cogens* is defined:⁴⁰

...a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The manner in which a rule attains the status of *jus cogens* is not set in stone, but depends on the changing morals, values, politics and goals of the international community.⁴¹ The Vienna Convention does not contain an exhaustive list of peremptory norms, but it is accepted that the prohibitions against genocide, slavery, piracy, racial discrimination and torture form part of *jus cogens*.⁴² It follows that conduct contrary to the peremptory norm constitutes a criminal act under international law and that a violation of the rule can never be legitimized through consent.⁴³

Tying in with the concept of *jus cogens* is the principle of *obligatio erga omnes*. An obligation *erga omnes* refers to an obligation of international criminal law created by a peremptory norm or *jus cogens*, which imposes the duty on a State to act in response to a violation of the peremptory norm. The concept is based on the premise that a State owes it to the entire international community to take action in the event of violation of the peremptory norm – in this case, prohibition of torture.⁴⁴ *Obligatio erga omnes* are characterized to be non-derogable, universally applicable and unjustifiable by any

³⁹ Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 1. See also Nowak, M. & McArthur, E. (2008) *The United Nations Convention against Torture: A Commentary*, Oxford University Press, p. 117-118. The *Jus Cogens* principle has been confirmed and applied in regional case law for example the case of *Prosecutor v Furundžija*, Case No. IT-95-17-1-T (Judgment 1998); *Al Adsani v United Kingdom*, (2002) 34 European Human Rights Review 11, paragraph 61.

⁴⁰ The Vienna Convention on the Law of Treaties was adopted by the United Nations on 22 May 1969 and entered into force on 27 January 1980.

⁴¹ Simbeye, Y. (2004) *Immunity and International Criminal Law*, Ashgate Publishing, Surrey, United Kingdom, p.64.

⁴² Steiner, HJ., Alston, P. & Goodman, R. (2008) p. 77 – 78.

⁴³ Steiner, HJ., Alston, P. & Goodman, R. (2008) p.168.

⁴⁴ *Prosecutor v Furundžija*, paragraph 151.

defense. The best description of the two inter-related, yet independent terms of *erga omnes* and *jus cogens* is quoted below:⁴⁵

Jus cogens refer to the legal status that certain international crimes reach and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*.

Some authors believe that the principle of *obligatio erga omnes* is irreconcilable with treaty-based crimes, as signatories to international treaties are meant to be the only parties with *locus standi* over offences addressed under a specific treaty.⁴⁶ Other criticism of the application of principles of *erga omnes* and *jus cogens* is that the universal relevance of these rules diminishes State sovereignty.⁴⁷ If these schools of thought are to be followed, all crimes of a peremptory nature, including torture, are better left un-codified and should exist only in the form of international custom, since it has been said that the “near unanimous support for the UNCAT is an indication of the emergence of custom prohibiting torture”⁴⁸ Yet, given the history of the modern world – especially the events of the past century, it is clear that codification of the peremptory prohibition against torture was a necessity. By reducing the prohibition of customary law to treaty law, the United Nations enabled States to strengthen their domestic legal systems at the hand of a coherent, clear and uniform structure.

The prohibition against torture is considered to be both absolute and non-derogable under international customary law.⁴⁹ These are important characteristics, as it means that no State, notwithstanding its circumstances and irrespective of being a signatory to any treaty prohibitive of torture, may limit a person's right not to be subjected to torture or CIDT.⁵⁰ The Commentary on the UNCAT, defines a non-derogable right to be a rule

⁴⁵ M Cherif Bassiouni (1997) “International Crimes: Jus Cogens and Obligatio Erga Omnes, Law and contemporary problems”, Volume 59, No. 4, *Accountability for international crime and serious violations of human rights*, Duke University School of Law, USA.

⁴⁶ Simbeye, Y. (2004) p.61.

⁴⁷ Inazumi, M. (2005) *Universal Jurisdiction in Modern International Law: An expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Utrecht, p.62.

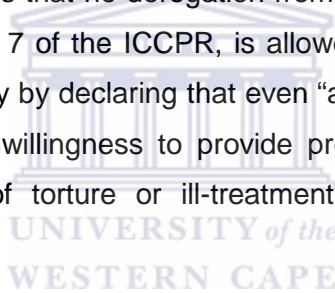
⁴⁸ Garnett (1997) “The Defence of State Immunity for Acts of Torture”, *Australian Yearbook of International Law*, p.102.

⁴⁹ Association for the Prevention of Torture (2009) *The criminalization of torture under the UN Convention against Torture and other Cruel, Degrading or Inhuman Treatment or Punishment: An overview for the compilation of torture laws*, Geneva, Switzerland.

⁵⁰ Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, p. 2, Geneva, Switzerland.

from which no State may derogate, even under exceptional circumstances.⁵¹ Therefore, no excuse could possibly justify the use of torture and the limitation of the right not to be subjected thereto.⁵²

Derogation-clauses are often inserted into treaties to allow States Parties to limit the application of certain specific clauses by noting reservations or declarations. The UNCAT contains a derogation clause which allows a State to declare itself unbound by prescribed methods of dispute resolution, as proposed under article 30. The Convention contains no clause which allows States to limit the application of the duty to prohibit and prevent torture or CIDT.⁵³ Article 2(2) of the UNCAT expressly confirms the non-derogable nature of the ban against torture by stating that no exceptional circumstances, including 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. Supportive hereof, is section 4(2) of the ICCPR, which states that no derogation from the right not to be subjected to torture, as protected by article 7 of the ICCPR, is allowed. The CAT further developed the meaning of non-derogability by declaring that even “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”⁵⁴



It is important to note that the UNCAT includes other forms of CIDT within its scope of prohibited actions.⁵⁵ It therefore follows that the absolute and non-derogable prohibition against torture is extended to CIDT, rendering such actions equally absolutely impermissible.⁵⁶

Inevitably linked to the peremptory and absolute nature of the prohibition against torture is the characteristic of universal jurisdiction. Universal jurisdiction is a principle of

⁵¹ Nowak, M. & McArthur, E. (2008) p. 119.

⁵² Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 5 states that “no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction.”

⁵³ Mujuzi, J.D. (2009) “The protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: South Africa’s reservations and interpretive declarations”, *Law Democracy and Development*, Volume 2, p.46.

⁵⁴ Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 5.

⁵⁵ Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 3.

⁵⁶ Nowak, M. & McArthur, E. (2008) p. 122.

international law to the effect that all nations may claim jurisdiction over a crime committed, irrespective of the nationality of the perpetrator or where the crime was committed.⁵⁷ Article 5 of the UNCAT permits State Parties to exercise universal jurisdiction over the crime of torture, requiring of all signatories to take the necessary steps to establish jurisdiction over the offences referred to in article 4 of the Convention. Specific reference is made to offences committed in any territory under the particular State's jurisdiction,⁵⁸ to the nationality of the offender⁵⁹ and to the nationality of the victim or complainant⁶⁰ as grounds for establishing jurisdiction. Furthermore, UNCAT article 5(2) requires of States Parties to take measures to establish jurisdiction over offences in cases where the alleged offender is present in any territory under its jurisdiction, but is not extradited pursuant to article 8. The APT explains the effect of clause 5(2) as requiring of a States Party to either exercise its jurisdiction to prosecute an individual suspected of committing torture, or to extradite an offender to another State to be duly prosecuted.⁶¹ Complementary to this explanation, is the CAT's emphasis on the fact that "the provisions of the UNCAT apply wherever a States Party exercises *de jure* or *de facto* control in accordance with international law."⁶² Similar to the duty to criminalize torture imposed by article 4 of the UNCAT, universal jurisdiction is considered to be applicable only to acts of torture and not to other forms of CIDT.⁶³

2.4 The United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

2.4.1 Defining torture

The basic and universally accepted definition of torture is contained in article 1 of the UNCAT:

1(1) 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

⁵⁷ Steiner, H.J., Alston, P. & Goodman, R. (2008) p. 1162.

⁵⁸ Section 5(1)(a) of the UNCAT.

⁵⁹ Section 5(1)(b) of the UNCAT.

⁶⁰ Section 5(1)(c) of the UNCAT.

⁶¹ Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 22.

⁶² Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 16.

⁶³ Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 21.

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.

Prior to the UNCAT entering into force, torture was defined in several instruments of international and human rights law, namely: Article 2 of the Inter-American Convention to Prevent and Punish Torture (1987),⁶⁴ and article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975).⁶⁵ The UNCAT fulfills the important function of awarding a comprehensive, legal definition to an offence recognized by international customary law,⁶⁶ but previously unidentified by a binding, multi-lateral treaty. The UNCAT is the most specialized piece of international legislation in its field and enjoys greater recognition and power of enforcement than the three abovementioned instruments, since the Inter-American Convention only asserts itself regionally, the Declaration is non-binding and the Rome Statute defines the relevant terms only in partial fulfillment of a greater mandate.⁶⁷

⁶⁴ 2. *For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.*

⁶⁵ 1. *For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.*

⁶⁶ Refer to chapter 1.

⁶⁷ Article 7(1)(f) of the Rome Statute of the International Criminal Court includes torture within its definition of crimes against humanity.

Customary law is an ever-changing body of law,⁶⁸ hence the importance to fix the definition of an act relevant to a period of time. Defining the act of torture means providing a platform from which the law can be interpreted and developed. With reference to the universality of the crime of torture, human rights law as practiced by the United Nations operates, to a large extent, on a model of globalization.⁶⁹ The movement of persons throughout the world causes crime to take on a larger, international dimension.⁷⁰ It is difficult to maintain equality among all persons by any other way than a uniform, global approach. In an effort to enhance the potential of all nations to exert universal jurisdiction over the crime that is torture, it is absolutely necessary to define forms of conduct falling under the scope of the absolute prohibition against torture and to describe the elements of the crime with clarity and certainty. By defining torture, the UNCAT essentially codifies the customary prohibition against torture and aims to set a universally recognized minimum standard, which is understood and enforceable on different levels.⁷¹ By accepting the definition as it appears in the UNCAT, States Parties effectively support a united opinion of torture and CIDT, which in turn prompts non-signatories to consider the Convention as a precedent afore-going future accession.

As noted by the International Criminal Tribunal of Rwanda (ICTR)⁷² in *Prosecutor v Akayesu*, the UNCAT does not catalogue specific acts in its definition of torture, but rather focuses on the conceptual framework of State sanctioned violence, as this approach is more useful and versatile in international law.⁷³ For purposes of practical discussion, the legal definition of the act of torture can be divided into the following identifying elements: conduct; infliction of severe mental or physical pain or suffering; intention and purpose of conduct; and official capacity.

⁶⁸ Roberts, A. (2001) "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law*, American Society of International Law, Volume 95 p. 757 available at <http://www.asil.org/ajil/roberts.pdf> accessed on 21 October 2009.

⁶⁹ Duner, B. (2002) *The Global Human Rights Regime*, Studentlitteratur, Sweden, p. 19 – 47.

⁷⁰ Reference is made to the effect of globalization on crime as generally discussed by Simbeye, Y. (2004) "Chapter 2: International Crimes" and more specifically by Findlay, M. (2000) *The Globalization of Crime, Understanding Transitional Relationships in Context*, Cambridge University Press, United Kingdom.

⁷¹ See generally Thienel, T. (2006) "The Admissibility of Evidence obtained by Torture under International Law", *The European Journal of International Law*, Volume 17, No. 2; And Cullen, A., 24 April 2008, "Defining Torture in International Law: A critique on the concept employed by the European Court of Human Rights", *California Western International Law Journal*, Volume. 34, p. 29 – 46.

⁷² The ICTR was established by the Security Council under Chapter VII of the Charter of the United Nations, to prosecute persons responsible for genocide and other human rights violations committed in Rwanda between January 1994 and December 1994. It is located in Arusha, Tanzania. See www.ictr.org.

⁷³ *The Prosecutor v Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, September 1998, paragraph 597.

2.4.1.1 Conduct

Legally, conduct can either take the form of a positive action or the form of an omission. An omission is defined as the failure or neglect to perform when there exists a legal duty to act positively.⁷⁴ Authors agree that an omission to act falls within the scope of the definition of torture under article 1 of the UNCAT.⁷⁵ This inherently implies that the UNCAT places a legal duty on States Parties to prohibit and prevent torture. It is therefore possible for an act of torture to result from an omission, provided that the conduct in the particular instance meets the remaining criteria of the definition as per article 1.⁷⁶ Once a person is placed in custody, the State acquires the obligation to protect the physical well-being of such a person.⁷⁷ Whereas the concept of torture is often regarded as the more severe form of treatment requiring a very specific kind of intent, the approach to the question of what constitutes CIDT is more flexible and inclusive.⁷⁸ An omission, as a form of conduct resulting in CIDT, is generally associated with negligence as a form of intent. Therefore, when it comes to harm caused by an omission, the elements of conduct and intent are closely linked, as illustrated in paragraph 2.4.1.3 below.

2.4.1.2 Infliction of severe mental or physical pain or suffering

Severity or gravity of harm is another important element of the definition of torture. One author considers the main distinction between torture and CIDT to be the severity of the pain or suffering inflicted.⁷⁹ Although a certain degree of pain or suffering is an inevitable part of the description of torture, the severity test is entirely subjective and can therefore not be employed as a unique defining factor. When considering the gravity of harm caused by torture, several sources of jurisprudence advise State Parties to consider factors such as the nature, consistency and context of the infliction of pain, the period of continuation of ill-treatment, whether the acts were premeditated, the purpose and

⁷⁴ Neethling, Potgieter & Visser, (2002) *Law of Delict*, 4th Edition, Butterworths, South Africa p. 61

⁷⁵ Ingelse, C. (2001) p. 208; Boulesbaa, A. (1999) p. 14.

⁷⁶ According to Boulesbaa, A. (1999) p.14 – 15, it would be absurd to conclude that the prohibition of torture in the context of article 1 does not extend to conduct by way of omission.

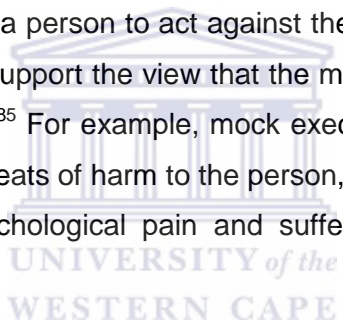
⁷⁷ *Hurtado v Switzerland*, European Court of Human Rights Case No. 1754/90 (1994).

⁷⁸ Evans, M. & Morgan, R. (1998) *Preventing Torture: A study of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment*, Oxford University Press, P.98.

⁷⁹ Rubel, J.S. (2006) "A missed opportunity – The ramifications of the Committee Against Torture's failure", *Emory International Law Review*, available at <http://www.britannica.com/bps/additionalcontent/18/24829337/A-MISSED-OPPORTUNITY-THE-RAMIFICATIONS-OF-THE-COMMITTEE-AGAINST-TORTURES-FAILURE-TO-ADEQUATELY-ADDRESS-ISRAELS-ILLTREATMENT-OF-PALESTINIAN-DETAINEES> accessed on 2 November 2009.

institutionalization of the ill-treatment and other subjective criteria such as the physical and mental condition of the victim, including factors such as the victim's age, gender, state of health, as well as position of inferiority.⁸⁰

Looking at specific actions classified as torture, it must be noted that the African Commission recognizes sexual violence as a form of torture, when used for purposes of intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person, if committed by or with the knowledge of a public official.⁸¹ In accordance with article 1 of the UNCAT, mental harm in itself can also be regarded as a form of torture.⁸² Illustrative hereof is the *Greek-Case*, in which the European Court of Human Rights developed the notion of mental suffering by holding that “the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault” may constitute psychological torture.⁸³ In its basic form, psychological torture takes the form of an action which forces a person to act against their will or conscience.⁸⁴ Several authors, as well as case law, support the view that the mere threat of death or torturous conduct can constitute torture.⁸⁵ For example, mock executions or serious, realistic and immediate threats of death, threats of harm to the person, or harm to the person's family, which threats can cause psychological pain and suffering, equal to the infliction of physical pain.⁸⁶



2.4.1.3 Intent and purpose of conduct

⁸⁰ Committee Against Torture, Report from Government of Brazil CAT/C/39/2, 28 July 2008. See also *Prosecutor v Limaj et al.*, ICTY, IT-03-66, 30 November 2005, paragraph 237 and *Prosecutor v Miroslav Kvocka et al.*, ICTY, IT 98-30/1, 2 November 2001, paragraph 143; *Prosecutor v Brdjanin*, ICTY, IT-99-36, 1 September 2004, paragraph 484.

⁸¹ *Prosecutor v Jean Paul Akayesu*, paragraph 597.

⁸² Committee Against Torture, Conclusions and recommendations, United States of America, CAT/C/USA/CO/2, 25 July 2006, paragraph 13; CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992 paragraph 5 insists that section 7 of the ICCPR values the mental health aspect of torture, as much as the physical infliction of pain.

⁸³ *Denmark et al v Greece*, European Commission No. 3321-3/67; 3344/67, Yearbook XII, 5 November 1969, p.461 (The *Greek-case*).

⁸⁴ *International Pen and Others v Nigeria* (1998) African Commission on Human and Peoples' Rights, Communication No. 137/94, 139/94, 154/96 and 161/97, paragraph 79.

⁸⁵ The International Council for the Rehabilitation of Torture Victims (2004) *A global appeal on behalf of victims of torture*, available at <http://www.irct.org/Default.aspx?ID=3558&M=News&NewsID=152> accessed on 10 November 2009.

⁸⁶ The *Greek-case*, p. 186; *Akkoc v Turkey*, European Court of Human Rights, Application No. 22947/93; 22948/93, Judgment 10 October 2000, paragraph 25, 116 & 117; *Campbell and Cosans v UK*, Case No. 7511/76, 7743/76, Judgment 25 February 1982, paragraph 26 states that the mere threat of torture may in some situations, constitute CIDT.

Purpose and intent, rather than severity of harm, has been identified as being the most important criteria for establishing whether an act of torture or CIDT has been committed.⁸⁷ Article 1 of the UNCAT is clear and unambiguous on the requirement of intent. As previously mentioned, harm can either be caused intentionally or negligently. For example, ill-treatment can amount to torture only if the perpetrator's actions serve a specific purpose.⁸⁸ Yet, CIDT can be either intentional or negligent.⁸⁹ Importantly, it must be noted that the unintentional neglect by authorities to provide basic necessities to prisoners, can never really constitute torture, but is classified as other forms of CIDT, since the element of specific intent is absent from such conduct.⁹⁰ In the *Greek*-case the European Commission of Human Rights found that the failure to provide minimum necessities such as food, water, heating, clothing and medical care, results in inhuman or degrading treatment as per article 3 of the ECHR.

Liability on the grounds of negligence is determined by the standard which an official body is required to uphold. In a case of reasonable or even gross negligence, the State will most probably only incur liability for CIDT and not for torture, as the specific intent to commit torture might be absent from the particular act or omission. The purpose of the conduct will necessarily be indicative of the intention of the conduct.

Article 1(1) of the UNCAT lists the purposes for which torture or severe ill-treatment are usually applied, including: to obtain information or a confession from the direct victim *or* from a third person, to punish the victim for an act that the victim *or* a third person has committed *or* is suspected of having committed, to intimidate *or* to coerce the direct victim *or* a third person; and/or for any reason based on discrimination of any kind.

When attempting to identify torture, it is extremely important to consider the specific purpose relative to an act of torture. Intertwined with this requirement and a helpful indicator of intent and purpose of conduct, is the degree of control that a person is exercising over another or whether there exists a situation of unequal power, as is often the case in situations of detention.⁹¹

⁸⁷ Nowak, M. & McArthur, E. (2008) p. 74.

⁸⁸ Nowak, M. & McArthur, E. (2008) p. 74.

⁸⁹ Nowak, M. & McArthur, E. (2008) p. 558.

⁹⁰ View shared by Ingelse, C. (2001) p. 209 and Nowak, M. & McArthur, E. (2008) p. 73.

⁹¹ Nowak, M. (2005) *Civil and Political Rights, Including the question of torture and detention*, Report of the Special Rapporteur on the question of Torture, UN Economic and Social Council, E/CN.4/2006/6.

2.4.1.4 Official capacity

This requirement means that an act must have been committed either by; at the instigation of; with the consent of; or with the acquiescence of a public official or another person acting in an official capacity.

This element is especially important to the definition of torture, since the inclusion of State involvement distinguishes the conduct from other forms of abuse, which are normally dealt with in terms of personal liability only. The test for the involvement of the State is whether the infliction of pain can be stopped by a public official. The term 'public official' implies the existence of even the most remote connection with interests or policies of the State or of a State organ.⁹²

Throughout discussions of the Working Group on the Torture Convention, many participants indicated their dissent with the application of the UNCAT on government level only, since the purpose of the UNCAT is to eradicate all forms of torture and CIDT.⁹³ The final result was the inclusion of the requirement that an act of torture be committed by involvement of a public official, thereby concentrating the focus of the UNCAT on the accountability of State actors. The UNCAT addresses individual accountability by prescribing the inclusion of the crime of torture in the domestic law of States Parties.⁹⁴ Acts of torture were generally considered far graver when committed on government level, than when committed by an individual.⁹⁵

The definition of torture as expressed by article 1 of the UNCAT is the point of departure for identifying conduct as torture and forms the basis of the international legal framework pertaining to it. As will be discussed throughout this chapter, the legal structure established by the UNCAT is supported by principles, rules and standards contained in various instruments of international law, such as UN guidelines, UN declarations and treaties, regional conventions, jurisprudence and publications of official bodies, amongst others. The sources of international human rights law in are plentiful, and the international legal structure surrounding torture and CIDT is well established and

⁹² Burgers, H.J. & Danelius, H. (1988) p. 119.

⁹³ Boulesbaa, A. (1999) p.24 refers to discussions by the Working Group on the Torture Convention.

⁹⁴ Nowak, M. & McArthur, E. (2008) p. 77 – 78.

⁹⁵ Boulesbaa, A. (1999) p. 27 refers to the discussions by the Working Group on the Torture Convention, prior to the adoption thereof.

developed. The comprehensive publications and studies of the United Nations and CAT provide easy access to information and interpretative guidelines to the normative standards around the question of torture, to State Parties to the UNCAT.

2.5 The distinction between torture and CIDT

In addition to providing for an absolute prohibition of torture, article 16 of the UNCAT includes other forms of CIDT to fall within the scope of application of the prohibition:

16. Each State Party shall undertake 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, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The European Court of Human Rights points out that while the UNCAT differentiates between torture and CIDT, both actions should be equally prohibited.⁹⁶ As mentioned in section 2.1.4.3, the primary criteria for differentiation between the two forms of conduct, is purpose and intent.⁹⁷ This view is shared by the Special Rapporteur on Torture, who describes CIDT as: -⁹⁸

Acts which fall short of the definition of torture in article 1, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise CIDT under article 16 of the Convention. Acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

In a discussion on the relation between torture and CIDT, the Special Rapporteur on Torture goes on to explain the application of the proportionality test as a method to distinguish between torture and CIDT. CIDT may be justified in certain instances,

⁹⁶ *Gafgen v Germany* (2009) The European Court of Human Rights, Case No. 22978/05, paragraph 19 (the *Gafgen*-case).

⁹⁷ Nowak, M. & McArthur, E. (2008) p. 558.

⁹⁸ Nowak, M. (2005) paragraph 35.

depending on factors such as the legitimate or reasonable use of violence in a particular situation and the ability of the victim to resist the use of force. In such cases, it is foreseeable that the disproportional or excessive use of force can constitute CIDT. However, in cases where a victim is under the *de facto* control of someone, in other words – a detention scenario, the proportionality test is no longer applicable and the prohibition of CIDT and torture is absolute.⁹⁹

The above opinion is supported by the International Criminal Tribunal of the former Yugoslavia (ICTY)¹⁰⁰ in its consideration of the difference between torture and other forms of CIDT:¹⁰¹

Materially, the elements of these offences are the same. The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of willfully causing great suffering or serious injury to body or health.

Some guidelines for the distinction of the concepts are offered in case law. However, points of distinction can overlap and are interpreted differently by various forums. For example, the Inter-American Commission- and Court require a higher intensity of pain for torture than for CIDT, but also looks at the purpose of the conduct complained of.¹⁰² The Human Rights Committee¹⁰³ differs in its application of the distinction in so far as it found in one case that an action amounted to both torture and CIDT,¹⁰⁴ but refrained from distinguishing between torture and CIDT in another.¹⁰⁵ The subjectivity related to the determination of severity supports an argument in favour of distinguishing acts of torture from CIDT solely on the grounds of purpose and intent. As one expert recalls: -

⁹⁹ Nowak, M. (2005) paragraphs 38 & 40.

