

GUIDE TO THE UN CONVENTION AGAINST TORTURE IN SOUTH AFRICA

By
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The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy, and collaborative efforts with civil society structures. The key areas that CSPRI examines are: developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research, raising awareness of decision makers and the public, disseminating information, and capacity building.

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Abbreviations

ACHPR	African Commission on Human and People's Rights
AI	Amnesty International
CAT	UN Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment
CIDT	cruel, inhuman and degrading treatment or punishment
CRP	Children's Rights Project
CSR	Convention on the Status of Refugees
CSPRI	Civil Society Prison Reform Initiative
CSVR	Centre for the Study of Violence and Reconciliation
DCS	Department of Correctional Services
DQA	Developmental Quality Assurance Process
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECoPT	European Committee for the Prevention of Torture
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate
IPV	Independent Prison Visitor
JICS	Judicial Inspectorate for Correctional Services
MEC	Member of the Executive Council
NDPP	National Director of Public Prosecution
NHRI	National Human Rights Institutions
OAU	Organisation of African Unity
QAP	Quality Assurance Process
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SRP	Special Rapporteur on Prisons and Conditions of Detention in Africa
UDHR	Universal Declaration of Human Rights
UPR	Universal Periodic Review

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Introduction

"I ask for water to wash myself with and also soap, a washing cloth and a comb. I want to be allowed to buy food. I live on bread only here. Is it compulsory for me to be naked? I am naked since I came here." Steve Biko¹

The