¹⁰⁰ The International Criminal Tribunal of the Former Yugoslavia was created by the Security Council under Chapter VII of the United Nations Charter. It is a court prosecuting war crimes committed during the 1990's in the Balkans. It is situated in The Hague. See www.icty.org.

¹⁰¹ *Naletilic and Martinovic*, ICTY, Case No. IT-98-34, 31 March 2003, paragraph 246.

¹⁰² *Ceaser v Trinidad and Tobago*, Inter-American Court of Human Rights, Case No. 12/147, Judgment of 11 March 2005, Series C No.123, paragraph 50, 68, 87, as discussed in the *Gafgen*-case.

¹⁰³ The Human Rights Committee is a United Nations treaty body which monitors the implementation of the ICCPR. For more information see <http://www2.ohchr.org/english/bodies/hrc/index.htm> accessed on 15 February 2010.

¹⁰⁴ *Alberto Grille Motta v Uruguay*, Communication No. 11/1977, UN Doc CCPR/C/OP/1 at 54 (1984) paragraph 14.

¹⁰⁵ *Wilson v the Philippines*, Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003) paragraph 7.4 & 7.5.

*...attempts have been made by various bodies to differentiate the prohibited acts by considering a distinguishing threshold based either on severity or purpose. Throughout the discussions it was generally considered that both approaches are problematic and that creating a hierarchy between torture and other forms of ill-treatment should be avoided.*¹⁰⁶

Though the purpose-test is not without problems, it is considered a more objective standard for distinguishing between the two concepts, than the threshold of pain.

In the *Gafgen*-case, the European Court of Human Rights states that the distinction between torture and CIDT is ultimately of little importance, since the legal consequences following a violation of the prohibition against torture, are not substantially different.¹⁰⁷ Reference is made to the discussion about redress in section 2.6.5 below, where it is concluded that the punishment for perpetrators of torture and/or CIDT typically takes the form of long imprisonment. For purposes of sentencing, the distinction will assist courts in deciding whether aggravating or mitigating circumstances should be applied for sentencing. It is important to note that certain provisions of the UNCAT are solely applicable to torture and not to CIDT, rendering a distinction between the two forms of conduct invaluable.

Firstly, State Parties' duty under the UNCAT to criminalize torture in their respective domestic legal systems is only applicable to torture and not in respect of actions amounting to CIDT. Secondly, State Parties' obligation to establish jurisdiction over acts of torture and either prosecute or extradite those suspected of committing such acts, is not applicable to instances of CIDT. Thirdly, as Evans rightly points out: -

...under article 16 of the UNCAT States undertake to prevent such acts, but it is only the obligations found in Articles 10 (education), 11 (review of interrogation rules and other arrangements for persons in custody), 12 (the conducting of prompt and impartial investigations) and 13 (securing the victim's right submit a complaint to competent

¹⁰⁶ Evans, M. & the Association for the Prevention of Torture (2001) *Getting to grips with torture, The Definition of Torture: Proceedings of an expert seminar Geneva 2001, Panel Discussion 1, "Threshold of Severity or Purpose?"* p. 17 – 19.

¹⁰⁷ The *Gafgen*-case, paragraph 18.

authorities for investigation) that are directly applicable to forms of treatment other than torture.¹⁰⁸

Finally, the appropriate form of redress and method of rehabilitation of victims of torture will necessarily differ from those applicable to victims of other forms of abuse. The scars left by torture are not only of a physical nature. Just as financial compensation is granted in respect of pain suffered, the psychological and social aspects of rehabilitation must be addressed. As the CAT confirmed in the case of *Guridi v Spain*,¹⁰⁹ “monetary compensation is not sufficient for a crime as serious as torture as the term of compensation should cover all the damages suffered by the victim, including restitution, compensation and the rehabilitation of the victim as well as the guarantee of non-repetition, depending on the circumstances of the case.” It therefore follows that victims of torture and those of CIDT, may have suffered different forms and extents of physical and psychological damages, which need to be addressed in a relevant and adequate manner. Where torture is practised in a widespread or systematic manner, actions such as the guarantee of non-repetition, official recognition of the act of torture and an apology by the responsible authorities, are considered appropriate and important rehabilitative steps.¹¹⁰ For these reasons, it is clear that the distinction between the two forms of conduct is one of great practical relevance.

2.6 Objectives of the UNCAT

The UNCAT expresses 5 main objectives namely: the prevention of torture; the implementation of the *non-refoulement* principle; the application of the exclusionary rule; the criminalization of torture; and providing redress to victims of torture.

2.6.1 The Prevention of Torture and CIDT

Article 2(1) of the UNCAT obliges State Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Articles 2(2) and 2(3) go on to exclude any exceptional circumstances whatsoever, including an order from a superior, from being invoked as a justification of

¹⁰⁸ Evans, M. (2001) p. 42, see footnote number 58.

¹⁰⁹ *Guridi v Spain*, Committee Against Torture, Application No. 212/2002, (2005), paragraph 6.8

¹¹⁰ Atlas on torture (2009) *Right of torture victim to adequate remedy and reparation*, available at <http://www.univie.ac.at/bimtor/rightofvictimsoftorturetoaremedyandrepairation> accessed on 29 March 2010.

torture. Prevention of torture and CIDT is the primary goal of the UNCAT. In addition to article 2, this obligation also manifests itself in articles 3, 4, 10 and 15 of the UNCAT, all of which, to different extents, aim to fulfill a preventive function.¹¹¹ Furthermore, the OPCAT, in its entirety, is dedicated to the prevention of torture.

The CAT confirms the application of the duty to prevent both to torture and to other forms of CIDT, as envisaged by article 16.¹¹² In an attempt to aid the practical interpretation of this obligation, States Parties are advised to always interpret treaties in good faith and in accordance with the ordinary meaning of its terms and to give effect to its goals and objectives.¹¹³ The ordinary meaning of the duty imposed by article 2(1) is to effect law reform on all levels so as to prohibit and prevent torture in the widest sense. Therefore, where not yet provided for in national law, States Parties should ensure the rights and freedoms protected by the UNCAT, in favour of all individuals within their respective jurisdictions.¹¹⁴ Ultimately, commitment to the UNCAT means acquiescence to full incorporation of the prohibition against torture and the obligation to prevent torture and CIDT within all relevant contexts of a State Party's legal system.¹¹⁵ As a preventive measure, in addition to proper prosecution and adequate punishment in its penal codes,¹¹⁶ the State should provide for effective methods of recourse under civil law.¹¹⁷ The CAT has, for instance, applauded Canada's inclusion of the proper definition of torture in its criminal code, as well as the exclusion of exceptional circumstances as a defense.¹¹⁸ Furthermore, the CAT recommends the abolition of capital and corporal punishment, as a manifestation of the prohibition of torture.¹¹⁹ States Parties should ensure that it is not possible to override the prohibition of torture and safeguards for its

¹¹¹ Nowak, M. & McArthur, E. (2008) p. 113.

¹¹² Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 3.

¹¹³ Article 3(1) of the Vienna Convention on the Law of Treaties 1969.

¹¹⁴ United Nations Economic and Social Council, Question on Human Rights, Adaptation of Municipal Law to International Conventions, E/CN.4/116 (9 June 1948), p.2 paragraph 1(a).

¹¹⁵ See generally Committee Against Torture, Recommendations made in response to South Africa's initial report to the CAT CAT/C/ZAF/CO/1, 7 December 2006 and Committee Against Torture General Comment 2, paragraph 4.

¹¹⁶ CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992, paragraph 8.

¹¹⁷ United Nations Economic and Social Council, *Question on Human Rights, Adaptation of Municipal Law to International Conventions*, E/CN.4/116 (9 June 1948), p. 2 paragraph 1(b).

¹¹⁸ Committee Against Torture, Conclusions and Recommendations, Canada, CAT/C/CO/34/CAN, 7 July 2005, paragraph 3.

¹¹⁹ Capital punishment in itself is not seen as torture however, the CAT recommends its abolition. Corporal punishment on the other hand, is almost always considered to be torture or ill-treatment. See Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 34 & 37.

prevention.¹²⁰ An opinion amongst authors is that the obligation to prevent torture is not absolute, but rather aimed at achieving reasonable results toward preventing torture.¹²¹

Although certain standards are apparent in international law, the methods and manner in which obligations of treaty law are implemented are mostly left to a State's own discretion.¹²²

Article 10(1) of the UNCAT obliges States Parties to ensure that all public functionaries, including law enforcement personnel, public officials, civil and military functionaries, medical personnel and especially persons involved in the custody, interrogation or treatment of individuals subject to any form of arrest or detention, be educated and informed on the prohibition against torture. The CAT gives a complete description of what it expects of State Parties in its report to New Zealand:¹²³

The State party should ensure that education and training...is...conducted on a regular basis. The State party should also continue to ensure adequate training for personnel to detect signs of physical and psychological torture and ill-treatment of persons deprived of their liberty, and integrate the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment) in the training of all professionals involved in the investigation and documentation of torture. In addition, the State party should continue to assess the effectiveness and impact of all its training programmes on the prevention and protection from torture and ill-treatment.

It is submitted that education is the most basic, yet most pro-active step for a States Party to take toward compliance with the UNCAT. It is imperative that State officials, working in situations involving custody, are aware of the boundaries of their authority. Such persons should be knowledgeable about the laws applicable to their posts and

¹²⁰ Amnesty International (2005) *12-Point programme for the prevention of Torture and other Cruel, Inhuman and Degrading Treatment or Punishment by Agents of the State*, AI Index No. ACT40/001/2005, paragraph 5, available at <http://www.amnesty.org/en/library/info/ACT40/001/2005> accessed on 2 October 2009.

¹²¹ Boulesbaa, A. (1999) p. 70 – 73; Ingelse, C. (2001) p. 261 – 263.

¹²² Association for the Prevention of Torture & Wendland, L. (2002) *A Handbook on State Obligations under the UNCAT*, Association for the Prevention of Torture, Geneva, p. 30 & 31.

¹²³ Committee Against Torture, Concluding observations, New Zealand, CAT/C/NZL/CO/5, 14 May 2009.

should be competent to deal with complaints regarding fellow employees or even higher offices, as it is envisaged that members of the public may turn to them for advice.

Article 11 of the UNCAT prescribes the systematic review of interrogation rules, instructions, methods, practices and policies regarding the treatment of persons in custody. Effectively, national policies and practices should be revised in accordance with changes in law and in the specific sector. In this regards, the ATP suggests the aid of national human rights monitoring bodies, to assist with legislative and judicial review processes.¹²⁴ The CAT recommends that States guarantee access to legal representation within the first few hours of detention, since this is the time in which torture is most likely to occur, especially in the case of *incommunicado* detention.¹²⁵

While the UNCAT embodies the theoretical legal approach towards the prevention of torture, the OPCAT provides the practical means to realize the ideology of eventual, absolute prohibition. Complimenting the UNCAT, the Optional Protocol establishes a system of international- and national monitoring mechanisms and provides thorough and practical guidelines for the prevention of torture. The UNCAT operates most effectively, when implemented in conjunction with the OPCAT. It requires of State Parties to establish and enforce National Preventive Mechanisms to combat torture and CIDT within each country. The preventive mechanisms of the OPCAT will be discussed in greater detail in paragraph 2.8 hereunder.

2.6.2 Implementation of the *non-refoulement* principle

Originally, the *non-refoulement* principle is a rule of refugee- and humanitarian law. The rule prohibits States from returning a person to their country of origin, if there are reasonable grounds to believe that the person will face the risk of torture.¹²⁶

The prohibition against *refoulement* forms an inherent part of the general, absolute prohibition against torture and the duty to prevent such conduct.¹²⁷ Article 3(1) of the

¹²⁴ The Association of the Prevention of Torture (2005) *Position Paper: The role of national human rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment*, Geneva.

¹²⁵ Committee Against Torture, Concluding observations, Korea, CAT/C/KOR/CO/2, 25 July 2006, paragraph 9 and Committee Against Torture, Conclusions and Recommendations, France, CAT/C/FRA/CO/3, 3 April 2006, paragraph 16.

¹²⁶ Amnesty International (2010) *Refugees in Canada - Who is a refugee?* Available at <http://www.amnesty.ca/Refugee/who.php> accessed on 22 January 2010.

UNCAT prohibits State Parties from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that said person would be in danger of being subjected to any form of torture. Factors such as the existence of a pattern of consistent, gross, flagrant or mass violations of human rights indicate whether the *non-refoulement* principle might find application.

The opinion that the *non-refoulement* rule is to be regarded in acquiescence with the general prohibition against torture, has been applied by the CAT in cases such as *Agiza v Sweden*¹²⁸ and *Tapia Paez v Sweden*.¹²⁹ The extended application of the prohibition has been confirmed by the Special Rapporteur on Torture, who reported that *the principle of non-refoulement is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture*.¹³⁰ Jurisprudence and literature further confirms that the *non-refoulement* principle can be classified as international customary law and therefore enjoys *jus cogens* status, based on the theory that it is inherently intertwined with the absolute prohibition against torture.¹³¹ The absolute nature of the *non-refoulement* principle effectively means that the rule can not be held subject to limitations in situations where freedom from torture or ill-treatment is at stake.¹³²

The CCPR supports the idea that under certain circumstances, *refoulement* can in itself constitute torture or CIDT:¹³³

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement...

¹²⁷ Feller, E., Turk, V. & Nicholson, F. (2005) *Refugee Protection in International Law: The UNHCR's global consultations on international protection*, Cambridge University Press, p.158; *Modise v Botswana*, African Commission Communication 97/1993, (2000), paragraph 9; *Soering v United Kingdom* No. 14038/88 European Court of Human Rights, 7 July 1989.

¹²⁸ *Agiza v Sweden* (2005) CAT Communication No 233/2003, CAT/C/34/D/233/2003, paragraph 11.5.

¹²⁹ *Tapia Paez v Sweden*, CAT Communication No 30/1996, CAT/C/18/D/39/1996, paragraph 14.5.

¹³⁰ Nowak, M. (2005) *Civil and Political Rights, Including the question of torture and detention*, Report of the Special Rapporteur on the question of Torture, UN Economic and Social Council, E/CN.4/2006/6, paragraph 31.

¹³¹ For an example of jurisprudence see *Ramzy v The Netherlands*, European Court of Human Rights Application No. 25424/05, paragraph 11 (*The Ramzy-Brief*). The principle is also entrenched in the Cartagena Declaration of Refugees, 1994, Paragraph III Section 5.

¹³² *Chahal v United Kingdom*, European Court of Human Rights, No. 22414/1993 paragraphs 78, 79 & 80 - The Court confirmed that in the *Chahal*-case that art 3 of the UNCAT imposes an absolute obligation on States, which can not be limited, even by such considerations such as undesirable or dangerous activities of the individual in question.

¹³³ CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992, paragraph 9.

The principle is repeated in several instruments of international human rights law, including the Declaration on Protection of all Persons against Enforced Disappearances,¹³⁴ the Inter-American Convention to Prevent and Punish Torture 1985¹³⁵ and the Charter of Fundamental Rights of the European Union 2000.¹³⁶ Article 33(2) of the Convention relating to the Status of Refugees¹³⁷ permits *refoulement* if the contracting country can reasonably prove the existence of danger to the national security or community of the country of refuge, unless *refoulement* entails a risk of the individual being subjected to torture or inhuman or degrading treatment or punishment, in which case it is absolutely prohibited.¹³⁸ Essentially, it is not the act of expulsion, but the effect and implications thereof that is material in determining whether the prohibition against *non-refoulement* has been violated.¹³⁹

Article 3 of the UNCAT requires of State Parties to provide measures for protecting all persons within its borders against expulsion to a country where the individual may be subjected to torture. In order to give effect hereto, future extradition treaties entered into by State Parties should be in keeping with the Convention's prohibition against *refoulement*.¹⁴⁰ In accordance with article 3(2), a State's administrative practices should include procedural mechanisms for determining whether a person is likely to be subjected to torture upon expulsion. Public officials charged with processing applications for asylum or refugee status should consider, as part of the administrative procedure, factors such as: evidence of systematic or gross human rights abuses in the State concerned; previous cases of torture or ill-treatment by the State concerned; internal

¹³⁴ Declaration adopted by General Assembly resolution 47/133 of 18 December 1992:

8. No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.

¹³⁵ The Inter-American Convention to Prevent and Punish Torture was created by the Western hemisphere Organization of American States in 1985 and entered into force on 28 February 1987:

13(4) Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

¹³⁶ *19(2) No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

¹³⁷ The Convention relating to the Status of Refugees 1951 was approved at a special United Nations conference on 28 July 1951. It entered into force on 22 April 1954.

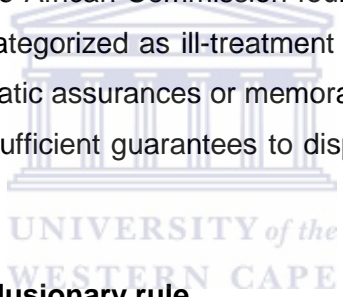
¹³⁸ Bruin, R. & Wouters, K. (2003) "Terrorism and the Non-Derogability of Non-refoulement", 15 *International Journal of Refugee Law* 5.

¹³⁹ Feller, E., Turk, V. & Nicholson, F. (2005) p. 186.

¹⁴⁰ Association for the Prevention of Torture & Wendman, L. (2002) p. 33.

changes in the State concerned; and the individual's personal risk factor.¹⁴¹ It must be noted that if an individual forms part, or is perceived to form part of a targeted group, the personal risk factor is considered to increase.¹⁴² In order for the prohibition to apply, the risk of torture should be real, foreseeable and of a personal nature.¹⁴³ States Parties should ensure that the standard, according to which risk is evaluated, constitutes a thorough assessment of the relevant factors and circumstances.¹⁴⁴ The onus rests on the individual to present a *prima facie* case of personal and present risk, which the State in question can then refute.¹⁴⁵ It is accepted that it is difficult for an individual to carry the full burden of proving his/her allegations. For this reason substantiation "only to the greatest extent practically possible" can reasonably be required of the threatened party.¹⁴⁶

Confirming the approach of the European Court of Human Rights in its implementation of the *non-refoulement* rule, the African Commission found that deportation *per se* can, in certain circumstances, be categorized as ill-treatment under the African Charter.¹⁴⁷ It must also be noted that diplomatic assurances or memoranda of understanding between countries are not considered sufficient guarantees to disparage the risk of torture or ill-treatment.¹⁴⁸



2.6.3 Application of the exclusionary rule

First expressed in the Declaration on Torture,¹⁴⁹ the objective of the exclusionary rule is to prohibit States from using evidence obtained under torture in judicial proceedings.

¹⁴¹ Association for the Prevention of Torture & Wendman, L. (2002) p. 35.

¹⁴² *S.S & S.A v The Netherlands*, CAT Communication No. 142/1999, 11 May 2001, paragraph 4.12.

¹⁴³ Committee Against Torture General Comment No. 1, A/53/44 annex IX, 21 November 1997, paragraph 6; *Soering v the United Kingdom* paragraph 31.3.

¹⁴⁴ Association for the Prevention of Torture & Wendman, L. (2002) p. 33-34.

¹⁴⁵ The *Ramzy*-brief, paragraph 37.

¹⁴⁶ The *Ramzy*-brief, paragraph 36.

¹⁴⁷ *Modise v Botswana*, African Commission Communication No. 79/1993, (2000), paragraph 32 - The case involved the illegal deportation of the complainant without due process of law. The Commission found a violation of article 5. The deportation exposed the complainant to personal suffering, it deprived him of his family, and it deprived his family of his support. In a broad interpretation of the definition of torture and ill-treatment, the commission found that such inhuman and degrading treatment, offends the dignity of a human being.

¹⁴⁸ Committee Against Torture, Concluding observations, Australia, CAT/C/AUS/1, 15 May 2008, Paragraph 16.

¹⁴⁹ 12. Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

Article 15 of the UNCAT stipulates that each State Party must ensure that any statement which is established to have been made as a result of torture is not invoked as evidence in any proceedings, except against a person accused of torture, as evidence that the statement was made. Similar to the *non-refoulement* principle, the exclusionary rule forms an inherent part of the general and absolute prohibition against torture.¹⁵⁰ The CAT supports this view by linking the exclusionary rule to the general prohibition on torture itself.¹⁵¹

The exclusionary rule is considered fundamental in upholding the absolute nature of the prohibition against torture and also plays a significant preventive role, which lies in the fact that information obtained under torture can never be of any value in the courts of a States Party.¹⁵² The Human Rights Committee has interpreted the non-admissibility of coerced statements to flow directly from article 7 of the ICCPR.¹⁵³ It is generally accepted that evidence obtained by CIDT is equally inadmissible as when extracted by torture.¹⁵⁴ The exclusionary-rule is not expressly described as absolute,¹⁵⁵ but is a function of the absolute nature of the prohibition of torture.¹⁵⁶ The effect hereof is that States are obliged under customary law to distance themselves from any violation of the rule and must refuse to pass as admissible, any evidence seemingly obtained under torture.¹⁵⁷ It is noted in the *Gafgen*-case that article 15 is silent on the question of derivative evidence, that is, evidence found as a result of a statement made under torture.¹⁵⁸ Yet, the exclusion of derivative evidence would be in keeping with the object of the Convention, as the CAT suggested in a report to Israel in 2001.¹⁵⁹

Since article 15 of the UNCAT requires of States Parties to ensure that evidence obtained by torture not be relied on in its national courts, it is implied that “if the current

¹⁵⁰ Joseph, S., Mitchell, K. & Gyorki, L. (2006) p. 34.

¹⁵¹ *P.E. v France* (2002) CAT Communication No. 193/2001, CAT/C/29/D/193/2001, paragraph 6.3.

¹⁵² The Atlas on Torture (2009) *Non-admissibility of evidence extracted by torture: The tainted fruit of the poisonous tree*, available at <http://www.univie.ac.at/bimtor/nonadmissibilityofevidenceextractedbytorture/166> accessed on 29 October 2009.

¹⁵³ CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992, paragraph 12

¹⁵⁴ Ingelse, C. (2001) p. 381.

¹⁵⁵ Joseph, S., Mitchell, K. & Gyorki, L. (2006) refers to the ability of countries to make reservations on article 15, yet none have been recorded to date.

¹⁵⁶ *G.K v Switzerland*, Committee Against Torture Communication No 219/2002, CAT/C/30/D/219/2002, (2003), paragraph 6.10.

¹⁵⁷ Thienel, T. (2006) p. 363.

¹⁵⁸ The *Gafgen*-case, paragraph 42.

¹⁵⁹ Committee Against Torture, Conclusions and recommendations, Israel, CAT/C/XXVII/Concl.5, 23 November 2001, paragraph 7(j).

national law does not have such an exclusionary rule, something more will have to be done by the national government to ensure that it does.”¹⁶⁰

Throughout its country reports, the CAT has made several recommendations for the effective prevention of the use of inadmissible evidence. For example, the inclusion of an express provision in the Criminal Procedure Code of a States Party to guarantee the non-admissibility of evidence obtained under torture,¹⁶¹ guaranteeing the right not to make self-incriminating statements¹⁶² and creating effective procedural mechanisms to challenge the legality of evidence allegedly having been obtained under torture.¹⁶³ Where applicable, States should provide for the medical examination of persons suspected of having been subjected to torture as soon as they are brought before a court. Local legal structures should further provide for the explicit inquiry by the presiding officer to establish whether the accused person has been subjected to torture. Practically, this requires the mandatory review of confessions made under police interrogation, which are later retracted before the court.¹⁶⁴

2.6.4 The criminalization of torture

The obligation to criminalize torture is a primary objective of the UNCAT and can practically be regarded as the first step toward the successful prevention and combating of torture. The duty set forth under article 4(1) of the UNCAT requires States Parties to ensure that all acts of torture, including attempts to commit torture or acts constituting complicity or participation in torture, are declared offences under its criminal law. Article 4(2) further requires such offences to be made punishable by appropriate penalties, which take into account the grave nature of the acts.

The obligation to criminalize torture fulfills two important functions. Firstly, it fulfills a deterring function, aimed at the prevention of torture.¹⁶⁵ The second function is to

¹⁶⁰ *A and Others v Secretary of State for the Home Department (No. 2)* (2005) United Kingdom House of Lords 71, paragraph 435.

¹⁶¹ Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture to Togo*, CAT/C/TGO/CO/1, 28 July 2006.

¹⁶² Association for the Prevention of Torture & Wendland, L. (2002) p. 56.

¹⁶³ The Atlas of Torture (2009).

¹⁶⁴ The Atlas of Torture (2009). *Non-admissibility of evidence extracted by torte: The tainted fruit of the poisonous tree*, available at <http://www.univie.ac.at/bimtor/nonadmissibilityofevidenceextractedbytorture/166> accessed on 29 October 2009.

¹⁶⁵ The Annual Report of the Committee Against Torture (2008) A/64/44 paragraph 52, sub paragraph 10.

prosecute and punish the perpetrator of torture. Prosecution and punishment not only fulfills a punitive function, but act as a form of satisfaction in favour of the victim.¹⁶⁶

According to the CAT, the introduction of a distinct offence of torture under the criminal code of a State Party is the most effective way of implementing Article 4 of the UNCAT.¹⁶⁷ Practically, the domestic criminal law system of a State should expressly recognize the above forms of conduct as criminal offences, including all forms of participatory actions, such as complicity, superior orders or instructions, instigation, consent, acquiescence, active concealment and as far as possible, passive concealment.¹⁶⁸ It is important that the crime of torture created in national law should include all the elements of the crime, as embodied in article 1(1).¹⁶⁹ In a report to Australia, the CAT extends the application of the UNCAT, by recommending the criminalization of acts constituting CIDT.¹⁷⁰ Yet, this is merely a recommendation with the view of banishing all forms of ill-treatment and not the duty strictly imposed by the UNCAT. In addition to criminalization, the Robben Island Guidelines¹⁷¹ advise that States should remove all forms of defenses for torture from its legal system – including threat of war and public emergency, as might under certain circumstances be used to justify abusive conduct.¹⁷²

Interesting to note, is the African Commission's comment that codification of international standards alone is not sufficient, but that the success of the laws largely depends on political will, stating that "the mere existence of a legal system criminalizing and providing sanctions for assault and violence would not in itself be sufficient; the

¹⁶⁶ Human Rights Watch, *Struggling to Survive*, 29 September 2004, paragraph VI International Legal Standards, available at <http://www.hrw.org/en/node/11975/section/7> accessed on 27 February 2010.

¹⁶⁷ Marchesi, A. (2008) "The Legal Contours of the Crime of Torture: Implementing the UN Convention Definition of Torture in National Criminal Law (with reference to the special case of Italy)," *Journal of International Criminal Justice*, Volume 6, No 2, p. 195 – 214.

¹⁶⁸ Various forms of participatory actions listed by Nowak, M. & McArthur, E. (2008) p. 247-248 and by Rodley, N. & Pollard, M. (2006) "Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *European Human Rights Law Reports*, Issue 2, p.122-123.

¹⁶⁹ Association for the Prevention of Torture (2009) *The criminalization of torture under the UNCAT: An overview for the compilation of torture laws*, Geneva, Switzerland.

¹⁷⁰ Committee Against Torture, Concluding observations, Australia, CAT/C/AUS/CO1, 15 May 2008, paragraph 18.

¹⁷¹ The Robben Island Guidelines are the African Union's guidelines and measures for the prevention of torture and CIDT in Africa. They serve as a tool for States to fulfil their national, regional and international obligations to prohibiting torture. They were adopted in 2002 by the African Commission. (See <http://www.apt.en/content/view/144/156/lang/en/> accessed on 30 March 2010).

¹⁷² Guidelines and measures for the prohibition and prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Part III Section 9.

Government would have to perform its functions to effectively ensure that such incidents of violence are actually investigated and punished.”¹⁷³

An important step toward proper criminalization is the requirement of a State to adopt the necessary measures to ensure the immediate and impartial investigation of complaints of torture, as envisaged by section 12 of the UNCAT.¹⁷⁴ States Parties must ensure that its authorities respond to allegations or complaints of torture or other CIDT by carrying out a prompt, effective, thorough, independent and impartial investigation into such allegations, the result of which must be made public in order to prosecute offenders before a competent, independent and impartial tribunal and to apply penal, civil and/or administrative sanctions as provided by the domestic law of the country.¹⁷⁵ In its interpretation of article 12, Amnesty International believes that the creation and implementation of an effective system for investigating complaints plays a primary role to ultimately prohibit and control the occurrence of torture. Investigations should be conducted by suitably-qualified personnel who are impartial and independent of both the alleged perpetrators and the body they report to. It points out further that even the remote existence of bias can possibly amount to a violation of article 12. The public prosecutor of a States Party should be able to open criminal proceedings where evidence of torture or CIDT is apparent, even if no complaints have been lodged. Judicial authorities should be able to provide for protection of complainants against intimidation, as well as compensation to victims, and police should be able to conduct internal investigations to institute disciplinary proceedings against any official suspected of committing acts of torture.¹⁷⁶

¹⁷³ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, African Commission Communication No 245/2002, (2006), paragraph 159.

¹⁷⁴ Committee Against Torture, Concluding Observations, Nicaragua, CAT/C/NIC/CO/1, 10 June 2009, paragraph 11.

¹⁷⁵ Organisation Mondiale Contre la Torture (2008) *India: No proper investigation into allegations of torture and ill-treatment by BSF officers*, Case No. IND 100809, Torture and ill-treatment/ Lack of a proper investigation/ Harassment :The International Secretariat of the OMCT requests your URGENT intervention in the following situation in India, available at <http://www.omct.org/index.php?id=&lang=eng&articleSet=Appeal&articleId=8751> accessed on 22 November 2009.

¹⁷⁶ Amnesty International, 8 January 2008, *Spain: Amnesty International calls for a thorough independent and impartial investigation to determine whether human rights were violated during the arrest of Igor Portu*, Amnesty International Public Statement, AI Index EUR 41/001/2008, available at <http://www.amnesty.org/en/library/asset/EUR41/001/2008/en/EUR410012008en.html> accessed on 28 August 2009.

Similar to article 2(2) of the UNCAT, States Parties' domestic criminal codes should provide for appropriate sanctions to be implemented, which gives rise to the question of an appropriate penalty under international law. Taking into account the gravity of the crime of torture, the CAT has noted that "the imposition of lighter penalties and the granting of pardons...are incompatible with the duty to impose appropriate punishment."¹⁷⁷ The Council of Europe's Committee of Ministers¹⁷⁸ has indicated the need to establish sufficiently deterring minimum prison sentences for perpetrators of torture and ill-treatment and supports the institution of minimum prison sentences, without the option of a fine or suspended sentences for grave abuses such as torture and ill-treatment.¹⁷⁹ The authors of the Commentary on the UNCAT do not consider a fine, short-term imprisonment, life imprisonment, nor corporal- or capital punishment to be the appropriate sanction.¹⁸⁰ It would therefore seem that long term imprisonment is the most suitable punishment. In addition to criminal sanctions, public officials who commit acts of torture should be submitted to disciplinary action, the results of which should entail suspension and/or dismissal.¹⁸¹

2.6.5 Providing redress to victims of torture

International human rights law obliges States to provide reparations to victims of serious human rights violations.¹⁸² The right to redress is fundamentally entrenched in the UDHR¹⁸³ and reflected in article 14 of the UNCAT which states that the legal system of a State must ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.

¹⁷⁷ *Guridi v Spain*, Committee Against Torture, Communication No. 212/2002, CAT/C/34/D/212/2002, (2005), paragraph 6.7.

¹⁷⁸ The Committee of Ministers is the European Council's body of decision makers. It comprises of the foreign affairs ministers of all member states. One of its main functions is the monitoring of compliance to international conventions, specifically the ECHR. It assembles in Strasbourg. For more information see <http://www.coe.int>.

¹⁷⁹ Council of Europe, Committee of Ministers, Interim Resolution ResDH(2005)43, *Actions of the security forces in Turkey Progress achieved and outstanding problems General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces*, Adopted by the Committee of Ministers on 7 June 2005.

¹⁸⁰ Nowak, M. & McArthur, E. (2008) p. 249-250.

¹⁸¹ *Türkmen v Turkey*, European Court of Human Rights, Application no. 43124/98, Judgment of 19 December 2006, paragraph 53.

¹⁸² United Nations, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. No. CPR/C/21/Rev.1/Add.13, 26 May 2004.

¹⁸³ Article 8 of The Universal Declaration of Human Rights provides for a right to remedy in respect of violations of rights protected by the constitution or by law.

The Human Rights Committee notes that the victim's right to redress in case of violation of a treaty obligation by a State, is considered non-derogable:¹⁸⁴

Article 2, paragraph 3, of the Covenant ... constitutes a treaty obligation inherent in the Covenant as a whole. Even if a state party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the state party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

It is important that remedies are enforceable, practical and adequate. The UN advises that measures of reparation may appear in different forms, such as restitution – meaning restoration of the victim's position to what it was prior to the violation; financial compensation for both physical and emotional pain and suffering; financial compensation for economically assessable material damages; rehabilitation - encompassing legal, medical, psychological, and other assistance to the victim; and measures of satisfaction, such as public apologies, truth-seeking, guarantees of non-repetition and changes in relevant laws and practices and most importantly - bringing to justice the perpetrators of human rights violations.¹⁸⁵ In an effort to ensure the victim's right to redress, State Parties should incorporate the victim's civil right to redress within its domestic legislation and promote judicial enforcement thereof.

It is extremely important to note that the right to compensation exists equally for victims of torture, as for victims of other forms of CIDT.¹⁸⁶ In this regard, the distinction between torture and CIDT is relevant for the determination of the appropriate remedy or *quantum*.

2.7 Implementation of the international legal framework

With regards to a timeframe for implementation of the stipulations of the UNCAT, Boulesbaa notes that the concepts of 'implementation within a reasonable time' and

¹⁸⁴ United Nations, *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*, UN Doc. A/RES/60/147, 16 December 2005, paragraph 19 – 23.

¹⁸⁵ *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*, UN Doc A/RES/60/147, 16 December 2005, paragraph 19 – 23.

¹⁸⁶ *Hajrizi Dzemajl v Yugoslavia*, Committee Against Torture, Communication 161/2000, CAT/C/29/D/161/2000, paragraph 9.6.

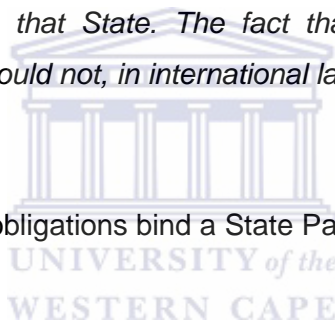
'progressive implementation' were both rejected during the negotiation period of the convention.¹⁸⁷ It was asked of the Legal Department of the United Nations, whether a State acceding to a Convention should have adapted its municipal law to the international obligations of the Convention prior to ratifying it. Its response was:

*...as far as international law is concerned, the adaptation of municipal law is not a condition precedent to a State binding itself internationally and a State may properly undertake an international obligation and then subsequently take the necessary domestic legislative measures to ensure the fulfillment of the obligation undertaken.*¹⁸⁸

However, it is relevant to note that: -

*...a State is under a duty to execute the provisions of a treaty from the date at which the treaty becomes binding upon that State. The fact that there may be omissions or deficiencies in municipal law would not, in international law, justify the failure of the State to fulfill its treaty obligations.*¹⁸⁹

It is therefore clear that treaty obligations bind a State Party immediately upon accession and ratification.



The standard practice is for a country to sign a treaty, where after the opportunity exists for the signatory state to harmonize its laws with that of the particular treaty, in an effort to prepare for accession and ratification. Although a signatory country is not expected to reform its laws completely prior to accession, it should at least attempt to take steps toward compliance. Ideally, accession and ratification follow once the signatory State has attended to the incorporation of the necessary measures into domestic law. The Vienna Convention confirms the above opinion, by prohibiting States from invoking conflicting provisions of internal law as a justification for non-compliance with the specific treaty.¹⁹⁰

¹⁸⁷ Boulesbaa, A. (1999) p. 71.

¹⁸⁸ United Nations Economic and Social Council, E/CN.4/116, 9 June 1948, p.3.

¹⁸⁹ United Nations Economic and Social Council, E/CN.4/116, 9 June 1948, p.4.

¹⁹⁰ Article 27 of the Vienna Convention on the Law of Treaties, 1969.

Specific mechanisms of enforcement contained in the UNCAT and OPCAT, are discussed below.

2.7.1 Mechanisms of enforcement under the UNCAT

Pursuant to its objective, the UNCAT assists the struggle against torture by instituting two main mechanisms of prevention, namely a complaints mechanism and a State reporting function. The complaints mechanism is administered and overseen by the CAT, as founded under Part II of the UNCAT. Consisting of 10 independent experts, the CAT is created for the express purpose of monitoring the implementation of the UNCAT. The CAT's mandate is executed in 4 different ways:

2.7.1.1 Inter-state complaints mechanism

Article 21 of the UNCAT sets forth a complaints mechanism, by which any States Party to the Convention may submit a complaint with the CAT to the effect that a fellow States Party is not fulfilling its obligations under the Convention. The States Party wishing to submit a claim of non-conformity must have made a declaration recognizing, in regard to itself, the competence of the CAT to consider such complaints. It must be noted that although many signatories, including South Africa, have made this declaration, the inter-state complaints mechanism has not been used to date.¹⁹¹

2.7.1.2 Individual complaints mechanism

Article 22 of the UNCAT provides for an individual complaints mechanism. Again, a States Party must have made a declaration to the effect that it recognizes the competence of the CAT to receive and consider complaints directly from the victim. If such a declaration has been lodged with the Secretary General of the United Nations, the CAT is permitted to receive communications from individuals or their proxies.

Although the duties imposed by the UNCAT are mostly State-orientated, the complaints mechanism is exclusively available for use by individuals, which gives rise to the question of accessibility. A condition of the individual complaints mechanism is that all remedies available to a complainant in domestic law must be exhausted before the CAT may review a communication. This means that an individual will first have to approach the national courts for relief. In countries where the crime of torture is recognized and the

¹⁹¹ <http://www2.ohchr.org/english/bodies/petitions/index.htm> accessed on 29 March 2010

wrong can be satisfactorily remedied, this would be the victim's first course of action. In countries where no domestic remedies exist, or where a complainant was unsuccessful in obtaining redress, the CAT may be approached. Complainants can either approach the CAT directly or may be assisted by NGO's or associations providing free legal aid, which may act as the complainant's proxy. In reality, many victims of torture are not familiar with the remedies that exist under international law, nor do they possess the means or resources to address an international forum.

The latest report shows that of 146 State Parties, only 64 have submitted a declaration recognizing the CAT's competency to receive individual complaints. However, the popularity and success of the individual complaints mechanism is clear, with 402 individual complaints registered at October 2009. Of these, 248 have been considered by the CAT and violations were found to have occurred in 48 cases. Interim measures were issued in 42 pending matters. According to the report by the CAT, complainants most frequently approach the CAT for protection against *refoulement*.¹⁹² As a result of its activities, the CAT has generated a persuasive body of jurisprudence.

The General Assembly instituted the United Nations Voluntary Fund for Victims of Torture in 1982. The Fund receives voluntary contributions and distributes these to NGO's and treatment centres for assisting victims of torture and to facilitate training projects for healthcare professionals, specialized in the treatment of victims of torture.¹⁹³ It must be noted that funds are limited and are not necessarily applied to assist complainants to the CAT.

2.7.1.3 Mechanism of inquiry

Article 20 of the UNCAT permits the CAT to launch an inquiry of its own accord, if it receives reliable information which appears to contain an indication of torture systematically practised by any States Party. Torture is practised systematically where it is committed habitually, deliberately and widespread throughout a particular country.¹⁹⁴

¹⁹² Statement by Claudio Grossman, 20 October 2009, Chairperson of the Committee Against Torture, 64th Session of the General Assembly, Item 71(b), New York, p.2, available at http://www.wcl.american.edu/dean/documents/20091015_UN_GeneralAssembly.pdf?rf=1, accessed on 30 March 2010.

¹⁹³ <http://www.un.org/events/torture/fund.htm> accessed on 29 March 2010.

¹⁹⁴ Committee Against Torture, Activities pursuant to article 20 of the UNCAT, Turkey, A/48/44/Add.1, 15 November 1993; Committee Against Torture, Concluding observations, Senegal, A/51/44, 9 July 1996.

In this regard, the UN adopted regulations governing the procedures to be followed.¹⁹⁵ It is imperative that the complaints received are reliable, speak of systematic abuse and that complaints are well-founded.¹⁹⁶ Once the CAT decides to follow up on a complaint, a delegate of the CAT will visit the area in question. During all phases of the inquiry, the CAT delegate will attempt to secure the State's cooperation. Upon completion of the CAT's report, the States Party is invited to respond to it. The inquiry is confidential, but the CAT may opt to lift confidentiality once the reports are completed or if publication is deemed to be in furtherance of the objectives of the inquiry.¹⁹⁷

Again, States Parties are required to submit a declaration in recognition of the CAT's ability to conduct inquiries. Out of 146, only 9 States Parties have refrained from declaring the CAT's competency. Thus far, 7 confidential inquiries have been launched by the CAT and a few others are in the process of being considered.¹⁹⁸

2.7.1.4 Periodic Reports

Article 19 of the UNCAT requires all State Parties to submit reports to the CAT, which indicate the measures that have been taken to give effect to the undertakings under the convention. State Parties should submit the initial report within 1 year of ratification and every 4 years thereafter. Upon receipt of the report, the CAT will publish its conclusions, comments, observations and recommendations, as deemed appropriate. The State reports in effect, serve as progress reports, by which a States Parties' extent of law reform and compliance to the UNCAT is monitored.

In addition to the activities of the CAT, an expert Special Rapporteur on Torture was appointed by the UN Commission on Human Rights to examine questions relevant to torture.¹⁹⁹ The duties of the Special Rapporteur comprise *inter alia* of transmitting urgent appeals to States with regard to individuals reported to be at risk of torture, as well as communications on past alleged cases of torture, undertaking fact-finding visits and

¹⁹⁵ United Nations (1998) Rules of Procedure of the Committee Against Torture, CAT/C/3/Rev.3.

¹⁹⁶ Article 70 - 75 of the Rules of Procedure of the CAT.

¹⁹⁷ Ingelse, C. (2001) p.159 – 165.

¹⁹⁸ Grossman, C., 20 October 2009, Chairperson of the Committee Against Torture, 64th Session of the General Assembly, Item 71(b), New York, p.3, available at http://www.wcl.american.edu/dean/documents/20091015_UN_GeneralAssembly.pdf?rf=1, accessed on 30 March 2010.

¹⁹⁹ The following persons have held the office of Special Rapporteur of Torture since its inception. 1985 – 1993: Sir Peter Kooimans (Netherlands); 1993 – 2001: Sir Nigel Rodley (UK); 2001 – 2004: Mr Theo van Boven (Netherlands); 2004 – current: Dr Manfred Nowak (Austria).

submitting annual reports on activities, to the Human Rights Council and the General Assembly.²⁰⁰ The mandate of the Special Rapporteur differs from that of the CAT insofar as it may investigate issues relating to torture in any country, irrespective of its status of accession to the UNCAT. Notably, it does not require the exhaustion of local remedies to fulfill its duties.

The efficacy of this office depends on the level of cooperation between the Special Rapporteur and the Government in question. The Special Rapporteur will prevail upon States to respond to its reports, expecting clarification of the substance of allegations made against it. The Rapporteur will monitor and evaluate the prosecution of perpetrators, offer means of recourse to the victims and attempt to ensure that occurrences of torture will be eliminated in the future.²⁰¹ As can be expected, States are not always eager to provide the information and assurances required. Throughout the years, by maintaining its presence, consistency and credibility, the office of the Special Rapporteur on Torture has become an influential one in the international arena and one that enjoys diplomatic support. An example of the efficacy of the work of this office is Zimbabwe's recent refusal of entry to Dr Nowak, to conduct a fact-finding mission upon invitation from the prime minister.²⁰² One can only assume that the refusal was made for fear of discovery and publication of the country's record of human rights abuses.²⁰³

The CAT reports that of 146 States Parties, 39 have never submitted a periodic report, thus breaching their obligations under the UNCAT. Up until October 2009, the CAT had adopted a total of 267 sets of concluding observations.²⁰⁴ The dates on which State Parties should submit reports, are scheduled in advance.

2.7.2 Mechanisms of enforcement under the OPCAT

²⁰⁰ <http://www2.ohchr.org/english/issues/torture/rapporteur/> accessed on 13 March 2010.

²⁰¹ Gutter, J. (2006) *Thematic procedures of the United Nations Commission on Human Rights and International Law: In search of a sense of community*, School of Human Rights Research Series Volume 21, Intersentia, Utrecht, p.243 – 247.

²⁰² BBC News, 29 October 2009, *Anger at Zimbabwe UN envoy snub*, available at <http://news.bbc.co.uk/2/hi/8331633.stm> accessed on 2 March 2010.

²⁰³ The Special Rapporteur has actively been conducting State visits, gathering information and compiling reports since 1985. All reports are available on http://www.ap.ohchr.org/documents/apage_e.aspt?m=103, accessed on 31 March 2010. However, it must be noted that the systematic scholarly examination of the nature and impact of the role of the Special Rapporteur on international law is very limited.

²⁰⁴ Grossman, C., 20 October 2009, Chairperson of the Committee Against Torture, 64th Session of the General Assembly, Item 71(b), New York, p.2 & 3, available at http://www.wcl.american.edu/dean/documents/20091015_UN_GeneralAssembly.pdf?rf=1, accessed on 30 March 2010.

As mentioned in section 2.6.1, the OPCAT is aimed at the practical implementation of the prohibition against torture, by establishing a mechanism of visitation to places of detention. Currently, there are 50 States Parties and 23 signatories to the OPCAT.²⁰⁵ Although South Africa is a signatory to the OPCAT,²⁰⁶ it has not yet ratified this treaty. It is ultimately expected of South Africa to conform to the recommendations by the CAT and to ratify the protocol in the foreseeable future.

The CAT considers the following places, in the context of detention and control, to be most conducive to torture and CIDT: prisons, hospitals, schools, institutions engaged in the care of children, military service, and institutions for the mentally ill/disabled.²⁰⁷ As previously mentioned, the OPCAT creates a system of visitation to places of detention, by international, as well as national, independent monitoring bodies. The objective of the visitation mechanism instituted by the OPCAT is based on the premise that persons deprived of their liberty require especial protection against torture and CIDT.²⁰⁸

2.7.2.1 International monitoring mechanism

Article 2 of the OPCAT creates the Subcommittee on Prevention of Torture and other CIDT (SPT) with a mandate comprising of the following functions:²⁰⁹ to visit places where persons are deprived of liberty; to publish general comments; to make recommendations to States Parties concerning the protection of persons deprived of liberty; to advise and assist States Parties in the establishment of a National Preventive Mechanism (NPM); to assist States Parties with the implementation of NPM's by advising, assisting and offering training or technical assistance; to make recommendations or observations to States Parties relative to the development of its NPM's; and lastly, to cooperate with other UN organs and organizations to strengthen the protection of all persons against torture and CIDT. By ratification of the OPCAT, each States Party agrees to allow visits and grant access to its places of detention, by the Subcommittee on the Prevention of Torture.²¹⁰ States Parties further agree to

²⁰⁵ <http://www.apt.ch/content/view/40/82/lang/en/> accessed on 3 December 2009.

²⁰⁶ South Africa signed the OPCAT on 20 September 2006.

²⁰⁷ Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 15.

²⁰⁸ Preamble to the OPCAT.

²⁰⁹ Article 11 of the OPCAT.

²¹⁰ Article 4 of the OPCAT.

provide the SPT with all relevant information that the SPT might require in the fulfillment of its mandate.²¹¹

The SPT has thus far visited a number of States, including Mauritius, Mexico, Benin, Sweden, Honduras and the Maldives. From an examination of the reports generated by the SPT, it would appear as if States Parties to the OPCAT are not very well prepared to implement the required mechanisms of enforcement - mostly due to budgetary, human resources and infrastructural constraints.²¹² On the other hand it must be said that despite the need to overcome certain obstacles, some States Parties, such as the Maldives, are demonstrating a set intention to comply with the OPCAT's obligations.²¹³

2.7.2.2 National Preventive Mechanisms

Article 3 of the OPCAT requires of each States Party to the Protocol, to establish and maintain, one or several visiting bodies, with the objective to prevent torture and CIDT within the particular country. It is imperative that countries guarantee the functional and financial independence of NPM's from State authorities, *ie* the legislature, judiciary and executive branches of Government.²¹⁴ The task of visiting all internal places of detention is demanding and time consuming. Qualified and competent staff must be employed for this purpose. On the strength of reports compiled from visits to detention facilities, the NPM's must make recommendations to the relevant authorities and should be actively involved in relevant legislative drafting processes. In addition to having a preventive function, the NPM also fulfills an advisory function.²¹⁵ The NPM is tasked with the duty to compile an annual report which should be made available to the relevant role players, the public and the SPT.²¹⁶ As mentioned in the concluding paragraph of this chapter, the enforcement of recommendations by the NPM remains problematic. State Parties are not obliged to implement the suggestions of the SPT or NPM, but are merely required to

²¹¹ Article 12 of the OPCAT.

²¹² The SPT's dialogue with the government of Sweden demonstrated that although the Parliamentary Ombudsman is mandated to fulfil a NPM function, a lack of resources, funding and concerns over the perceived independence of this body, should it actually fulfil these functions, are obstacles to proper compliance to the OPCAT. (Report on the visit of the SPT to Sweden, 10 September 2008, CAT/OP/SWE/1).

²¹³ The Maldives demonstrated its eagerness to comply with the OPCAT, by establishing the National Human Rights Commission of the Maldives in 2007, designated to function as a NPM. (Report on the visit of the SPT to the Maldives, 26 February 2009, CAT/OP/MDV/1).

²¹⁴ Nowak, M. & McArthur, E. (2008) p. 1074.

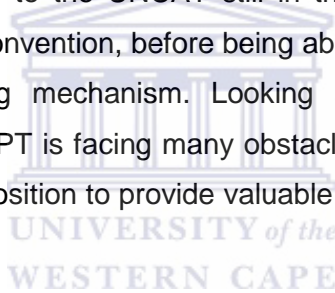
²¹⁵ Nowak, M. & McArthur, E. (2008) p. 1074 – 1078 & 1083.

²¹⁶ Nowak, M. & McArthur, E. (2008) p. 1098.

examine these and to enter into dialogue with the visiting bodies to discuss the possibility of implementation.²¹⁷

Often, States Parties choose to extend the mandate of existing oversight bodies, such as ombudsmen, national human rights institutions or national complaints directories, to fulfill the function of a NPM in accordance with the strict requirements of the OPCAT. Some examples include Sweden's employment of the parliamentary ombudsman, whose mandate already included the power to carry out unannounced visits, the right to initiate investigations and to examine individual complaints, prior to the SPT's first visit to the country.²¹⁸

Most of the reports by the SPT are confidential and not published on the United Nations' official website.²¹⁹ Overall, it seems that the SPT is fulfilling a secondary function to the CAT, with many State Parties to the UNCAT still in the process of aligning its laws, policies and practices to the Convention, before being able to focus on the institution of a detailed and stringent visiting mechanism. Looking at the published reports, the conclusion is drawn that the SPT is facing many obstacles in the fulfillment of its duties and although the SPT is in a position to provide valuable advice to State Parties, it is not yet functioning optimally.



2.7.3 Mechanisms of enforcement: Other instruments of international law

Together with the OPCAT, the UNCAT constitutes the most complete and specialized part of the international legal framework pertaining to torture and CIDT. As is evident from the discussion in this chapter, the framework established by the UNCAT is complemented and supported by other instruments of international- and regional law. A brief summary of the mechanisms of enforcement under the ICCPR and African Charter is presented below, as examples of international and regional law applicable in the case of South Africa.

2.7.3.1 The ICCPR

In event of violation of section 7 of the ICCPR, a victim may lodge a complaint with the Human Rights Committee, which monitors adherence to the ICCPR. The complaints

²¹⁷ Sections 12 & 20 of the OPCAT, as referred to in Nowak, M. & McArthur, E. (2008) p. 1096.

²¹⁸ Report on the visit of the SPT to Sweden, CAT/OP/SWE/1, 10 September 2008, paragraph 29.

²¹⁹ See http://www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm accessed on 30 March 2010.

procedure is aimed at addressing consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms throughout the world.²²⁰ A Working Group on communications screens all communications received and decides whether to pursue a complaint, provided that the communication received meets the relevant criteria.

The similarity of the objectives of the ICCPR the UNCAT, as far as the prohibition of torture is concerned, puts the Human Rights Committee in the position to compliment the work of the CAT and to participate as an interpretive source, to the development and understanding of the international legal framework pertaining to torture. As a result of decisions reached through the complaints mechanism, the Human Rights Committee has accumulated a substantial body of jurisprudence. Amongst the most prominent, its findings have aided in defining and identifying acts of torture²²¹ and CIDT.²²² The Human Rights Committee further exercises its influence by the publication of concluding observations on country visits,²²³ as well as by issuing General Comments. As referred to throughout this paper, General Comment No 20 is most substantially relevant in respect of the question of torture. The Human Rights Committee is well established, very active and its recommendations are generally well received.²²⁴

2.7.3.2 The African Charter

The following paths of recourse are available to member States, in event of violation of section 5 of the African Charter:

Firstly, the African Charter establishes an Inter-State complaints mechanism. Under article 47, State Parties may lodge a complaint with the African Commission against a fellow States Party. However, before invoking this remedy, the States involved should

²²⁰ <http://www2.ohchr.org/english/bodies/chr/complaints.htm> accessed on 22 March 2010.

²²¹ For example, “beatings, electric shocks, mock executions and deprivation of food and water” have been identified as acts of torture in *Muteba v Zaire* (124/82); *Miango v Zaire* (194/85) and *Kanana v Zaire* (366/89)

²²² For example, the Human Rights Committee found in the case of *Polay Campos v Peru* (577/94) that “a victim placed in a cage and displayed to the media” constituted CIDT. In *Williams v Jamaica* (609/95) it found that the State’s failure to provide medical care and treatment for a prisoner on death row, with severely deteriorated mental health, to be another example of CIDT.

²²³ For example, the Human Rights Committee expressed concern over the State obtaining the consent of minors, or other persons incapable of giving proper consent, to participate in medical experiments. See Concluding Observations on the Netherlands (2001) UN Doc. CCPR/CO/72/NET paragraph 7.

²²⁴ Organisation Mondiale Contre la Torture (2006) “Part III: Jurisprudence of the Human Rights Committee,” *Organisation Mondiale Contre la Torture Handbook Series*, Volume 4, available at http://www.omct.org/pdf/UNTB/2006/handbook_series/vol4/eng/handbook4_en_03_part3.pdf accessed on 31 March 2010.

attempt to settle the matter through bilateral negotiation. The Inter-State complaints procedure is not often used.²²⁵

The second tool of enforcement available to complainants is the individual complaints mechanism. Although article 58 states that communications will be considered where it reveals “the existence of a series of serious or massive violations of human and peoples’ rights”, the African Commission considers all complaints received from individuals and NGO’s, as long as it complies with the criteria for admissible communications as per article 56.²²⁶ Another condition for submitting a complaint with the African Commission is that the domestic remedies available to the complainant must have been exhausted by a complainant, prior to approaching the African Commission.²²⁷ The African Commission was inaugurated in 1987 and although the individual complaints mechanism is frequently used,²²⁸ it faces many constraints. These include a lack of resources, poor visibility and accessibility throughout Africa, and most notably, the fact that its decisions are not legally binding.²²⁹ Concerns were raised about the impartiality of some of the members of the Commission, who held government posts, or were connected to persons involved in African governments, whilst serving on the Commission.²³⁰ Until 1997, the African Commission received about 200 non-state communications. This number is similar to the amount of complaints received by the Human Rights Committee during its first 10 years of operation and is therefore not considered inutile, given Africa’s circumstances.²³¹ Reference made to its decisions in sections 2.4.1.2, 2.6.2 and 2.6.4 indicates that the African Commission has played an active role in its interpretation of section 5 of the African Charter.

²²⁵ Heyns, C. & Killander, M. (2006) “The African Regional Human Rights System, International Protection of Human Rights: Achievements and Challenges”, in Gómez Isa, F & De Feyter, K (eds.), *International protection of human rights: achievements and challenges*, University of Deusto, Bilbao.

²²⁶ Heyns, C. & Killander, M. (2006).

²²⁷ Article 50 of the African Charter.

²²⁸ A list of all communications to the African Commission can be found at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html> accessed on 23 March 2010.

²²⁹ Wachira, G.M. (2008) *African Court on Human and Peoples’ Rights: Ten years on and still no justice*, Minority Rights Group International, p.6 & 9, available at <http://www.unhcr.org.refworld/bd/48e4763c2.pdf> accessed on 31 March 2010.

²³⁰ Krisch, N. (1998) *The establishment of an African Court on Human and Peoples’ Rights*, The Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, available at http://www.hjil.de/58_1998/58_1998_1_b_713_732.pdf accessed on 31 March 2010, p. 716.

²³¹ Krisch, N. (1998) *The establishment of an African Court on Human and Peoples’ Rights*, The Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, available at http://www.hjil.de/58_1998/58_1998_1_b_713_732.pdf accessed on 31 March 2010, p. 715. Reference is made to footnotes 22 & 23.

The Optional Protocol to the African Charter of Human and Peoples Rights on the establishment of an African Court of Human and Peoples' Rights was adopted by the Organization of African Unity in 1998, however, the Court is not yet functional.

Lastly, though not provided for in the African Charter, a decision of the Assembly of the African Union requires all State Parties to submit periodic reports with the African Commission.²³² Reports should address matters of compliance with the Charter and must be submitted bi-annually. Through this mechanism, the African Commission can monitor the human rights situation in African countries to a certain extent. A total of 41 State Parties have submitted periodic reports and most States have lodged multiple reports. South Africa's submitted an initial report during 1998 and a second report during 2004.²³³

2.8 Comparing various mechanisms of enforcement

Drawn below, is a comparison between the various individual complaints mechanisms, as would be applicable for a complainant from a South African point of view:

	Human Rights Committee	CAT	African Commission
Criteria for Communication	Complainant must be identified. Reliable attestation. Proper language. Complaint in line with the ICCPR. Exhaustion of local remedies.	Complainant must be identified. Exhaustion of local remedies. Declaration accepting jurisdiction by State Party.	Complainant must be identified. Proper language. Complaint in line with African Charter. Exhaustion of local remedies.
Aim	Reviews individual complaints attesting consistent, gross and systematic	Specific focus on individual complaints of acts of torture and other	Reviews individual complaints of violations of any of the provisions of the

²³² Heyns, C. & Killander, M. (2006).

²³³ The 2004 report mentions torture and CIDT twice. Firstly to indicate its status of ratification of the UNCAT and secondly, with reference to the Extradition Act.

	violations of human rights.	forms of CIDT.	African Charter, including torture.
Provisional Measures	States are instructed to take interim measures to avoid irreparable damage, irrespective of determination on merit. ²³⁴	State asked to respond within 6 months. State can be requested to take provisional measures, prior to decision being taken. (for example, interdicting an extradition in case of risk of torture)	State asked to respond. In case of no response, African Committee continues on strength of allegations. No provisional measures in place.
Final Measures	Very specific recommendations, including: compensation, non-repetition, undertaking of public investigation, prosecution, punishment, restitution etc ²³⁵ . Follow-up procedures in place.	Final conclusions and recommendations, including measures that should be adopted and practices that should be amended. Report back by States expected in periodic reports.	Recommendations to stop continuing violation; order that necessary steps are taken toward compliance.

From the above, it is advisable that the individual victim of abuse should choose between the CAT and African Commission. The table below weighs the positive and negative attributes of the individual complaints mechanism of each system:

²³⁴ Rule 92 of the Human Rights Committee's Rules of Procedures.

²³⁵ Steiner, HJ., Alston, P. & Goodman, R. (2008) p. 895.

CAT		African Commission	
Positive	Negative	Positive	Negative
International attention and recognition of issue.	Less accessible and more costly.	More accessible and perhaps less costly.	The Commission does not derive the power to accept communications from individuals or make recommendations to the State Parties, from the African Charter, but from other sources of law. Its mandate is vague and not clearly set out in the African Charter. ²³⁶
Political weight - States tend to take reports and recommendations more seriously.		NGO's have active relationship with Commission, many are registered as observers. ²³⁷	
Specifically focused on torture and CIDT, more specialized. Wealth of expertise, resources and access to sources of international law.		More complaints before the AC will strengthen its efforts, credibility and will develop the legal position in Africa.	It seems that the African Union (Assembly) does not really support the efforts of the African Commission ²³⁸ therefore there is less confidence in the system.
Communication criteria slightly less stringent than that			

²³⁶ Odinkalu, C. A. (1998) "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment", *Transnational law and contemporary problems* 8, p.359.

²³⁷ Heyns, C. & Killander, M. (2006).

²³⁸ Heyns, C. & Killander, M. (2006).

of AC.			
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From the perspective of available resources, expertise and infrastructure, it is clear that the UNCAT is better equipped to deal with individual complaints, although the African Commission has proved to be an eager advocate of the African Charter and deserving of States Parties' support.

The International Human Rights movement has come a long way since taking its first steps about 60 years ago. If complaints mechanisms are not fully utilized, it is most probably for lack of awareness or limited public knowledge of available remedies. Both the CAT and the African regional human rights system have the potential of granting adequate relief to victims and influencing State behaviour and decisions. Similarly, both systems are yet to reach their full potential.

2.9 Conclusion

Concluding, two questions are posed to determine whether the UNCAT suffices to effectively prevent and combat torture and CIDT in the international arena. Firstly, does the UNCAT succeed in doing what it sets out to do? In other words, does the UNCAT purport to address all the relevant aspects required to effectively prevent and combat torture and CIDT?

The strengths of the UNCAT are multiple. The legal definition of torture in article 1(1) of the UNCAT forms the basis of the international legal framework pertaining to torture and has come to be globally accepted as the point of departure for all matters relative to torture and CIDT. The elements of the crime of torture are clearly and unambiguously outlined in the definition. The UNCAT presents an embodiment of the absolute prohibition against torture and *refoulement*, as entrenched in international customary law. *Jus cogens* is developed by the UNCAT, insofar as other forms of CIDT are included within the scope of the general prohibition against torture. This inclusion widens the application of international human rights law pertaining to ill-treatment, enabling and empowering States to eradicate all forms of abuse amounting to or related to torture. Whilst including CIDT within its range of operation, the two forms of conduct still remain distinct, allowing a flexible and contextual approach. By establishing universal jurisdiction over the crime of torture, the UNCAT demands that no refuge is awarded to

perpetrators of torture. Simultaneously, torture is combated on national level. The UNCAT and its objectives are entirely supported by guidelines and other instruments of international human rights law. Together with the OPCAT, the UNCAT provides States with the means and guidance for implementing effective preventive mechanisms and institutionalizing proper avenues for recourse. The OPCAT's strength lies in its specific focus of places of detention and unambiguous requirements of a visiting and monitoring body.

The practicality of the provisions of the UNCAT and OPCAT lies in the fact that it is State-orientated. The duty to implement preventive measures, to declare torture a crime, to prosecute and punish violations, to practice the *non-refoulement* principle, to observe the exclusionary rule and to educate and inform, are all imposed on government departments. It is submitted that the obligations thus imposed are not unreasonable and are in keeping with the constitutional values of democracy, freedom and equality, as generally already observed by most countries, including South Africa. Strictly speaking, all States that are constitutionally protective of a person's right to dignity and integrity, should be attending to law reform on a level, similar to that prescribed by the international framework.

The second question relates to the UNCAT's weaknesses. It is noted that although literature on torture is plentiful, not a lot of interpretive tools are available on the concept of cruel, inhuman and degrading treatment or punishment. *In lieu* of clear guidelines, States may possibly encounter difficulty in its application thereof.

However, it is concluded that the greatest weaknesses of the UNCAT (and OPCAT) is its poor enforceability. There are no enforcement mechanisms to ensure strict adherence to the duties imposed by the convention and protocol, and there are no obligations on States Parties to implement the CAT's decisions. Ingelse points out that linguistically, the CAT can only offer its 'views', which are indeed not orders or enforceable recommendations.²³⁹ Similarly, there are no enforcement mechanisms to ensure that the African Commission's decisions and recommendations are implemented. Subsequently,

²³⁹ Ingelse, C. (2001) p. 196.

these are often ignored or vetoed by States.²⁴⁰ The African Commission noted that “the main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of.”²⁴¹ However, the fact remains that States Parties have consented to observe the provisions of specific treaties and should therefore be held accountable to honour the obligations thus incurred. It is important to create awareness on the issue of torture and other forms of CIDT, to increase accessibility to human rights law. For the UNCAT to work most effectively, increased public awareness about mechanisms of recourse and greater access to remedies are paramount.

As the first treaty to impose positive obligations on States Parties to prevent torture and CIDT, it is submitted that the legal framework created by the UNCAT and supported by other treaties in international law, presents member States with sufficient and adequate information and resources to prevent, combat and address occurrences of torture and other forms of ill-treatment. It is submitted that the UNCAT, complimented by the OPCAT, accomplishes the objective of assisting the struggle against torture, by forming a foundation for the international legal framework pertaining to torture and CIDT. The conclusion is reached that the international legal framework in its current form, constitutes a comprehensive and cohesive guide according to which all nations, irrespective of their status of ratification, may sculpt their laws pertaining to torture and CIDT.

²⁴⁰ Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, p.125 -126.

²⁴¹ *Organisation Mondiale Contre La Torture and Others v Rwanda*, African Commission Communication Nos. 27/1989, 46/1991, 49/1991, 99/1993, 21–31 October 1996, paragraph 19.

CHAPTER 3:

SOUTH AFRICA'S LEGAL FRAMEWORK IN RELATION TO THE UNCAT

This chapter aims to assess South Africa's legal position pertaining to torture and cruel, inhuman and degrading treatment or punishment, relative to international normative standards and particularly, to the framework created by the UNCAT and OPCAT. The discussion will consist of an examination of legislation, jurisprudence, government policies and practices of State organs in relation to the objectives and obligations imposed by the UNCAT. The comparative study will consider constraints specific to South Africa and where applicable, will identify obstacles barring full compliance with international standards. Attention will be paid to the recommendations made by the CAT in response to South Africa's initial report to the Committee, as this serves as the basic point of departure from which reform of this area of law should be considered. Since South Africa displays a sector-specific or contextual approach to torture and CIDT, the study will focus on various different legal positions, as applicable to particular centres or scenarios of detention.

3.1 South Africa's history and rationale behind signing the UNCAT

Apartheid is South Africa's rationale for accession to the UNCAT. As mentioned in section 1.1, the fact that the country was governed by a racial segregationist government from 1948 – 1994, means that acts of torture and severe ill-treatment of persons is a common occurrence throughout South African history. Racism, or rather, white supremacy, was at the heart of the regime and any form of opposition was oppressed at all costs.²⁴² Apartheid, as a political order, in itself constituted a crime against humanity.²⁴³ Arbitrary arrest and detention, torture, discriminatory violence, intimidation and other forms of brutalities were systematic, common, almost accepted, occurrences.²⁴⁴ South Africa's initial report to the CAT refers to a myriad of accounts of abuse and brutality committed against political prisoners, activists and civilians, mainly by the police and security forces under the minority government.²⁴⁵

²⁴² Steiner, H.J., Alston, P. & Goodman, R. (2008) *International Human Rights in Context: Law Politics Morals*, 3rd Edition, Oxford University Press, p. 1360.

²⁴³ Steiner, H.J., Alston, P. & Goodman, R. (2008) p. 1359 – 1360.

²⁴⁴ Streater, O. (2008) *Review of existing mechanisms for the prevention and investigation of torture and cruel, inhuman and degrading treatment or punishment in South Africa*, Centre for the Study of Violence and Reconciliation, p. 8.

²⁴⁵ Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, p.2, 5 – 8.

In an attempt to deal with the innumerable human rights violations committed under the authoritarian nationalist rule, the Truth and Reconciliation Commission (TRC) was founded.²⁴⁶ The TRC's mandate was to investigate gross human rights violations, to afford victims an opportunity to relate the violations they suffered, to grant amnesty to those perpetrators of human rights who gave a full account of the wrongs committed by them and to take measures aimed at the reparation, rehabilitation and restoration of the human and civil dignity of victims of violations of human rights.²⁴⁷ The TRC was a quasi-judicial body which heard testimonies from both victims of violence, as well as perpetrators of violence during the apartheid-era. The TRC heard testimonies – not only of atrocities suffered systematically at the hand of apartheid-security forces, but also allegations and accounts of conspiracies,²⁴⁸ chemical and biological warfare²⁴⁹ and secret state funding to finance such actions.²⁵⁰ Methods of torture employed and institutionalized by security forces include sexual abuse, kidnapping, prolonged solitary confinement, brutal methods of assault and deprivation of sleep, medical attention, food and water. The case of prominent anti-apartheid activist, Steve Biko, serves as an example. Following his arrest in 1977, Mr Biko was assaulted brutally whilst chained to a grill, causing him to suffer brain damage. He was transported from Cape Town to Pretoria, naked, tied in chains in the back of a police vehicle, before succumbing to his injuries.²⁵¹ As mentioned in Chapter 1, most of South Africa's leaders – including the current and previous presidents as well as members of the judiciary, were detained as political prisoners and were, to various extents, subjected to torture or severe ill-treatment during the apartheid rule.²⁵²

In principle, the work of the TRC was considered a necessary step towards the successful transformation of the nation from authoritarianism and repression to a

²⁴⁶ Archbishop Desmond Tutu was appointed chairman of the TRC.

²⁴⁷ Mandate and duties afforded to the TRC in terms of the Promotion of National Unity and Reconciliation Act No 34 of 1995.

²⁴⁸ Reference is made to special investigations conducted by the TRC into the death of Mozambican President Samora Machel and the crash of the Helderberg, as discussed in the Truth and Reconciliation Commission of South Africa Report (1998) Volume 2, p. 494 – 509.

²⁴⁹ Truth and Reconciliation Commission of South Africa Report (1998) Volume 2, p.510 – 523.

²⁵⁰ Truth and Reconciliation Commission of South Africa Report (1998) Volume 2, p. 524 – 542.

²⁵¹ SA History.org, "Stephen Bantu Biko" available at <http://www.sahistory.org.za/pages/people/bios/biko-s.htm> accessed on 12 February 2010.

²⁵² Reference is made to Justice Albie Sachs who, as an anti-apartheid activist, suffered prolonged detention, solitary confinement, torture in the form of sleep deprivation and finally lost an arm and the sight in one of his eyes due to the explosion of a car bomb – Sachs, A. (2009) *The strange alchemy of Life and Law*, Oxford University Press.

constitutional democracy.²⁵³ The TRC reports contain detailed and statistically supported evidence of state authorised violence. After presiding over some 19 050 cases,²⁵⁴ the TRC concluded that “torture, as practiced by members of the South African Police, constituted a systematic pattern of abuse which entailed deliberate planning by senior members of the police, and was a gross human rights violation.”²⁵⁵ The apartheid regime eventually ended with the negotiation of a democratic settlement between opposing political groups.

Though it might be less pronounced than before, torture and the severe ill-treatment of persons still occupy a place in post-apartheid South Africa. Torture typically presupposes the deprivation of personal liberty. Examples of contemporary occurrences of torture and CIDT in South Africa include:²⁵⁶ police brutality, poor conditions of detention in correctional facilities, the abusive treatment of prisoners, the ill-treatment of children in child care facilities, hazardous conditions of repatriation facilities and the ill-treatment of refugees and migrants, as well as xenophobic behaviour, conducted and tolerated by State officials.

With one of the most liberal and progressive constitutions in the world, South Africa sets an example for fellow African countries in many respects.²⁵⁷ Ratification of the UNCAT indicates that South Africa acknowledges the importance of protecting all persons from torture and other forms of CIDT. It is indicative of the State’s recognition of the international legal framework pertaining to torture and serves as a testimony to the acceptance of the characteristics of the prohibition against torture and CIDT. Yet, more than a decade has passed since accession and the State has done little to ensure adherence to the obligations of the Convention. Given South Africa’s history, plus the State’s disposal to a well established international framework prohibitive of torture, it is unacceptable that the national legal framework should not adequately protect all persons from torture and CIDT.

²⁵³ Simpson, G. (1998) *A Brief Evaluation of South Africa’s Truth and Reconciliation Commission: Some Lessons for Societies in Transition*, The Centre for the Study of Violence and Reconciliation.

²⁵⁴ The Truth and Reconciliation Commission of South Africa Report, Volume 7.

²⁵⁵ The Truth and Reconciliation Commission of South Africa Report, Volume 2, p. 220.

²⁵⁶ Muntingh, L. (2008) *Preventing and Combating Torture in South Africa: A framework for action under CAT and OPCAT*, Centre for the Study of Violence and Reconciliation & Civil Society Prison Reform Initiative, p.1.

²⁵⁷ Steiner, H.J., Alston, P. & Goodman, R. (2008) p. 328. Also see generally Heyns, C. (1996) *Where is the voice of Africa in our Constitution?* Center for Human Rights, University of Pretoria.

3.2 The prohibition against torture in South African law

The Constitution of the Republic of South Africa (The Constitution)²⁵⁸ is the primary contributor to South Africa's legal framework pertaining to torture and other forms of cruel, inhuman and degrading treatment or punishment. The Bill of Rights is the only piece of domestic legislation which expressly prohibits torture and other forms of ill-treatment. The definition of torture as per article 1(1) of the UNCAT is not incorporated *verbatim* into the Constitution as recommended by the CAT.²⁵⁹ Quoted below is section 12 of the Constitution:

12. Freedom and Security of the Person

12(1) Everyone has the right to freedom and security of person, which includes the right: ...

(c) To be free from all forms of violence from either public or private sources;

(d) Not to be tortured in any way; and

(e) Not to be treated or punished in a cruel, inhuman or degrading way.

The core values underlying the Constitution are democracy, human dignity, equality and freedom. South African law classifies torture and CIDT as a violation of the constitutional right to freedom and security, the right to dignity and the right to life.

The right to freedom and security of person is prominent insofar as it is applicable to all situations of detention ordained and governed by the State. Section 12 is designed to guarantee substantive and procedural fairness in its application. This means that a person's liberty may only be deprived for valid reasons and where the right to freedom is limited, regard must be had for due process of law.²⁶⁰ South African constitutional law is filled with jurisprudence relating to the right not be detained without trial, since this rule also falls within the scope of section 12. However, case law specifically pertaining to the application of the prohibition against torture and CIDT is considerably less. The case of *S v Dodo*²⁶¹ raised the question whether the duration *per se* of a mandatory life sentence of imprisonment, constituted CIDT. In response hereto, the Constitutional Court

²⁵⁸ The Constitution of the Republic of South Africa 1996. The Bill of Rights appears as Chapter 2 thereof.

²⁵⁹ Committee Against Torture, General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 9.

²⁶⁰ Currie, I. & De Waal, J. (2005) *The Bill of Rights Handbook*, 5th Edition, Juta, South Africa, p. 292 – 294.

²⁶¹ *S v Dodo* 2001 (3) SA 382 (CC).

emphasized the importance of the proportionality between the offence committed and the period of imprisonment, holding that the right not to be subjected to CIDT would only be infringed in cases of gross disproportionality.²⁶² In an effort to define and interpret sections 12(d) & (e) of the Constitution, the Court indicated that the legislative terms should be read disjunctively. Effectively this results in the existence of seven different modes of prohibited conduct namely: torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment and degrading punishment.²⁶³ Applying this maxim in *S v Dodo*, the Court indicated that a limitation of the right not to be subjected to CIDT would occur if the punishment appears to possess any one of these characteristics. It was held that the terms 'cruel', 'inhuman' or 'degrading' must involve some degree of impairment of human dignity, in order for section 12(e) to be applicable.²⁶⁴

The concept of CIDT immediately raises the question of the acceptability of corporal- and capital punishment, since such forms of punishment displays potential conflict with the rights protected under sections 12(d) & (e).

Corporal punishment as a disciplinary measure, used to be largely practiced throughout South Africa. The first step toward reform in this area appeared in the form of the Gauteng Schools Education Act²⁶⁵ which abolished corporal punishment in this province. The Schools Act followed by invalidating and criminalizing corporal punishment in all public and independent schools.²⁶⁶ *S v Williams* saw the Constitutional Court invalidating whipping as a method of sentencing on the grounds that it constituted an inhuman form of punishment. It was held that whipping constituted "a severe affront to dignity as a human being."²⁶⁷ Sections 294 and 290 of the Criminal Procedure Act (CPA)²⁶⁸ were amended to nullify whipping as a form of sentencing. The Correctional Services Second Amendment Act²⁶⁹ generally prohibits the infliction of corporal punishment in prisons and the Abolition of Corporal Punishment Act²⁷⁰ repealed all legislation authorizing the

²⁶² *S v Dodo*, paragraph 39.

²⁶³ *S v Williams* 1995 (3) SA 632 (CC) paragraph 869.

²⁶⁴ *S v Dodo*, paragraph 35.

²⁶⁵ Gauteng Schools Education Act No 58 of 1996.

²⁶⁶ Section 10 of the Schools Act No 84 of 1996.

²⁶⁷ *S v Williams*, paragraph 3.

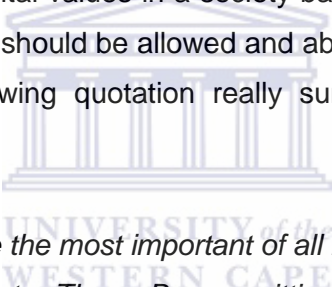
²⁶⁸ Criminal Procedure Act No 51 of 1977.

²⁶⁹ The Correctional Services Second Amendment Act No 33 of 1996.

²⁷⁰ The Abolition of Corporal Punishment Act No 33 of 1997.

imposition of corporal punishment as a sentence in a court of law.²⁷¹ The last form of corporal punishment currently still allowed under South African common law, is the reasonable chastisement of children by their parents. This use of violence, albeit moderate, has not yet been declared unconstitutional, although it has been suggested that the right to reasonable chastisement be made unavailable as a defense in cases of criminal assault.²⁷²

The case of *S v Makwanyane*²⁷³ represents a turning point in South African human rights law. Here, the Constitutional Court abolished the death penalty firstly for being a form of cruel, inhuman and degrading punishment and secondly, on the basis of its conflict with the constitutional right to life.²⁷⁴ The minority reports emphasized the urgency to change the country's legal order to one based on mutual respect, by referring to the days when the apartheid-government trampled on the value of life and human dignity.²⁷⁵ The right to life and dignity are fundamental values in a society based on principals of democracy and freedom and every person should be allowed and able to exercise these rights in an unqualified manner. The following quotation really summarizes the essence of the case.²⁷⁶



The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does...

The abolition of capital punishment as a manifestation of the prohibition against torture was incorporated in the Criminal Law Amendment Act,²⁷⁷ which piece of legislation formally set aside capital punishment as a form of criminal sanction and now provides for the administration of alternative forms of punishment.

²⁷¹ Devenish, G. (1999) *A commentary on the South African Bill of Rights*, Butterworths, South Africa, p. 90.

²⁷² Currie, I. & De Waal, J. (2005) p. 615.

²⁷³ *S v Makwanyane* 1995 (3) SA 391 (CC) Case No CCT/3/94.

²⁷⁴ *S v Makwanyane*, par 137 (Chaskalson J), 166 (Ackermann J), 174 (Didcott J), 208 – 214 (Kriegler J), 217, 234 (Langa J), 313 (Mokgoro J), 318, 344 (O'Regan J), 350, 357 (Sachs).

²⁷⁵ *S v Makwanyane* paragraph 322

²⁷⁶ *S v Makwanyane*, paragraph 144.

²⁷⁷ Section 51 of the Criminal Law Amendment Act 105 of 1997 created a sentence of mandatory life imprisonment to be imposed when a person is convicted of a crime listed in Part I of Schedule 2 of the Act.

The nature of the State's duty to protect the right to life can be described as both negative and positive. The negative aspect refers to the duty not to take someone's life, whilst the positive aspect refers to the duty of the State to protect the life of its citizens.²⁷⁸ Section 12(c) develops the horizontal application of the State's duty to provide protection of human rights, by requiring of the State to protect individuals, both by refraining from causing an infringement and by taking appropriate steps to reduce violence.²⁷⁹ Illustrative hereof is the well-known case of *Carmichele v Minister of Safety and Security*,²⁸⁰ which tested the State's duty to protect persons from violence originating from private sources. In this case, the Constitutional Court confirmed that the State has a duty to provide protection against criminal activity to all persons by means of putting in place necessary laws and structures, but also to take preventive operational measures. It follows then, that any form of legitimized violence, such as corporal punishment, should necessarily fall foul of section 12(c).²⁸¹

The Constitution recognizes the absolute and non-derogable nature of the prohibition against torture, by listing it as such under section 37. The absolute nature of the constitutional prohibition was effectively upheld in *S v Makwanyane*, which denied the State the right to inflict excessive and degrading punishment on a member of society.²⁸² The right not to be subjected to torture or CIDT cannot be limited under any circumstances, since such a limitation can never be considered reasonable or justifiable in an open and democratic society based on freedom and equality as required by the limitation provision of the Bill of Rights.²⁸³ It is important to note that the Constitution prescribes that all laws must be consistent with the Bill of Rights. Based on this premise, legislative reform pertaining to ill-treatment, abuse or torture should always be in keeping with section 12 of the Constitution.

3.3 Criminalization of torture in South Africa

²⁷⁸ Currie, I. & De Waal, J. (2005) p. 285.

²⁷⁹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paragraph 47.

²⁸⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

²⁸¹ Cheadle H., Davis, D. & Haysom, N. (2009) *South African Constitutional Law, The Bill of Rights*, 2nd Edition, Issue 1, 7-16, Juta.

²⁸² Cheadle H., Davis, D. & Haysom, N. (2009) *South African Constitutional Law, The Bill of Rights*, 2nd Edition, Issue 1, 7-15, Juta.

²⁸³ Section 36 of the Bill of Rights.

The act of torture is not defined as a crime under South African common law.²⁸⁴ Currently, offenses amounting to of torture or cruel and ill-treatment are treated as any one of the following common law crimes: assault and/or assault with the intent to do grievous bodily harm and/or indecent assault and/or attempted murder.²⁸⁵

The problem with the failure to define torture in national criminal law is the fact that the internationally recognized elements of the crime of torture differ from those of the crimes listed above. The elements of assault, for example, are: The unlawful, intentional application of force, directly or indirectly, to the person of another; or inspiring a belief in another person, that such force will be immediately be applied to him/her.²⁸⁶ Whereas the elements of assault with the intent to do grievous bodily harm, differ from assault only as far as intent is concerned. The crime of indecent assault consists of an assault which is by its nature, of an indecent character.²⁸⁷ The definition and the elements of a crime are imperative to successful prosecution. Even the absence of one of the element of a crime, will hinder proper prosecution. It is clear that the elements of the crime of torture as defined under the UNCAT and that of the various forms of assault under South African common law, are highly incompatible.

In lieu of a recognized and adequately descriptive definition of the crime of torture, the National Prosecuting Authority and the courts are hindered from prosecuting and punishing an act of torture as an autonomous crime. In the case of *S v Madikane*,²⁸⁸ the court merely considered torture as an aggravating circumstance to assault with the intention to do grievous bodily harm. The absence of legislation criminalizing torture makes it difficult and impractical to apply the constitutional and absolute prohibition against such conduct. The effects of this inadequacy of national law, is firstly that no appropriate punishment or rehabilitative measures are in place. Secondly, that the training and education of security sector personnel is inadequate. Thirdly, is the concern that insufficient gravity is afforded to such crimes, given the official capacity of perpetrators. Lastly, the non-recognition of torture as a crime, makes the task of preventing and monitoring human rights violations in centres of detention, extremely

²⁸⁴ Torture is not listed as a crime under any of the schedules to the CPA, which are mostly an indication of common law crimes.

²⁸⁵ Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, paragraph 68.

²⁸⁶ Burchell, J. (2005) p. 680.

²⁸⁷ Burchell, J. (2005) p. 691.

²⁸⁸ *S v Madikane and Others* 1990 (1) SACR 377 (N).

onerous.²⁸⁹ The duty imposed by the UNCAT is clear and unambiguous. All acts of torture must be criminalized under national law. In its current form, South African criminal law falls short of the obligation imposed by the UNCAT.

3.4 The right to redress under South African law

The victim of an infringement of human rights' right to redress should be protected as a non-derogable right under national law.²⁹⁰ In spite hereof, the South African Constitution does not guarantee such protection, nor does it set out the available remedies to address possible infringements of the provisions of the Bill of Rights. Section 38 allows anyone complaining of an infringement of a constitutional right to approach a competent court for a declaratory order. In the case of *Fose v Minister of Safety and Security* the Constitutional Court confirmed that in the absence of a delict of torture *per se*, it is possible to institute a delictual claim for damages, based on the different degrees of assault recognized under common law.²⁹¹ A delictual claim can be instituted to rectify patrimonial loss,²⁹² to obtain compensation and maintenance in the case of injury or death of a breadwinner as a result of assault,²⁹³ or to obtain damages for pain and suffering.²⁹⁴

For the law of delict to apply, certain basic elements should be present in the behaviour complained of. These comprise of conduct (an act or omission); wrongfulness; fault (intention or negligence); causation; and damage (pecuniary or non-pecuniary). A claim for damages is instituted against the perpetrator in his/her personal capacity.²⁹⁵ The CAT recommends that where compensation cannot be obtained from the perpetrator, the State should be held accountable.²⁹⁶ Where a claim is instituted against the State, the plaintiff must be able to show that the State had the duty to prevent the harm caused,

²⁸⁹ Dissel, A., Jensen, S. & Roberts, S. (2009) *Torture in South Africa, Exploring torture and cruel, inhuman and degrading treatment through the media*, Centre for the Study of Violence and Reconciliation, p. 12.

²⁹⁰ United Nations, *The 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*, A/RES/60/147, 21 March 2006, Rule 2(c) available at <http://www2.ohchr.org/english/law/remedy.htm> accessed on 2 February 2010.

²⁹¹ *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W), paragraph 16.

²⁹² *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*, 1982, 4 SA (D), p. 377.

²⁹³ Neethling, Potgieter, Visser (2002) *Law of Delict*, 4th Edition, Butterworths, p. 301 – 308.

²⁹⁴ Neethling, Potgieter, Visser (2002) p. 281.

²⁹⁵ Muntingh, L. (2008) *Guide to the UNCAT in South Africa* raises concern over the efficacy of claiming damages from a perpetrator, since such a person might not possess the means to provide adequate pecuniary compensation, plus said perpetrator will be incarcerated.

²⁹⁶ Committee Against Torture, Summary record of the public part of the 294th meeting, Namibia, Sweden, CAT/C/SR.294/ADD.1, 13 May 1997, paragraph 23

but omitted to do so, thereby establishing the element of accountability or fault.²⁹⁷ The presence of the element of causation is determined by asking whether the State's wrongful act was the cause of the plaintiff's loss or whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue.²⁹⁸

The *Fose*-case is a rare example of South African case law dealing with the question of the State's delictual liability pertaining to acts of torture, in this instance, committed by the South African Police Service (SAPS). The Court concluded that delictual remedies would suffice as appropriate relief in the event of an isolated act of torture, whereas constitutional damages might be more relevant in cases of widespread and persistent infringements of fundamental rights.²⁹⁹ One of the significant elements of the *Fose*-case was the court's recognition of fact that the availability of constitutional damages is inevitably tied to the adequacy of common law remedies for the violation of human rights.³⁰⁰ Though the Supreme Court of Appeal held that Constitutional damages is the only appropriate relief justified for the breach of a constitutionally entrenched right,³⁰¹ the effect of the more narrowly-interpreted *Fose*-judgment is that constitutional damages serve as an additional form of damages, where delictual damages prove to be inadequate.

In addition to compensation and/or a declaration of rights by the court, a victim of abuse may also approach the court for a prohibitory or mandatory interdict.³⁰²

South African law does not guarantee fair and adequate redress to victims of torture, as the infringement of their rights are not properly categorized. The victim of torture or CIDT's only option is to institute a delictual claim against the perpetrator on the grounds of any of the recognized crimes against the person or against human life. Although it is possible for victims of assault to obtain financial compensation for harm suffered on these grounds, the effects of torture and the methods of rehabilitation differ from that

²⁹⁷ In the case of *Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 (SCA) the court formulated the test for determining wrongfulness of an omission: *An omission is wrongful if the Defendant is under a legal duty to act positively to prevent the harm suffered by the Plaintiff.*

²⁹⁸ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A).

²⁹⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 22 & 23.

³⁰⁰ Roux, T. (2008) "The Dignity of Comparative Constitutional Law", *Acta Juridica*, University of Witwatersrand, p. 185-203.

³⁰¹ *Modder East Squatters and another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd*, Supreme Court of Appeal Case No. 187/03, 27 May 2004

³⁰² Neethling, Potgieter, Visser (2002) p. 279.

applicable to other forms of abuse. As noted by the CSPRI, the weak legislative framework concerning torture makes it difficult for victims of torture to identify their legal position and the remedies available to them.³⁰³ Effectively the vagueness surrounding torture in the law of delict forces victims to re-model their complaint to a form suitable for adjudication under the legal structure currently available. In such circumstances, courts are forced to disregard the true nature of the claim and the victim of torture will inevitably fail to obtain the satisfaction he or she deserves.

3.5 The exclusionary rule under South African law

The Constitution recognizes the exclusionary rule in article 35(5) where it states that evidence obtained in a manner that violates any right in the Bill of Rights should be excluded from use in court if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Contributing to the function of the exclusionary rule is the constitutional right not to make self-incriminating statements, as embodied in sections 35(1)(c) and 35(3).³⁰⁴ The exclusionary rule is further recognized in section 217 of the CPA, stating that a confession made in relation to the commission of any offence shall, if such confession is proved to have been made freely and without undue influence, be admissible evidence in criminal proceedings.

As seen in chapter 2, international standards require effective mechanisms to be made available to challenge evidence suspected of being obtained by ill-treatment. Although South African law does not contain such specific procedures, the onus of proof rests on the State to prove beyond a reasonable doubt that a confession made in the absence of any form of duress³⁰⁵ and therefore it is submitted that this burden of proof allows sufficient opportunity for inspection of the circumstances under which evidence was obtained.

³⁰³ Muntingh, L. & Fernandez, L. (2006) *Civil Society Prison Reform Initiative Submission to the United Nations Committee Against Torture – First Country Report on the Implementation of the UNCAT*, CSPRI, paragraph 85.

³⁰⁴ 35(1) *Everyone who is arrested for allegedly committing an offence has the right...*

(c) *not to be compelled to make any confession or admission that could be used in evidence against that person*

35(3) *Every accused person has a right to a fair trial, which includes the right...*

(j) *not to be compelled to give self-incriminating evidence.*

³⁰⁵ As applied in *S v Nene and Others* (2) 1979(2) SA 521 (D); *S v Mphahlele and Another* 1982(4) SA 505 (AD); *S v Zuma and Others* 1995(1) SACR 568 (CC).

The exclusionary rule pertaining to derived evidence was enforced in *Mthembu v S*, where the court found that “the evidence of an accomplice extracted through torture, (including real evidence derived from it), is inadmissible, even where the accomplice testifies years after the torture.”³⁰⁶ Evidence obtained through the use of torture was ruled to be inadmissible – even when deemed reliable and necessary to secure the conviction of an accused facing serious charges. It held that the Constitution prohibits torture absolutely and that the use of electric shock treatment by the SAPS for the purposes of obtaining evidence fell within the scope of the prohibition.³⁰⁷ It further ruled that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute.³⁰⁸ The court has gone on to refer the matter to several organs of State for incorporation of the rule into domestic law.³⁰⁹ The *Mthembu*-decision is a groundbreaking step toward law reform in South Africa and it is submitted that South African courts’ observance of the exclusionary rule is satisfactory and in keeping with international requirements.³¹⁰

3.6 The *non-refoulement* principle in South African law

Nationally, the deportation of foreigners is governed by the Immigration Act,³¹¹ the Refugees Act³¹² and such immigration policies instituted from time to time, by the Department of Home Affairs (DHA). Neither the Constitution, nor the Immigration Act observes the prohibition against *refoulement* as an absolute and non-derogable right. Notably, section 2 of the Refugees Act recognizes the right not to be returned, where risk of ill-treatment exists upon a person’s return.³¹³ The principle of *non-refoulement*

³⁰⁶ Preamble to the case of *Mthembu v S*, SCA 379/07, September 2008.

³⁰⁷ *Mthembu v S*, paragraph 22.

³⁰⁸ *Mthembu v S*, paragraph 36.

³⁰⁹ Including the Minister for Safety and Security, the National Commissioner of the SAPS, the Executive Director of the Independent Complaints Directorate (ICD), the National Director of Public Prosecutions and the Chairperson of the SA Human Rights Commission.

³¹⁰ Opinion supported by Van Caenegem, W. (2007) *New trends in illegal evidence in criminal procedure: general report – Common Law*, Bond University, Australia, p. 35.

³¹¹ The Immigration Act No. 13 of 2002.

³¹² The Refugees Act No. 130 of 1998.

³¹³ 2. *General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances*

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

does therefore exist within the South African legal framework pertaining to torture (though not expressly stated in law), but the question of implementation and enforcement is an entirely different story. The Immigration Act authorizes the arrest and deportation of any person who is considered to be an illegal alien.³¹⁴ The implication of this is that immigration officials may detain illegal immigrants pending deportation.

Empirical reports indicate that the *non-refoulement* rule is not observed by the DHA or its employees.³¹⁵ One example is the case of Pakistani national, Khalid Rashid.³¹⁶ The State deported Rashid to his country of origin, despite serious risk of torture and amid reports of secret detention, enforced disappearances and death sentences imposed after unfair trials. The State did not take into account all relevant considerations to assess whether there are substantial grounds for believing that he would be in danger of being subjected to torture in Pakistan. There is no evidence that Rashid was afforded access to independent legal advice or whether he was warned of his rights not to incriminate himself, to remain silent and to demand protection against exposure to torture.³¹⁷

Following the *Rashid*-case allegations were made in the media that South Africa is participating in extraordinary renditions.³¹⁸ The Extradition Act³¹⁹ which it must be said does not expressly prohibit the removal of a person faced with a real risk of capital punishment, torture, or any form of inhuman, cruel or degrading treatment or punishment, authorizes extradition where a person has been convicted of what qualifies

b) *his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.*

³¹⁴ Sections 32 & 34 of the Immigration Act. A person is an 'illegal foreigner' when his or her presence in the Republic is in contravention of any of the provisions of the Immigration Act.

³¹⁵ Lawyers for Human Rights (2008) *Monitoring immigration detention in South Africa*. CORMSA (2009) *Protecting Refugees, Asylum Seekers and Immigrants in South Africa*, p. 35, 64 & 85. See also CORMSA (2006) *The documented experiences of refugees, deportees and asylum seekers in South Africa: A Zimbabwean Case Study*, Johannesburg. http://cormsa.org.za/wp-content/uploads/Research/SADC/REPORT%20ON%20THE%20TREATMENT%20OF%20ZIMBABWEAN%20REFUGEES%20_3.pdf accessed on 29 March 2010.

³¹⁶ *Jeebhai v Minister of Home Affairs* (139/08) SCA 160, 27 November 2008.

³¹⁷ Amnesty International (2006) *Briefing for the Committee Against Torture*, AI Index: AFR 53/002/2006, p.4

³¹⁸ South African Press Association, 13 June 2006, "Rashid case negative for SA internationally", *Independent Online* available at http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=qw1150202882829B216 accessed on 4 December 2009.

³¹⁹ Extradition Act No. 67 of 1962.

as an extraditable offence under the Act.³²⁰ In South Africa's initial report to the CAT, it was pointed out that despite the exclusion of an express prohibition against *refoulement* where risk of ill-treatment exists it is the practice of the Minister to exercise his discretion regarding the extradition of a person. In doing so he must consider the possibility of the person's basic rights being violated by the prosecution process that will be followed upon delivery of the person to the requesting state – thereby partially covering the criteria of the UNCAT's article 3.³²¹ It is submitted that this discretionary mechanism is too arbitrary and not sufficient for the coherent prevention of *refoulement*.

The difference between extradition and deportation is noted by the Constitutional Court in *Mohammed v the President of South Africa*, namely that extradition is the request of one State and the assent of another, to deliver an alleged criminal for purposes of prosecution in the requesting State, while deportation is the unilateral act of a State to expel an undesirable alien to his/her country of origin.³²² The UNCAT does not draw a distinction between these two forms of expulsion.³²³ In the *Mohammed* case, the Court held that deportation, where the individual will be subjected to the death penalty, constitutes an infringement of the rights protected by the Bill of Rights,³²⁴ thus setting an important precedent in South African human rights law.

With regards to administrative procedures to be followed in assessment of immigrants' status, no legislative provision is made for officials to consider the risk of ill-treatment faced by an applicant. It has been documented that persons with refugee status or persons awaiting asylum, are detained and deported at the whim of immigration officials.³²⁵ According to the South African Human Rights Commission (SAHRC),

³²⁰ South African Law Reform Commission (2004) Issue Paper 25 Project 131, *Trafficking in persons*, available at http://www.doj.gov.za/salrc/ipapers/ip25_prj131_2004.pdf accessed on 18 November 2009.

³²¹ Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, paragraph 102.

³²² *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), paragraph 28.

³²³ The court noted in paragraph 59 of the *Mohamed*-case that the words extradite, expel and return are used interchangeably in article 3 of the UNCAT.

³²⁴ *Mohamed*-case paragraph 71.

³²⁵ Centre for Human Rights (2009) *The nature of South Africa's legal obligations to combat xenophobia*, Faculty of Law, University of Pretoria, p. 83 and footnotes numbers 169 & 170, where reference is made to Rulashe, P. (2008) *UNHCR begins repatriating victims of xenophobic violence*, UNHCR, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7HWMZF?OpenDocument> accessed on 17 February 2010. See also Lawyers for Human Rights, 14 October 2008, *Press Release on an urgent application challenging the unlawful detention and deportation of refugees*, available at <http://www.lhr.org.za/news/2008/lhr-urgent-application-challenging-unlawfuldetention-and-deportation-refugees> accessed on 17 February 2010.

detention and deportations have proven to be ineffective and costly.³²⁶ The system is reportedly subject to corruption and abuse - immigrants often simply re-entering the country after deportation.³²⁷ Due to the recent insurgence of people, especially Zimbabwean nationals, extreme backlogs are experienced by the DHA and it is not practical to follow the procedures and timeframes as envisaged by legislation.³²⁸ Specific reference is made to the maximum periods instituted for detention without trial.³²⁹ Refugees and asylum seekers are particularly vulnerable, large in number and often not welcomed by South African citizens.³³⁰ They are a popular target for discrimination, coercion, ill-treatment and even torture, both by members of civil society and public service.³³¹ Feelings of animosity between citizens and migrants are superficially suppressed and extremely volatile.³³² This sentiment is indicated by the various and sporadic outbursts of xenophobia throughout South Africa. Instead of receiving refugees, the DHA deport them on a daily basis,³³³ possibly to avoid problems concerning arbitrary detention and to alleviate the pressure from DHA officials and infrastructure.

Legislative failure to comply with international standards, render immigration laws insufficient to deal with applications actually received and reports suggest that officials struggle to fulfill their duties as it is.³³⁴ But for the prohibition against *refoulement* contained in the Refugees Act, South African legislation does not provide for a legal device supportive of the prohibition. Notable in this regard is a comment by Lawyers for Human Rights which summarizes the position as follows:

³²⁶ South African Human Rights Commission (2008) *SAHRC speaks for the first time at the Human Rights Council*, available at http://www.sahrc.org.za/sahrc/cms/publish/printer_297.shtml accessed on 23 October 2009.

³²⁷ Lawyers for Human Rights (2008) *Monitoring immigration detention in South Africa*.

³²⁸ The Special Rapporteur on Human Rights and Counter-terrorism, 26 April 2007, *Preliminary findings on visit to South Africa*. This report raises concerns over abuse of detention and deportation procedures.

³²⁹ For example the status of an undocumented migrant is to be determined within 48 hours and detention should not be longer than 30 days without a court order.

³³⁰ Refugee Documentation Centre of Ireland (2009) *Information on the current situation regarding xenophobic attacks in South Africa*, Q10465.

³³¹ Centre for Human Rights (2009) *The nature of South Africa's legal obligations to combat xenophobia*, Faculty of Law, University of Pretoria, p. 29 & 30.

³³² The Mercury, 11 August 2009, *Xenophobia has yet to be addressed*, p. 10 as appears at <http://www.lhr.org.za/> accessed on 12 October 2009.

³³³ Ebenstein, J. (2009) *Court declares Home Affairs Actions in deporting asylum seeker as unlawful and unconstitutional*, Lawyers for Human Rights. Prior to the court's decision, the Department displayed a pattern of detaining asylum seekers illegally.

³³⁴ Human Rights Watch (2005) *Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg*, November 2005, Volume 17, No. 15(A). It reported administrative inefficiency as one of the DHA's greatest problems.

*While effective enforcement is certainly a key issue, it requires more than professional and efficient enforcement mechanisms. It also depends on the existence of a legislative framework which is in itself sound and workable.*³³⁵

An ineffective legal device, insufficient resources, administrative incompetence and the failure to prioritize duties to ensure the humane treatment of migrants are factors which effectively lead to the systematic violation of the most basic principles of human rights- and refugee law by the DHA.³³⁶ The problem of ill-treatment of immigrants is a big problem in South Africa, one that attracts international attention and one that will certainly not disappear by itself. Law reform should focus on the creation of a support structure for the prohibition of *refoulement* as it currently provided for in the Refugees Act.

3.7 Prevention of torture and CIDT in South African law

South Africa's legal position on the prevention of torture will be discussed in view of the fact that torture and CIDT have a higher degree of occurrence when persons are involuntarily detained.³³⁷ Furthermore, *in lieu* of umbrella legislation, South African law approaches the question of torture in a sector-specific manner. This section will look at mechanisms of prevention relative to various places of detention, focusing mainly on correctional centres, police custody, repatriation centers, child and youth care centres and mental health care centres.

3.7.1 Correctional Centres

South African prisons are overcrowded and understaffed.³³⁸ This is probably the greatest obstacle in the effort toward eradicating torture and ill-treatment in correctional facilities. Reports indicate concern over the high percentage of deaths in custody, inadequate medical services, the occurrence of sexual assault and violence within correctional

³³⁵ Lawyers for Human Rights, *Comments on the white paper on international migration*, Government Gazette No 19920, April 1999, 30 November 1999.

³³⁶ Human Rights Watch, 8 January 2009, *South Africa: End Strain on Asylum System and Protect Zimbabweans*, available at: <http://www.unhcr.org/refworld/docid/49670ba4c.html> Specific reference is made to mass deportations, disregard for refugee status or pending applications by the DHA and poor conditions of detention in repatriation facilities.

³³⁷ Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 15.

³³⁸ Muntingh, L., (2009) *UN Committee against torture releases list of issues for South Africa*, CSPRI newsletter No 31. It was reported in 2009 that prisons in South Africa were 144% overcrowded.

centres.³³⁹ Concerns over the lack of basic infrastructure including water, sanitation and nutrition have been raised by the Special Rapporteur on Prisons for the African Commission.³⁴⁰ Further problems include discriminatory practices, coercion, gangsterism and corruption.³⁴¹ Another great cause of concern is the conditions in which prisoners awaiting trial are detained. Due to delays and postponements of trials, persons awaiting trial may be detained for lengthy periods, in conditions that are below the prescribed international standards.

South African prisons are governed by the Correctional Services Act (CSA)³⁴² and such policies as are instituted from time to time by the Department of Correctional Services (DCS). Officials in employment of the DCS have to adhere to its internal Code of Conduct.³⁴³ The management of correctional centres is governed by an extensive document, named the B-orders. Although the Code of Conduct states that staff should treat inmates with dignity and respect, neither legislation nor the Code contain express references to the prohibition against torture or CIDT. As the CSPRI notes in its report to the CAT, “torture as a human rights violation has not entered the human rights discourse in the Department of Correctional Services.”³⁴⁴

Section 32(b) and (c) of the CSA authorizes the use of force by correctional officials to achieve the objective of detaining prisoners in safe custody where no other means are available, provided that a minimum degree of force is used and the force is proportionate to the objective. The use of force by an official is only justified for purposes of self defense, the defense of any other person, preventing a prisoner from escaping or the protection of property. The use of force in any other circumstances must be pre-authorized by the Head of the Correctional Centre, in which case it may include the use

³³⁹ Cronje, F., 20 March 2009, *What is happening in our prisons?* SAIRR Today, available at http://www.sairr.org/sairr-today/news_item.2009-03-18.51424845081 accessed on 30 August 2009.

³⁴⁰ News24, 3 April 2008, *African prisons 'inhuman'*, available at <http://www.news24.com/printArticle.aspx?iframe&aid=456fd55c-1b13-4c2f-be96-2e0ac73875c0&cid=965> accessed on 30 August 2009.

³⁴¹ Jali, T. S. B. (2006) Commission of Inquiry into Allegations of Corruption, Maladministration, Violence or Intimidation within the Department of Correctional Services, Approved by the President of the Republic of South Africa by Proclamation No 135 of 2001, Final Report. Available at <http://www.dcs.gov.za/Documents/Jali/JALI%20COMMISSION.pdf>.

³⁴² Correctional Services Act No. 111 of 1998.

³⁴³ Code of Conduct available at <http://www.dpsa.gov.za/macc/DCS%20code%20of%20conduct.pdf>

³⁴⁴ Muntingh, L. & Fernandez, L. (2006) *CSPRI submission to the Committee Against Torture in response to "Republic of South Africa – First Country Report on the implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment"*, Civil Society Prison Reform Initiative, paragraph 31.

of non-lethal incapacitating devices or firearms. If force was used, the inmate concerned must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical officer.³⁴⁵

The OPCAT requires that unlimited access be granted to places of detention, allowing members of the visiting body to conduct private interviews with detainees.³⁴⁶ Observations and recommendations must be communicated confidentially to the State and to the national preventive body.³⁴⁷ In comparison, the CSA does not contain any provisions allowing visitation by an international monitoring body, although in principal, visits by independent bodies are allowed.³⁴⁸ Regular, unannounced visits, access to all places of detention and access to information should be allowed within South African prisons.³⁴⁹ Although several of oversight mechanisms exist which fulfill a function similar to that of a NMP, these cannot be defined as NPM's as they do not comply with the strict standards imposed by the OPCAT.

Firstly, section 85 of the CSA establishes the office of Judicial Inspectorate of Correctional Centres. Its mandate includes the inspection or facilitation of inspection of correctional centres, aimed at reporting on the treatment of inmates and on conditions in correctional centres. The President appoints a judge in the office of Judicial Inspectorate, who is authorized to receive and deal with complaints submitted by the National Council, the Minister, the Commissioner, a Visitor's Committee and in cases of urgency, an Independent Correctional Centre Visitor (ICCV). In addition, the Judicial Inspectorate may of its own volition deal with any complaint.³⁵⁰ The Judicial Inspectorate appoints the ICCV specifically to investigate deaths in correctional centres, segregation

³⁴⁵ Sections 32(4) & (5) of the CSA.

³⁴⁶ Article 14 of the OPCAT.

³⁴⁷ Article 16 of the OPCAT.

³⁴⁸ For example Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, paragraph 140 refers to visitation by the International Red Cross.

³⁴⁹ APT (2006) *Establishment and Designation of National Preventive Mechanisms*, Chapter 6, Geneva

³⁵⁰ Section 86 of the CSA.

and the use of mechanical constraints.³⁵¹ The ICCV reports to the Inspecting Judge and is tasked with giving feedback to inmates, regarding their individual complaints.³⁵²

The second oversight mechanism takes the form of the ICCV. Section 92 of the CSA provides for the appointment of an ICCV whose mandate comprises of dealing with inmates' complaints by means of regular visits, private interviews and by officially recording all complaints and outcomes. The ICCV may access all parts of correctional centres and any document or record it might require.³⁵³ Unresolved complaints should be referred to the Visitor's Committee and each ICCV must submit a quarterly report to the Visitor's Committee. It would seem that the mandate of the ICCV is generally exercised satisfactorily, as far as impartiality is concerned.³⁵⁴

Thirdly, the SAHRC is contractually authorized to visit correctional centres.³⁵⁵ Moreover, in 2007 the SAHRC set up the Section 5 Committee on Torture to advise on the promotion and protection of rights as per section 12 of the Constitution.³⁵⁶ The aim of the Section 5 Committee is to assist SAHRC in its duties as an independent monitoring body.³⁵⁷ No reports could be found on the work of the Section 5 Committee, but it is involved in lobbyist actions such as the promotion of public awareness on the issue and the establishment of the South African No Torture Consortium.³⁵⁸

In addition to the above visiting mechanisms, section 21 of the CSA establishes an individual complaints mechanism for inmates. In terms hereof, every prisoner must, upon

³⁵¹ Section 86 of the CSA requires the Judicial Inspectorate to submit an annual report to the Minister of Correctional Services and to the President, which report is then tabled at Parliament. Annual reports are not binding and mostly serve as an indication of performance by the relevant ministry. At most, these reports have an advisory function.

³⁵² Judicial Inspectorate for Correctional Services, Briefing to the Portfolio Committee on Correctional Services, 8 July 2009, available at <http://www.pmg.org.za/files/docs/090708jics.ppt#256,1> accessed on 18 November 2009.

³⁵³ Section 93 of the CSA.

³⁵⁴ Gallinetti, J. (2004) *Report of the evaluation of the Independent Prison Visitors (IPV) System*, CSPRI Research Paper No.5.

³⁵⁵ Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, paragraph 161.

³⁵⁶ Cohen, J. (2007) *The Role of NHRI's as a national preventative mechanism and the issue of independence*, SAHRC.

³⁵⁷ The Section 5 Committee consists of civil society organizations such as the CSPRI, CSVN, LHR, ICD, SAHRC and the Judicial Inspectorate of Correctional Services.

³⁵⁸ The SANTOC was established in an effort to unite all civil society organizations in its quest to promote public awareness around torture and the promulgation of a Bill on Torture. See <http://www.ngopulse.org/article/south-african-no-torture-consortium-launched> accessed on 16 March 2010.

admission and on a daily basis, be given the opportunity to lay complaints or make requests to the Head of the Correctional Centre or to any other correctional official duly authorized to receive complaints. Complaints, and the manner in which they were dealt with, must be recorded. If a complaint of assault is laid, the prisoner must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical officer. If an inmate is not satisfied with the response to a complaint or request, he/she may indicate this, together with the reasons for the dissatisfaction to the Head of the Correctional Centre, who must refer the matter to the National Commissioner. The response to the complaint must be conveyed to the complainant. The inmate may refer the matter to the ICCV if unsatisfied with the response.³⁵⁹

With regards to enforcement of the above mechanisms, the *Jali* Commission reported that inmates have largely lost faith in the Judicial Inspectorate and ICCV complaints system, since their complaints were not dealt with effectively and offending warders often remain on duty without being punished. It was also noted that the ICCV struggle to fulfill its mandate is due to a lack of co-operation on the part of officials and that ICCV members sometimes even suffer abuse at the hands of officials.³⁶⁰ Furthermore, it must be taken into account that the individual complaints procedure is aimed at solving problems internally, or from a disciplinary point of view.³⁶¹ An inmate still needs to lay a complaint of assault with the police in order for a criminal investigation to be launched. Dismissal of matters by the police will render the complaints procedure virtually ineffective.

It is extremely important that sufficient weight and priority is afforded to complaints submitted by inmates and reports published by independent monitoring bodies. The impartiality, independence and competence of monitoring bodies are crucial to the efficacy of the system.

³⁵⁹ Section 21(1) – (6) of the CSA.

³⁶⁰ Van Den Berg, A. (2007) *Summary and comment on the Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - the Jali Commission*, CSPRI Research Report No. 13.

³⁶¹ Section 93(1)(d) of the CSA.

The CSPRI is of the opinion that, from a technical point of view, international standards were taken into account in the drafting process of the CSA.³⁶² This means that the legal structure pertaining to the conditions in which prisoners are to be detained, comply with international standards. However, issues such as overcrowding and lack of resources cause the practical implementation of the rules surrounding the treatment of prisoners to remain problematic.

3.7.2 Police Brutality

The following phrase embodies the essence of the discussion relating to police brutality:

*The police are given unparalleled and special powers in the furtherance of their duties, including the power to detain and to use force. Depending on how these powers are used, they may either protect or violate human rights.*³⁶³

The conduct of members of the SAPS is governed by the South African Police Service Act.³⁶⁴ This Act does not generally address the manner in which members of the police should treat detainees and therefore does not contain a prohibition against torture and CIDT. However, the SAPS formulated a policy with the express purpose of eradicating torture and CIDT of persons in its custody, namely the Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service. In its policy, the SAPS acknowledges that South Africa's accession to the UNCAT necessitated a re-evaluation of the treatment of persons in its custody and a review of its approach towards methods of interrogation, detention and behaviour in general. The SAPS policy prohibits torture absolutely, making it clear that no member may torture any person, permit anyone else to do so, or tolerate the torture of another by anyone and that no exception will serve as justification for torture. It is specifically stated that any order by a superior allowing a person to be tortured is unlawful and may not be obeyed. The fact that a member acted upon an order by a superior will not serve as grounds of

³⁶² Muntingh, L. & Fernandez, L. (2006) *CSPRI submission to the Committee Against Torture in response to "Republic of South Africa – First Country Report on the implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment"*, Civil Society Prison Reform Initiative, par 29.

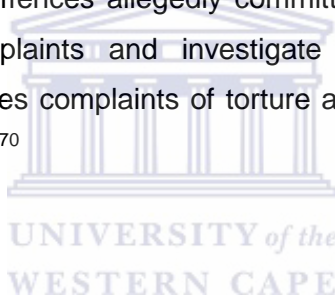
³⁶³ Lumina, C. (2006) *Police accountability and policing oversight mechanisms in the Southern Africa Development Community*, Institute for Security Studies, available at http://www.iss.co.za/index.php?link_id=24&slink_id=3530&link_type=12&slink_type=12&tmpl_id=3 accessed on 29 August 2009.

³⁶⁴ South African Police Service Act No. 68 of 1995.

justification for torture.³⁶⁵ The violation of the rule will expose an official to disciplinary action.³⁶⁶

Section 49 of the CPA authorizes the use of force by members of the SAPS during the apprehension of a suspect. This clause has been the topic of much recent debate since government wishes to amend it to allow increased use of force.³⁶⁷ Whilst this section is not directly relevant to torture and ill-treatment of persons in detention, permitting an increased use of violence may promote a culture of violence.³⁶⁸

As a preventive measure, officials are required to inform detainees of their constitutional rights and must keep a custody register. As far as a complaints mechanism is concerned, the Police Service Act establishes the Independent Complaints Directorate (ICD), an independent body mandated to receive complaints and to investigate allegations of misconduct or offences allegedly committed by a member of the police. The ICD may receive complaints and investigate deaths in police custody.³⁶⁹ Particularly, the ICD investigates complaints of torture and it has adopted the following definition of the prohibited act.³⁷⁰



³⁶⁵ The Policy on the Prevention of Torture and the Treatment of Persons in Custody of the SAPS, available at http://www.saps.gov.za/docs_pubs/legislation/policies/torture.htm accessed on 13 August 2009.

³⁶⁶ Committee Against Torture, South Africa's initial report to the Committee Against Torture, CAT/C/52/Add.3, 25 August 2005, paragraph 76.

³⁶⁷ South African Police Services, 3 July 2009, *Police want greater power to use lethal force against criminals*, available at <http://www.sabinetlaw.co.za/defence-and-security/articles/police-want-greater-power-use-lethal-force-against-criminals> accessed on 2 February 2010.

³⁶⁸ 49(2) *If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-*

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

³⁶⁹ Police Service Act section 53(2)(a) – (b).

³⁷⁰ Independent Complaints Directorate, Paper delivered at a workshop for the drafting of a plan of action to prevent torture and ill-treatment in Africa, Cape Town, 12 February 2002, available at <http://www.icd.gov.za/reports/2002/torturepaper.htm>.

Any act by which severe pain, suffering or humiliation, whether physical or mental, is intentionally inflicted on a person for purpose of obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating him or her or a third person, when such pain, suffering or humiliation is inflicted by or at the investigation of or with the consent or acquiescence of a member or any other person acting under authority or protection of the service.

The ICD makes recommendations to the Director of Public Prosecution and the Commissioner of Police, by submitting annual reports. However, concerns exist over the efficacy of the ICD – not relating to its investigative function, but over the implementation of its recommendations. Legislation does not provide for the SAPS to enforce the recommendations of the ICD's reports.³⁷¹ A proposal was recently made for article 53 of the Police Services Act to be amended, to make it mandatory for the SAPS to implement and enforce the ICD's recommendations.³⁷² The CAT responded positively to policies and practices adopted by the SAPS, however, it did indicate concern over the restraint experienced by the ICD.³⁷³

As far as the education of police officials are concerned, the SAPS have developed a training package called Human Rights and Policing. Its aim is to provide information and training on how to police in line with the Constitution and International Human Rights principles.³⁷⁴ The fact that torture and CIDT are not recognized under South Africa's criminal code is a great obstacle to proper investigation of such complaints.³⁷⁵ The Policy conforms to the duty imposed by the UNCAT to educate and inform and the obligation to keep all practices under review. As in the case of correctional centers,

³⁷¹ Parliamentary Monitoring Group, 6 October 2009, Private Member's Proposed Legislation: SA Police Service Amendment Bill to enforce ICD recommendations, available at <http://www.pmg.org.za/report/20091006-private-members-proposed-legislation-south-african-police-services-ac> accessed on 6 December 2009.

³⁷² Notice of the proposed Amendment Bill was submitted to the office of the Speaker of Parliament on 25th June 2009.

³⁷³ Recommendations to South African by the CAT, par 10.

³⁷⁴ South African Police Services, *Human Rights and Policing* available at, http://www.saps.gov.za/docs_pubs/legislation/policies/_policing.htm accessed on 2 August 2009.

³⁷⁵ Muntingh, L. & Fernandez. L. (2006) *CSPRI submission to the Committee Against Torture in response to "Republic of South Africa – First Country Report on the implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment"*, Civil Society Prison Reform Initiative.

limited resources and infrastructure,³⁷⁶ corruption,³⁷⁷ the level of competency and education of officials, as well as poor prioritization of issues are factors often considered obstacles faced by the SAPS. Accounts of police brutality and ill-treatment of detainees by officials are rather common, despite the necessary policy structure being in place.³⁷⁸

Looking critically at the different public sectors involved with the detention of persons, it must be noted that the SAPS have attempted actively to incorporate the prohibition against torture within its policy and practices. Although the prohibition against torture is not manifested as legislation, the inclusion of the duty to educate staff on the issue of torture, the incorporation of a prohibition against abusive behaviour in its code of conduct, and the establishment of an individual complaints mechanisms in the form of the ICD, is indicative of the intention of the SAPS to act in furtherance of the objectives of the UNCAT.

3.7.3 Repatriation Facilities

The management of repatriation facilities in South Africa is overseen by the DHA as part of their mandate to provide protection to refugees and asylum seekers entering South African borders.³⁷⁹ Repatriation facilities are used for the detention of undocumented migrants under the Immigration Act.³⁸⁰ This provision is subject to certain conditions, including that a person thus detained may not be held longer than 30 days without a court order extending this period.³⁸¹ The United Nations High Commissioner for Refugees (UNHCR) recognizes the right to seek and enjoy asylum as a fundamental human right,³⁸² but allows for a limited number of permissible exceptions to the general rule that detention should normally be avoided.³⁸³ Limitations must be prescribed by the national law of the State and may only be invoked in the following circumstances: to

³⁷⁶ See for example the Institute for Security Studies (2002) *Effectiveness of Policy Implementation, Community Policing in the SAPS' Priority Areas*, Monograph 71, available at <http://www.iss.co.za/PUBS/MONOGRAPHS/No71/Chap5.html> accessed on 4 February 2010.

³⁷⁷ Rademeyer, J., 12 May 2008, *SAPS full of criminals*, News24 available at http://www.news24.com/Content/SouthAfrica/News/1059/42252e9fe8ac497ab635831031b36ae8/12-05-2008-01-25/SAPS_full_of_criminals accessed on 13 August 2009.

³⁷⁸ Dissel, A. & Mbelle, N., 11 December 2008, *How to stop police torture*, The Star; Coetzer, J., 18 July 2009, *Police Brutality Rising*, iafrica.com/news accessed on 11 August 2009.

³⁷⁹ African National Congress, 24 August 2005, Address by the Hon. NN Mapisa-Nqakula, to the Parliamentary Portfolio Committee of the National Assembly, Ministry of Home Affairs.

³⁸⁰ The Immigration Act repealed the Aliens Control Act which provided for the detention of an 'alien' if a person is suspected on reasonable grounds to be an alien.

³⁸¹ Section 34(1)(d) of the Immigration Act.

³⁸² Article 14 of the UDHR.

³⁸³ United Nations High Commissioner of Refugees (1999) *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, paragraph 4.

verify the identity of an asylum seeker; to determine grounds for seeking asylum; where their travel documents were destroyed/fraudulent documents were used with the intent to mislead the country of asylum; or to protect national security or public order.³⁸⁴

No provision is made for the independent monitoring of conditions in repatriation facilities in South Africa. As a result, the legal system pertaining to the treatment of refugees and asylum seekers in detention remains unsupported by official reports and statistics. Non-governmental bodies such as the SAHRC,³⁸⁵ the Consortium for Refugees and Migrants in South Africa (CORMSA),³⁸⁶ and LHR³⁸⁷ have in the past attempted to monitor conditions in these facilities by entering into agreement with the relevant authorities.³⁸⁸ Documented problems at South African repatriation centers include routine violence, corruption, bribery, insufficient food, overcrowding, lack of reading and writing materials, denial of visits by family and friends, failure to provide access to medical care, indefinite detention without judicial review and the refusal to grant access to monitoring bodies.³⁸⁹ The legal framework on repatriation centers does not provide for an individual complaints mechanism.

There is currently only one operational repatriation centre in South Africa, namely the Lindela Repatriation Facility at Krugersdorp. The DHA recently announced its intention to close this facility, but a final decision has not been reached and alternative arrangements remain unclear. Lindela is managed by a private company, Bosasa, appointed by the DHA.³⁹⁰ There seems to be little or no transparency in the relation between these contracting parties,³⁹¹ nor are there any measures in place to ensure the company's responsibility to comply with international minimum standards of detention. It

³⁸⁴ United Nations High Commissioner for Refugees (1999) *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, paragraph 4 (i) – (vi).

³⁸⁵ Section 184 of the Constitution grants to the SAHRC the power to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated. The SAHRC has been monitoring conditions at the Lindela Repatriation Centre since 1998.

³⁸⁶ The Consortium for Refugees and Migrants in South Africa (June 2008 & 2009) *Protecting Refugees, Asylum Seekers and Immigrants in South Africa*.

³⁸⁷ Lawyers for Human Rights (2008) *Monitoring Immigration Detention in South Africa*.

³⁸⁸ For example The South African Human Rights Commission, 2000, *Lindela at the crossroads for detention and repatriation, an assessment of the conditions of detention*, available at <http://www.info.gov.za/view/DownloadFileAction?id=70338> accessed on 30 July 2009.

³⁸⁹ Aglotsson, E. & Van Garderen, J. (2002) *Towards a responsible framework for the arrest, detention and repatriation of illegal foreigners: A human rights perspective of the Immigration Bill*, Lawyers for Human Rights.

³⁹⁰ Consortium for Refugees and Migrants in South Africa, 2009, p. 63.

³⁹¹ CORMSA reported that the DHA denies access to independent monitors, but now allows a survey of detainees.

is unclear whether the contract between the DHA and Bosasa prohibits torture and CIDT, whether methods employed by the staff of the contractor, comply with constitutional and human rights requirements or whether such methods are systematically reviewed.

The UNHCR's Revised Guidelines prescribe that the conditions under which asylum seekers are detained should be humane and should respect the dignity of all persons. The following rules are particularly important:³⁹² the segregation of torture/trauma victims from other asylum-seekers; the segregation of detainees according to gender and age; the segregation of asylum seekers from convicted criminals; access to family, friends, religious/legal counsel; access to medical treatment; physical exercise; means to maintain personal hygiene and beds; and access to a complaints mechanism.

South African legislation complies with international and constitutional standards in so far as it recognizes that detention is not preferable, that conditions of detention should be humane and it specifies permissible limitations to the general rule that detention should be avoided.³⁹³ However, although the training of staff dealing with matters pertaining to refugees and asylum seekers is addressed in article 39 of the Refugees Act, no reference is made to human rights training as envisaged by the UNCAT. It would seem that no provision is made for training of staff on the subject of human rights, including torture and CIDT. Furthermore, national policies and practices aimed at ensuring the acceptability of conditions of detention remain absent. Poor conditions of detention are conducive to human rights violations, especially infringement of the right not to be subjected to CIDT. Improved conditions of detention would effectively minimize the occurrence of CIDT. Law reform, to ensure dignified conditions, is seriously and urgently required.

Differing in nationality, refugees will typically possess limited knowledge of the South African legal system and the ways of protecting their rights. A clear and transparent complaints system is needed at repatriation centers and immigrants should be allowed access to legal advice. Fair, adequate and practical remedies of redress should be made available. A monitoring body should be able to inspect conditions in repatriation facilities.

³⁹² United Nations High Commissioner of Refugees (1999) *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, Nos. 10 i,ii, iii, iv, v, vi, ix, x.

³⁹³ Section 34(1)(e) Immigration Act & section 23 of the Refugees Act.

Greater transparency and accountability are required in respect of the contractual relation between the DHA and the appointed managing company, to ensure that acceptable practices are followed to eliminate the occurrence of CIDT.³⁹⁴ These recommendations are instrumental in promoting the protection of refugees from exploitation, ill-treatment and torture and for establishing a framework for good governance.

3.7.4 Mental Health Care Facilities

Admission to Mental Health Care facilities is often involuntary or compulsory, as a result of a court order. To prevent abuse of the system, the Mental Health Care Act³⁹⁵ sets out stringent requirements for admission of assisted or involuntary patients.

Areas of particular concern are highlighted in the CSPRI's guide to the UNCAT:³⁹⁶

the use of patients as auxiliary staff to provide services to other patients; ensuring the safety of all patients; the use of psychopharmacological medication; the use of electro-convulsive therapy; the means of restraint being used; and the use of seclusion.

On an international level, the UN Resolution on Protection of Persons with Mental Illness does not use the term torture, but rather refers to the abuse of patients.³⁹⁷ The Mental Health Care Act does not contain an express prohibition against torture, but observes every health care user's right to human dignity and privacy³⁹⁸ and recognizes the right not to be subjected to abuse, exploitation or degrading treatment.³⁹⁹ Importantly, section 70(1)(c) of the Mental Health Care Act views the mistreatment of a health care user as a crime, punishable by a fine or imprisonment.⁴⁰⁰ If an act of abuse is witnessed, it must be reported immediately to the Review Board and to the SAPS.⁴⁰¹

³⁹⁴ South African Human Rights Commission (2000) *Lindela at the crossroads for detention and repatriation, an assessment of the conditions of detention*, p. 10.

³⁹⁵ Mental Health Care Act No. 17 of 2001.

³⁹⁶ Muntingh, L. (2008) *Guide to the UN Convention Against Torture in South Africa*, CSPRI & Community Law Centre, p.20.

³⁹⁷ Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Adopted by General Assembly Resolution No 46/119 of 17 December 1991, 1(3) states that *All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.*

³⁹⁸ Section 8(1) of the Mental Health Care Act.

³⁹⁹ Section 11(1)(a) & (c) of the Mental Health Care Act.

⁴⁰⁰ 70(1)(c) *Any person who neglects, abuses or treats a mental health care user in any degrading manner or allows the user to be treated in that manner, under this Act, is guilty of an offence.*

⁴⁰¹ General Regulations to the Mental Health Care Act No 7578 Vol 452, 14 February 2003, No 24384.

It is submitted that the Mental Health Care Act, while successfully providing a structure protective of the Health Care User's safety and recognizing degrading treatment as a criminal offence, is insufficient insofar as the development of the prohibition against torture and the training of health care personnel in the area of human rights are concerned. Legislation should provide for the co-operation of Health Care Facilities with visiting- and monitoring bodies, to ensure maximum transparency and enforcement of national laws in keeping with international guidelines.

3.7.5 Child and Youth Care Centers

The administration of facilities for children is governed by the Child Care Act,⁴⁰² the recent Children's Amendment Act (CAA) and the Regulations thereto.⁴⁰³ Although neither of these acts reflects the UNCAT's wording of the definition or the absolute prohibition against torture and CIDT, the CAA and Regulations thereto effectively prohibit the abuse, torture and ill or degrading treatment of children within child and youth care centres.

The CAA provides the platform for the development of a set of norms and standards according to which child care facilities ought to be operated. The Regulations to the CAA place the specific responsibility on foster parents, as well as on management clusters of foster care schemes, to refrain from imposing physical, violent punishment or humiliation and degrading forms of discipline on children.⁴⁰⁴ In respect of child- and youth care centres, certain behaviour management actions are expressly prohibited, including *inter alia* the humiliation and ridiculing of a child,⁴⁰⁵ the imposition of physical punishment⁴⁰⁶ and the practice of isolating or locking a child up as a form of punishment.⁴⁰⁷ The CAA contains a framework of national norms and standards according to which children in the care of another should be treated. Amongst these is the specifically included duty to ensure a safe environment for children, which is supported by a prohibition against inhumane and degrading treatment or punishment.⁴⁰⁸ In addition, the CAA provides for

⁴⁰² The Child Care Act No 74 of 1983.

⁴⁰³ The Children's Amendment Act No 41 of 2007, set to enter into force on 1 April 2010.

⁴⁰⁴ CAA Regulations 65(1)(h) & 69(2)(b)(iv).

⁴⁰⁵ CAA Regulation 76(2)(c).

⁴⁰⁶ CAA Regulation 76(2)(d).

⁴⁰⁷ CAA Regulation 76(4)(b).

⁴⁰⁸ CAA Regulations Part VI, relative to section 216 of the Act pertaining to drop-in centres.

child protection services, including a fund for the purpose of ensuring that child and youth care centres are managed in line with national norms and standards prescribed by the CAA.⁴⁰⁹

A significant development of the law pertaining to the protection of children against abuse is the establishment of a complaints mechanism within child and youth care centres. Every child and youth care centre should have a written complaints procedure which allows children to complain about incidents or staff members. The procedure must be accessible to children and must be structured so as not to create conflict situations within the centre.⁴¹⁰

Section 110 of the CAA creates a general reporting duty, in case of the occurrence of abuse, injury and death of a child.⁴¹¹ Specifically, it is the duty of all persons involved with the operation of a child and youth care centre, to report the abuse, injury or death of a child, to the relevant authorities.⁴¹²

Section 211 of the CAA is particularly noteworthy, as it provides for a system of internal and external monitoring. The provincial head of Social Development is charged with ensuring that a quality assurance process is conducted in respect of all child care facilities. This includes both internal- and external assessments of centers, plus the compiling and implementation of an organizational development plan for each centre.⁴¹³ Although this monitoring and reporting system is a step in right direction, no independent visitation mechanism is yet in place in respect of child and youth care centers.

Overall, the CAA and Regulations do much for protecting children from abuse within drop-in centres, alternative care centres, child- and youth care centres or from abuses within foster parenting schemes. In light of South Africa's watered-down approach to the prohibition of torture, the CAA represents an enhanced effort towards the protection of the rights of children - generally considered to be a particularly vulnerable group of the population. In fact, it is the first piece of legislation to give effect to the constitutional

⁴⁰⁹ Section 193 of the CAA.

⁴¹⁰ Regulation 74 of the CAA.

⁴¹¹ Section 110 of the CAA requires of any person who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official. Section 110 is accompanied by Regulation 33.

⁴¹² Sections 89, 178 and 226 respectively require the personnel of partial care centres, alternative care centres and drop-in centres to report incidents of abuse. Section 178 is supported by Regulation 64.

⁴¹³ Section 211(1) & (2) of the CAA.

prohibition against inhuman and degrading treatment. However, as will be discussed in the next chapter, the future incorporation of a Bill on Torture into South African law implies a sector-neutral and uniform approach to torture and ill-treatment. This means that the CAA and regulations would possibly fulfill a complimentary and interactive function to any piece of generally applicable legislation. *In lieu* of a functional framework against torture in South Africa, the prohibitions and preventive measures of the CAA are welcomed.

3.8 Conclusion

To summarize the above analysis of the existence of national mechanisms of prevention is a comparative chart, indicating the sector-specific availability of prescribed measures:

Sector	Independent International Visiting & Monitoring Mechanism	Independent National Visiting & Monitoring Mechanism	Internal checks and balances	Reporting duty	Complaints Mechanism
Correctional Centres	Yes	Yes	Yes	Yes	Yes
Police Custody	No	Yes	Yes	Yes	Yes
Repatriation Centers	No	No	Uncertain	No	No
Child & Youth Care Centers	No	No	Yes	Yes	Yes
Mental Health Care Centers	No	No	Yes	Yes	No

The fundamental rights protected in the Constitution merely form a foundation for the legal framework in South Africa and this is in itself not a guarantee of absolute compliance. To quote Justice Chaskalson on the value of a Constitutional framework:

If you talk about respect for human rights and possibly the conduct of people, it is a true that there is much that happens in our society that is inconsistent with the values of our Constitution. But that doesn't mean that the values of the Constitution aren't of importance ... they are the framework of the society we are building and the framework

*of our law. It doesn't really help to say that not everybody lives according to the values of the Constitution. The challenge is to create a society where those values are realised.*⁴¹⁴

Creating a society in which human rights are observed by all, means establishing a proper legal structure at the hand of which civilians may exercise their constitutional rights and which public officials may utilize to protect such rights.

The prohibition against torture and CIDT as found in the Constitution is a point of departure from which such conduct can be prevented and addressed. But for the general application of article 12 of the Constitution, South African law addresses torture and CIDT in a sector-specific and segmented form. In the absence of legislation of general application, various public offices involved with the detention of persons all address the question of torture and CIDT to various extents. The SAPS by incorporating it into its policies and practices, the DCS by focusing on oversight mechanisms and the inclusion of a prohibition against ill-treatment of children in legislation pertaining to child and youth care centres.

This results in a lack of a uniform or comprehensive approach to the issue. It creates uncertainty and ambiguity with regard to the relevant and applicable sources of law. Jurisprudence relative to torture is limited and the matter appears to be largely disregarded by government. But for ratification of the UNCAT, the government displays a passive attitude toward the issue of torture. Inaction by the legislature to incorporate the duties of the UNCAT into national law can be construed as the State's reluctance to address the topic. South Africa displays a poor degree of compliance with international standards, particularly in regard to its obligations under the UNCAT and the CAT.

As a developing country and a young democracy, it is accepted that there are many issues which require attention and improvement. We recently celebrated the 20-year anniversary of the release of Nelson Mandela from incarceration. In light hereof, the country's progress to freedom and equality was revisited and amongst the steps that were assessed, were the effects and impact of the truth and reconciliation process on

⁴¹⁴ Nelson Mandela Foundation, 22 May 2008, *In Conversation with Arthur Chaskalson* available at http://www.nelsonmandela.org/index.php/news/article/in_conversation_with_arthur_chaskalson/ accessed on 12 November 2009.

the lives of the persons who were involved with the struggle against apartheid. It is clear that the scars of brutality suffered have not yet healed and the memories of severe ill-treatment suffered by activists, civilians and their families will always form a substantial part of South Africans' feelings and attitudes toward each other.⁴¹⁵ Given South Africa's history and record of human rights abuses, it is surprising and rather alarming, that torture and CIDT are still tolerated within the South African legal framework.



⁴¹⁵ Cape Times, 7 February 2010, *Reconciliation is not an event, it's a process.*

CHAPTER 4: THE DRAFT COMBATING OF TORTURE BILL, 2008

4.1 The Bill in context

South Africa follows a dualist approach to international law.⁴¹⁶ This means, that in order for provisions of international law to be binding, it must be incorporated into domestic legislation. Contrary to this is the monist system, which sees treaty law becoming a part of domestic law, immediately and automatically upon ratification of a treaty by a State Party thereto.⁴¹⁷ In conjunction with section 231, section 39 of the Constitution allows national courts to consider provisions of international law when interpreting the Bill of Rights. Therefore, even though terms of international law are not self-executing under the dualist system,⁴¹⁸ it is possible for international law to find limited application in South Africa through interpretation and consideration by the judiciary.⁴¹⁹

As far as criminalization of torture is concerned, the principle of legality provides for an exhaustive list of Common Law crimes under South African law. The only way for new crimes to be incorporated into law, is through legislation.⁴²⁰ There exists no umbrella legislation which recognizes torture as a crime, nor is torture *per se* described as an offence in any other piece of South African legislation. It is imperative that adequate legislation be passed in order for duties incurred under the UNCAT to be implemented and enforced as a mechanism of domestic law.

4.2 Background to the Bill

The Combating of Torture Bill in its current form is the third version of draft legislation attempting to address torture within South African law. Both previous versions of the Bill were published in 2006.⁴²¹ The Bill has not been tabled in parliament, but previous

⁴¹⁶ Section 231(4) of the Constitution states that an international agreement will only become binding in the Republic once it is enacted into law by national legislation.

⁴¹⁷ Circle of Rights (2000) *Economic, Social and Cultural Rights Activism: A Training Resource*, Section 7 Module 22, p. 418 & 419, International Human Rights Internship Program, USA.

⁴¹⁸ *AZAPO and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC).

⁴¹⁹ Section 39 of the Constitutions states that "(1) When interpreting the Bill of Rights, a court, tribunal or forum: ... (b) must consider international law."

⁴²⁰ Burchell, J. (2005) *Principles of Criminal Law*, 3rd Edition, Butterworths, p. 96.

⁴²¹ Muntingh, L (2008) *Comments on the Combating of Torture Bill* (2008) CSV & CSPRI Roundtable discussion on the Combating of Torture Bill, 2008, p.1.

versions were published for public comment.⁴²² Despite attempts by lobbyists from civil society advocating for the promulgation of the Bill, a final and proper version of the Bill must yet be drafted and presented in parliament. The CSPRI rightly notes that “statutory silence on the issue only contributes to a culture of tolerance and acceptance of torture and ill-treatment.”⁴²³

4.3 Primary provisions of the Bill

4.3.1 The definition of torture

The definition of torture proposed in clause 3 of the draft Bill is close to that of the UNCAT, but differs in two aspects. Firstly, the definition of the element of conduct is developed to include an omission as a form of conduct. Reference is made to the discussion in section 2.4.1.1 where it is indicated that an omission, although not expressly included in the UNCAT’s definition of conduct, is deemed to form part of the concept of conduct. By clearly stating that an omission constitutes a form of conduct, the Bill eliminates any doubt which might exist around the scope of actions covered by the definition of the element of conduct and makes it easier to identify acts of torture. The inclusion of this phrase is noteworthy.

The second difference lies in the description of the involvement of the public official, which falls short of the requirements of the definition of the UNCAT. Clause 3 of the Bill proposes that the act of torture must be committed “by a public official” and goes on to define the term in its list of definitions. Article 1 of the UNCAT recognizes an act of torture committed not only by a public official, but also “at the instigation of or with the consent or acquiescence of a public official, or any other person acting in an official capacity.” The UNCAT’s description of official involvement, is comprehensive and far reaching. The practical effect of the definition as per the Bill means that an act of torture needs to have been committed directly by, or at the hand of a public official. This requirement is extremely limiting and makes it easy for perpetrators to escape culpability due to the fact that they might not have been personally involved with the commission of an act of torture, even though the act might have been tacitly authorized by an official or may even have been committed upon instruction of an official. It is submitted that the

⁴²² South African Human Rights Committee & Association for the Prevention of Torture (2006) *Report: Roundtable discussion on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, April 2006, p. 11.

⁴²³ Muntingh, L. (2007) *Torture is not a crime in South Africa*, CSPRI Newsletter No 20.

wording of this requirement as it stands, can potentially render the entire definition of the act of torture ineffective, since perpetrators can easily navigate their way around incurring liability. This narrow qualification certainly does not succeed in furthering the objectives of the act or UNCAT and needs to be developed in accordance with the form of the UNCAT. Amnesty International supports the opinion that the inclusion of the references to all forms of conduct by public officials is “critical to ensure that official involvement in torture (and other ill-treatment), at all levels, is specifically criminalized, as it is in the Convention Against Torture, and that no impunity for officials is allowed.”⁴²⁴

The South African Constitution prohibits both torture and conduct amounting to cruel, inhuman and degrading treatment or punishment. The Bill should therefore reflect and enforce this position. An extreme oversight of the draft Bill is the fact that no reference is made to other forms CIDT. As seen in section 2.5, section 16 of the UNCAT includes other forms of CIDT within the definition of torture and imposes the duty on State Parties to prevent both the act of torture and CIDT equally. The Bill allows no such extension. The effect of promulgation of legislation without reference to CIDT limits the application of the Bill to very specific acts only. It is submitted that this limitation causes the South African legal framework to fail to address other forms of conduct, which are considered prohibited. The CSPRI notes: -

*...most of the victims of torture and other cruel forms of treatment in South Africa are impoverished, marginalized persons who lack the knowledge and the means to vindicate their constitutional rights. The absence of a strongly deterrent punitive regime for abuses against such persons, as well as other minority groups such as asylum seekers, children in homes, inmates of psychiatric institutions, facilitates grave malpractices at the hands of some state officials or those functioning at their behest and with their knowledge.*⁴²⁵

Without a comprehensive legal framework by which acts of torture as well as other forms of inhuman treatment are recognized as crimes, victims and especially marginalized

⁴²⁴ Amnesty International (2006) *South Africa: Briefing for the Committee Against Torture*, AI Index AFR53/002/2006.

⁴²⁵ Muntingh, L. & Lovell, F. (2006) *Submission to the Committee Against Torture in response to the Republic of South Africa – First Country Report on the implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, p.6.

groups will find it increasingly difficult to exercise their right not to be subjected to such treatment. The failure to define CIDT under national legislation means that the legal position of persons subjected to treatment falling short of torture, is addressed under common law – a position which is vague, insufficient and non-effective.⁴²⁶

In accordance with the CAT's recommendations to South Africa,⁴²⁷ it is submitted that the definition of torture as contained in the UNCAT should be adopted in national legislation. Since the purpose of the Bill is "to ensure that anything done in terms of this Act conforms with the Convention,"⁴²⁸ nothing short of full incorporation of the proper definition of torture and CIDT should be accepted as national legislation.

4.3.2 The absolute prohibition

Article 4 of the UNCAT requires States Parties to ensure that acts of torture are dealt with under their national penal codes. The prohibition against torture is codified in the statement of objectives of the Bill.⁴²⁹ However, by not expressly employing the wording 'absolute prohibition,' 'non-derogable' or 'peremptory norm' the Bill falls short of the expected standard.⁴³⁰ Although the heading of clause 4 of the Bill purports to contain a prohibitive statement, practically, this section deals with the criminalization of the act of torture. It is submitted that national legislation should express the absolute prohibition against torture and CIDT in a clear and unambiguous manner, since this should serve to support the prohibition contained in the Constitution and must function as the basis from which criminalization of torture should be approached.

4.3.3 Criminalization of torture

Clause 4 of the Bill proposes the criminalization of an act of torture committed by a public official. The prohibited conduct includes the commission of an act, the attempt to commit an act, as well as participation to the commission of an act, by means of incitement, instigation or procurement of a person to commit an act of torture. The liability thus imposed on public officials is welcomed, but clause 4 of the Bill does not

⁴²⁶ Reference is made to the conclusions drawn in Chapter 3.

⁴²⁷ Commission Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, par 9.

⁴²⁸ Clause 2(b) of the Combating of Torture Bill, 2008.

⁴²⁹ Clause 2(1)(c)(iii) of the Combating of Torture Bill, 2008.

⁴³⁰ Muntingh, L., 28 October 2008, *Comments on the Combating of Torture Bill*, CSV & CSPRI Roundtable discussion on the Combating of Torture Bill held in Cape Town.

mirror the provisions of the UNCAT. As discussed in section 2.6.4, article 4 of the UNCAT requires of States Parties to ensure that all acts of torture are offences under its criminal law. This means that all acts, as defined under the UNCAT, should be criminalized. Since the definition of torture in the Bill falls short from that of the UNCAT, it follows that certain forms of conduct will not be defined as acts of torture under the Bill.

The Bill fails to criminalize torture perpetrated by any other party than a public official. It does not purport to apply to non-state actors, private managers of detention facilities or any other situation where *de facto* control is exercised over another person.⁴³¹ This is an unacceptable oversight which detracts from the intention of the UNCAT.

As far as the penalty is concerned, clause 4 of the Bill provides for a sentence of imprisonment upon conviction, which is the appropriate sanction in terms of international law, yet no minimum sentence is prescribed. According to international norms, a lengthy prison sentence is the appropriate sanction for a conviction relating to torture. In response hereto, the draft Bill provides for the crime of torture to be included under Schedule 1 and Part II and III of Schedule 2 of the CPA.⁴³² This means that certain minimum sentences become applicable in the case of conviction. For example, in the case of a first offender committing an offence under Schedule 2 Part II of the CPA, a minimum prison sentence of 15 years will be applicable.⁴³³

Furthermore, the Bill sets out a list of factors which should be considered as aggravating circumstances for sentencing purposes in sections 5(a) – (f). These include racial discrimination, commission of acts of torture against a minor or a disabled person, the use of a weapon and the use of rape or indecent assault. The last factor to be listed is the “infliction of life threatening physical injuries.” It is submitted that the inclusion of this phrase is rather excessive, since the infliction of severe pain and suffering forms a prevalent part of the definition of torture, surely meaning that this factor should be regarded as an element of the crime, rather than an aggravating circumstance.

⁴³¹ Muntingh, L., 28 October 2008, *Comments on the Combating of Torture Bill*, CSV & CSPRI Roundtable discussion on the Combating of Torture Bill held in Cape Town.

⁴³² Clause 9 of the Combating of Torture Bill, 2008.

⁴³³ The Criminal Law (Sentencing) Amendment Act No. 38 of 2007.

Clause 4(3) of the Bill supports the absolute nature of the prohibition by precluding factors such as status of an offender, superior orders and state of emergency, from serving as forms of defense or justification for acts of torture. These provisions bring the Bill in line with article 2(2) and 2(3) of the UNCAT, which confirm that acts of torture can not be justified.

The characteristic of universal jurisdiction is reflected in clause 6 of the Bill. Corresponding with articles 5(1)(a), (b) and (c) of the UNCAT, clauses 6(1)(a) and (d) of the Bill allows South African courts to exercise jurisdiction on the grounds of nationality of the offender or of the victim and sections 6(1)(b) and (c) establish territorial jurisdiction. Contrary to the UNCAT, the Bill is silent on the question of extradition of an offender to his/her country of origin and on the question of establishing jurisdiction over offences committed within South African territory. Articles 5(2) & 8 of the UNCAT confirms the extraditable nature of the crime of torture, yet the Bill fails to address this issue. It is submitted that draft legislation should make reference to the extraditable nature of the offence of torture.⁴³⁴

4.3.4 Non-refoulement

The principle of *non-refoulement* is dealt with under clause 7 of the Bill, which prohibits extradition of an accused to another State where there exists a real likelihood or danger that he/she would be subjected to torture, upon return to the particular State. Although clause 7(2) of the Bill reflects the UNCAT's article 3(2), no provision is made for officials to determine whether such danger actually exists - namely taking into account all relevant factors such as existing patterns of gross, flagrant or mass violations of human rights in a particular State. The application of the prohibition is limited by the use of the verb 'extradited' on its own. Extradition means "the surrender of fugitives from justice by a government to the authorities of the country where the crime was committed."⁴³⁵ Extradition is a very specific legal action and does not include other, less formal ways of expulsion such as the *refoulement*, return or even deportation of persons. The narrow wording therefore means that the Bill does not prohibit other forms of expulsion such as deportation or the forceful return of persons to their countries of origin or other States. In fact, many of the persons returned or expelled by the South African government, leave

⁴³⁴ Muntingh, L. (2009) *UN Committee against torture releases list of issues for South Africa*, CSPRI Newsletter No 31, p.2.

⁴³⁵ Definition of extradition as per Cassel (1995) *Popular English Dictionary*, London.

the country not by way of an extradition order or agreement, but by deportation.⁴³⁶ By addressing and prohibiting only extradition, the Bill fails to give effect to the *non-refoulement* principle as it is understood under international law and as it is meant to operate under the UNCAT. As it stands in the draft Bill, the *non-refoulement* principle is not nearly sufficiently protective, but opens the gateway for abuse and disregard.

4.3.5 Preventive Mechanisms

Although the provision of measures aimed at the combating of torture is one of the primary goals of the Bill, the practical mechanisms of implementation are extremely weak.

The only mechanism resembling a measure of prevention that can be found in the Bill is the duty of cabinet ministers to educate or train public officials on the combating of torture.⁴³⁷ In its statement of objections, clause 8(2)(e) of the Bill starts off by expressing the desire to educate and inform all officers of the public sector on the correct treatment of persons in custody. Clause 8 of the Bill develops this idea by providing for practical methods for the realization of this objective, imposing on cabinet members the duty to develop programs aimed at informing officials of the gravity of torture and raising awareness on the issue of torture. Although the goal of clause 8 of the Bill is pursuant to the State's duty to educate and inform officials involved with the treatment of persons in custody as per article 10 of the UNCAT, the wording of sections 8(2)(a) & (b) is repetitive and weak. Clause 8(2)(d) is aimed at equipping public officials to "combat" torture, but no mention is made of prohibition and prevention. While clause 8 might give theoretic effect to article 10 of the UNCAT, no guidance is provided as to which sectors of public service should be trained, how training should take place, what training should entail or the timeframe within which training should take place. Two subsections are dedicated to educating officials on the gravity of torture, when attention is rather needed on practical measures of implementation of educative programmes. It is submitted that these subsections would probably best express its objectives, if combined and rephrased.

⁴³⁶ See generally Katz, A. (2005) *The transformation of South Africa's role in international co-operation in criminal matters*, CSV. See also Banda, J., Katz, A. & Hubschle, A. (2005) "Rights versus justice: Issues around extradition and deportation in transnational terrorist cases", *African Security Review*, Volume 14, No 4, 2005 available at <http://www.issafrika.org/pubs/ASR/14No4/EBanda.htm> accessed on 10 February 2010.

⁴³⁷ Clause 8(2)(d) of the Combating of Torture Bill, 2008.

The greatest defect of the draft legislation is probably the failure to establish national preventative mechanisms, as intended by the OPCAT. Even though South Africa has not yet ratified the OPCAT – draft forms of domestic legislation should at least consider the requirements of the OPCAT and surrounding international standards, in light of future ratification. By simultaneously expressing the obligations of the UNCAT and OPCAT in a singular piece of legislation, the State would not only be making optimal use of its resources, but will be able to present the public with a comprehensive document, not subject to further amendments.

Instituting a national monitoring body to survey places of detention is critical to the success of legislation pertaining to torture. For instance, as mentioned in section 3.7.2, the ICD is currently one of the most prominent bodies to which complaints of torture may be directed. As noted in chapter 3, the statutory basis for the ICD is the South African Police Services Act, with the ICD falling under the executive control of the national Minister of Safety and Security. In its submission on South Africa's initial report to the CAT, Amnesty International has expressed concern that the above legislative basis and the political accountability to which the ICD is subjected, has created the public perception of diminished independence and impartiality in the ICD's functions.⁴³⁸ As previously mentioned, the efficacy of the ICD's work is also questioned, due to the fact that its recommendations are not binding. As one commentator points out:

*Many of the cases regarding alleged police misconduct that are received by the ICD, with the exception of deaths in custody, which are referred back to the police themselves for investigation. There is also a limited capacity to monitor the outcome of the investigations. In addition the police are not compelled to report back to oversight bodies on their compliance with the agency's recommendations. The result is that there is little scope to evaluate the impact of the work of many of these bodies and little opportunity to build confidence in the communities.*⁴³⁹

⁴³⁸ Amnesty International (2006) *South Africa: Briefing for the Committee Against Torture*, AI Index AFR53/002/2006, p. 9.

⁴³⁹ Open Society Foundation for South Africa (2005) *Strengthening Police Oversight in South Africa*, available at www.osf.org.za accessed on 3 February 2010.

It is therefore imperative that an independent, credible and competent monitoring body be established – or alternatively, that existing bodies be strengthened, to ensure the eradication of torture in South African detention facilities. The various options in this regard are discussed in section 5.2.3.

4.3.6 The Right to Redress

While article 14 of the UNCAT requires of State Parties to ensure that its legal system allows victims of torture to obtain adequate redress, this invaluable right is completely omitted from the Bill. The only reference to redress is found in clause 8(2)(c), which places a duty on cabinet members to cause the training of officials to enable them to provide appropriate assistance and advice to victims of torture. This is not nearly sufficiently protective of the victim of torture's right to fair, adequate compensation and rehabilitation. The fact that this important aspect is not addressed in draft legislation means that the Bill is far from compliant to international standards. It is unacceptable to leave the torture victim with insufficient remedy or relief.

In this regard, a comparison can be made to the draft Prevention and Combating of Trafficking in Persons Bill, as recently tabled in Parliament. Clause 27 of this Bill enables the court to order the convicted offender to pay appropriate compensation to the victim of an offence. Such an order may be made in addition to the sentence passed, whether on request of the complainant or of the court's own accord. A similar provision in the Torture Bill would be a valuable aid to give effect to the victim of torture's right to redress.

4.3.7 Exclusionary Rule

The Bill entirely fails to address the exclusionary rule. It was concluded in section 3.5 above, that the exclusionary rule is already manifested in South African law and duly applied by the courts. Yet, the rule as it appears in article 15 of the UNCAT is not codified in South African legislation. Its inclusion is therefore advised, so that the position held in constitutional law and in the rules of evidence, may be sufficiently supported and specifically applicable to cases of torture.

4.4 Conclusion

It is concluded that the draft Bill on Torture in its current form is weakly drafted and does not comply with the minimum standards set by international law and specifically, by the

UNCAT.⁴⁴⁰ The Bill omits many of the primary principles and objectives of the UNCAT, most notably the victim's right to redress, the implementation of the *non-refoulement* principle, the application of the exclusionary rule, the establishment of preventive mechanisms, the right to submit complaints, the duty to review practices and procedures and the reporting duty. As far as criminalization is concerned, the CAT has in the past advised States Parties "to adopt a definition of torture that covers all the elements contained in article 1 of the Convention and incorporate into the Penal Code a definition of a crime of torture that clearly responds to this definition."⁴⁴¹ Serious discrepancies in language only enlarge the potential for loopholes and limitations.⁴⁴² South African authorities need a credible, clear and comprehensive legal framework for the criminal investigation of acts of torture and CIDT. Similarly, the courts are in need of a mandate and legislative guideline according to which perpetrators of acts of torture may be punished and victims may be able to obtain relief.

Amnesty International shares the concern of local civil society organizations such as the CSVR and CSPRI insofar that the current draft Combating of Torture Bill should be strengthened in line with the language used and requirements expressed in the UNCAT. It is argued that the legislature should consider the UNCAT, OPCAT and other standards of international law as valuable sources of information, at the hand of which the Bill should be drafted. In addition, political will is needed to ensure that an improved Bill is promoted, discussed and passed by the South African Parliament as soon as possible.⁴⁴³

The UNCAT constitutes a framework according to which States Parties could mould their national laws. It is not enough for national legislation to provide merely for a vague repetition of certain chosen principles contained in the international treaty, as seems to be the case with the draft Combating of Torture Bill, but to actually address the issues relative to the particular field of law and to provide national leaders with clear and practical guidelines for implementation.

⁴⁴⁰ CSVR (2008) *Submission to the 44th Session of the African Commission on Human and Peoples' Rights*, 5 November 2008.

⁴⁴¹ Committee Against Torture, Conclusions and recommendations, LITHUANIA, CAT/C/SR.584 and 587 Paragraph 110 (a).

⁴⁴² Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 9.

⁴⁴³ Amnesty International (2006) *South Africa: Briefing for the Committee Against Torture*, AI Index AFR53/002/2006.

CHAPTER 5: RECOMMENDATIONS FOR LAW REFORM

If you are neutral in situations of injustice, you have chosen the side of the oppressor. If an elephant has its foot on the tail of a mouse and you say that you are neutral, the mouse will not appreciate your neutrality.

- Desmond Tutu

This chapter will consider the inadequacies which are apparent from the examination of South Africa's legal structure pertaining to torture and CIDT and will attempt to make practical suggestions and recommendations for law reform in the light of the obligations imposed by the UNCAT.

5.1 Inadequacies of the current law relating to torture in South Africa

The most prominent inadequacy of the national legal framework pertaining to torture and CIDT is the fact that the terms 'torture and other cruel, inhuman and degrading treatment or punishment' are undefined in South African law. So far the application of the Constitutional prohibition against torture has led to the abolition of capital and corporal punishment, the exclusion of evidence obtained by means of ill-treatment and the denouncement, in certain cases, of forced, irregular deportations.⁴⁴⁴ Other than some isolated examples of jurisprudence, certain spheres of Government, notably the SAPS and the DCS, have responded to the absolute prohibition of international law by drafting and employing codes of conduct or measures of internal discipline. Although these attempts are encouraged as positive contributions toward compliance with international standards, examples of the enforcement of the absolute prohibition against torture and CIDT seem few and far between. It is submitted that the main reason for the limited level of compliance with the international legal framework in this regard, is the sector-specific approach to the prevention of torture and CIDT. There is a pressing need for a uniform,

⁴⁴⁴ *Arse v Minister of Home Affairs and Others* (25/2010) ZASCA 9, 12 March 2010. See also Lawyers for Human Rights (2009) *Court declares Home Affairs actions in deportation of asylum seeker as unlawful and unconstitutional*, LHR Press Release available at <http://www.lhr.org.za/news/2009/court-declares-home-affairs-actions-in-deporting-asylum-seeker-as-unlawful-and-unconstitut> accessed on 4 February 2010.

comprehensive and clear law according to which public offices are supposed to approach the question of torture and ill-treatment.

The lack of a definitive legal framework, results in the omission of certain valuable principles from South African law. The crime of torture is not recognized under South African criminal law and there is no penalty or particular punishment applicable to the perpetrator of torture. The victim of torture or CIDT does not possess any specific civil right to redress. There are no adequate, relevant or sufficient remedies in the form of rehabilitation or restitution available for the victims of torture and victims are therefore forced to revert to the institution of delictual claims in an attempt to remedy wrongs suffered. South Africa's position on the prevention of torture in the form of xenophobic attacks is almost non-existent. Furthermore, the right not to be subjected to *refoulement* is ill protected and poorly implemented.

The legal position relating to the aforementioned issues is extremely concerning and must be rectified as a matter of urgency. Common Law principles relative to torture are difficult to identify, vague in its application – often overlapping or ambiguous. Several different sources must be consulted in an attempt to find the relevant set of rules applicable to a particular situation. The only reference to the absolute prohibition against torture appears in the South African Constitution. Although it certainly is necessary for the Constitution, as the supreme law of the land, to guarantee the right not to be subjected to torture or ill-treatment, there does not exist one, comprehensive and practical source of information available on anti-torture law in South Africa. This presents extreme difficulties to any individual, particularly a victim of torture or layman, to determine their position or rights relative to torture or CIDT, within the South African context.

Aside from the vagueness surrounding the appropriate legal approach on how to deal with torture and CIDT, as well as the seemingly considerable amount of effort that the victim of torture has to invest to obtain justice, another issue of concern is the weak enforceability of standards of international human rights law in the South African context.

South Africa's initial report to the CAT, submitted 7 years late, is a clear indication that the issue of torture and the compliance with the provisions of the UNCAT does not enjoy

sufficient prioritization by government. In addition to this is the State's reluctance to finally ratify the OPCAT. The general lack of resources and funding is the most probable cause for this passivity. Yet, given South Africa's historical record of human rights abuses in the form of torture and CIDT, frequent outbursts of xenophobia and well-publicized accounts of mistreatment of detainees in prisons and police custody, the State can ill afford not to grant the requisite attention to the matter.

5.2 Recommendations

5.2.1 Incorporation of the UNCAT into national law

The first step toward aligning South Africa's position on torture and CIDT with international standards is to draft and pass legislation which is compliant with the requirements of the UN Convention and which puts the necessary structures in place for successfully preventing and managing occurrences of torture and CIDT. The current draft version of the Combating of Torture Bill, as discussed in Chapter 4, is insufficient and incapable of addressing issues of torture within South Africa. It is imperative that the Bill on Torture represents the full incorporation of the UNCAT - and ideally the OPCAT, into national law. It is recommended that the legislature consider such comments as have been made by various concerned parties, especially those submitted by the CAT and groups representative of civil society.

Domestic legislation should contain a definition of torture and CIDT, similar to that of the UNCAT. The act of torture should be clearly and distinctly identified as a criminal offence in national law. South Africa needs a clear and uniform approach to the problem of torture. Instead of viewing torture as an offence relative to a specific sector, the criminalization of torture should be an extension of the common law approach to crime.

5.2.2 Ratification of the OPCAT

South Africa is already a signatory to the OPCAT and therefore it is only logical to recommend the final ratification thereof. In order to become fully compliant with international legal standards imposed by the UNCAT, the State must ratify the OPCAT and should ensure that supportive, domestic legislative structures are in place.

5.2.3 Establishment of National Preventive Mechanisms

Law reform should entail the establishment of a national preventive mechanism as an absolute necessity. A pro-active approach is needed to successfully prevent torture and CIDT. It is recommended that a visiting- and monitoring mechanism be created simultaneously with the incorporation of the provisions of the UNCAT into national law. This will not only strengthen South Africa's approach toward prevention of torture, but will eliminate the duplication of reformative efforts, for the time when the OPCAT actually will be ratified.

Currently, there is no centralized visitation system in place to monitor conditions in places of detention. In an effort to assist signatories to the OPCAT to streamline legal structures, the APT explores factors influencing States' decision to employ a new or existing body to fulfill the function of NPM and it considers the effects of instituting either a singular, or multiple visiting bodies. According to this study: -

*...specific advantages and disadvantages are associated with the design of a new body versus the designation of an existing body, and with the use of a single unified mechanism for the whole country or several mechanisms for different regions or types of institution. However, none of these approaches is inherently superior to the others.*⁴⁴⁵

South Africa's first option is to utilize current structures, such as the ICCV, ICD and SAHRC, by extending existing duties to that of an independent, national visiting- and monitoring body as envisaged under the OPCAT. In this case, a review of mandates, areas of jurisdiction and an audit of independence and internal processes will be required. Such a review should necessarily inspire legislative or policy adjustments insofar as current infrastructures fall short of full compliance to the OPCAT. The benefits of employing existing bodies, are that the basic structures already exists and that an extension of mandates should probably prove less costly and more time-effective than creating an entirely new NPM. However, the challenge would be in coordinating and streamlining the existing sector-specific oversight mechanisms, so that multiple functionaries operate co-operatively, coherently and comprehensively.

⁴⁴⁵ Association for the Prevention of Torture (2006) *Establishment and Designation of National Preventive Mechanisms*, Chapter 6, Geneva, Switzerland, p. P78.

The second option is to establish a single body with an express NPM function. The benefits of employing a new body, is firstly, the establishment of a new mandate which can from the outset comply with the OPCAT.⁴⁴⁶ Secondly, a single body focusing solely on implementing NPM's, will inevitably become more specialized and will be better equipped to deal with the issue at hand. By centralizing the NPM, it is not only possible to approach prevention from a universal and uniform point, but makes it easier and more practical to manage the prevention process in order to obtain effective and consistent results.⁴⁴⁷

5.3 Law reform: Practical implementation

Boulesbaa logically suggests that it is not sufficient for State Parties merely to adopt preventive measures in law, but also to implement and enforce these rules effectively.⁴⁴⁸

The primary goal of law reform is to change behaviour and mindsets. An important factor of the success of national law reform is the review and monitoring of the implementation of legislation.⁴⁴⁹ Cooperation between relevant international, regional and national bodies, as well as the provision of access to information, is further factors contributing to the success of reformative changes. In order to promote implementation, the CAT recommends State Parties to strengthen its cooperation with national non-governmental organisations.⁴⁵⁰ Of even greater importance, is due consideration to and implementation of the CAT's observing comments and recommendations. The State reporting duty to the CAT must not be underestimated as a means by which the State may measure its own reformative progression. Therefore, it is not only legislative incorporation of the UNCAT that is needed, but a re-evaluation of policies and practices by the State.

⁴⁴⁶ Association for the Prevention of Torture (2006) *Establishment and Designation of National Preventive Mechanisms*, Chapter 6, Geneva, Switzerland, P88.

⁴⁴⁷ In New Zealand a central NPM in the form of a national human rights commission coordinates preventive tasks. The central NPM is responsible for investigating and developing recommendations concerning systemic issues that fall across all places of detention in New Zealand, coordination of the reports of the individual national preventive mechanisms and advising the national preventive mechanisms of any systematic issues arising from its analysis of the individual reports. Information about OPCAT implementation in New Zealand and the Association for the Prevention of Torture's comments on the relevant legislation is available at http://www.apr.ch/un/opcat/new_zealand.shtml accessed on 10 February 2010.

⁴⁴⁸ Boulesbaa, A. (1999) p. 68.

⁴⁴⁹ For example, the active observation of trials and publication of information thereon.

⁴⁵⁰ Committee Against Torture, Concluding observations, Kenya, CAT/C/KEN/CO/1, 19 January 2009, paragraph 7

Some recent examples of legislation which require government to prepare specific implementation plans are the Child Justice Act⁴⁵¹ and the Sexual Offences Act⁴⁵² which both create a legislative obligation regarding implementation and establishment of national policy frameworks. Such policy frameworks are aimed at ensuring a coordinated and uniform approach by all government departments and state organs, to the matters dealt with under the respective acts. In both instances, the national policy frameworks are subject to regular review.⁴⁵³

The implementation of legislation can only be successfully realized if both the public and especially State officials who are involved in custody or detention situations - including police officers, prison staff, staff of mental health and social care institutions, staff of child care facilities, judges, prosecutors, public defense attorneys, parliamentarians and members of the military force, are properly educated. Education should entail training on the applicable international treaty law, as well as national legislation.⁴⁵⁴ Measures of protection of human rights should be made more accessible.⁴⁵⁵ This should be in part achieved by passing national legislation on torture, but the State should also promote transparency by allowing free and easy access to information regarding the issue of torture, the government's steps towards eradicating torture and the publication of statistics.⁴⁵⁶ An example hereof is the Swedish government's decision to increase accessibility to law by translating the conclusions and recommendations of the six United Nations treaty monitoring bodies and by distributing these in municipalities and relevant branches of public offices.⁴⁵⁷

⁴⁵¹ Child Justice Act No. 75 of 2008.

⁴⁵² Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.

⁴⁵³ Section 93(2) of the Child Justice Act prescribes review of the policy framework within 3 years after initial publication and at least once every 5 years thereafter. Section 62(2) of the Criminal Law Amendment Act subjects the policy framework to review within 5 years after initial publication and once every 5 years thereafter.

⁴⁵⁴ In New Zealand, employees in correctional facilities are expected to demonstrate knowledge of a variety of legislation, policy and procedures. This includes familiarity with the 'Use of Force' policy and use of control and restraint responses in prisons. See Committee Against Torture, Concluding observations CAT/C/NZL/5, 17 August 2007, p.24.

⁴⁵⁵ An example of how to make the protection of human rights accessible is the initiation of a number of training programmes on the practical execution of policy decisions by the Philippines, such as the "Access to Justice for the Poor" Project, the Mobile Court or "Justice on Wheels" programme of the Supreme Court and the recent directive by the National Police Commission to activate human rights desks in all police stations nationwide. See Committee Against Torture, Concluding Observations, CAT/C/PHL/CO/2, 29 May 2009, paragraph 6.

⁴⁵⁶ Association for the Prevention of Torture (2005) *Position Paper: The role of national human rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment*, Geneva.

⁴⁵⁷ Conclusions and recommendations of the Committee against Torture, Sweden, CAT/C/CR/28/6, 6 June 2002.

5.4 Conclusion

From a technical perspective, the adjustments which need to be made to streamline South Africa's laws with the UNCAT, are not unreasonably invasive or extensive. The prohibition against torture is already constitutionally recognized and now needs to be made accessible by means of enacting national legislation and key policy decisions. Political will is needed to prioritize the issue of torture, to improve the draft Combating of Torture Bill and to enact an adequate piece of legislation in parliament. Since the fall of apartheid, South Africa has strived to develop and strengthen its human rights laws and to act as an example of good governance, accountability of public office and respect for the rule of law, to developing countries. It is submitted that South Africa's existing political administrative structure is perfectly capable of ensuring protection against torture. In light of our history and overall human rights record, it is expected of South Africa to take a firm stance against torture and ill-treatment.

By adopting a no-tolerance policy toward torture and CIDT and by strengthening its commitment toward the protection of human rights, the State would be sending a clear message of solidarity with the survivors of torture, as opposed to demonstrating acquiescence with the perpetrators of torture, through instituting halfhearted attempts to address the matter or by maintaining neutrality and silence.

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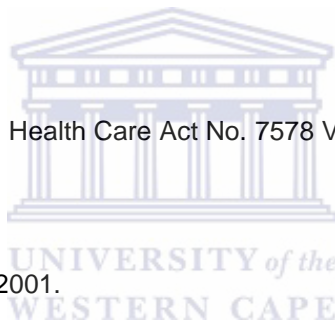
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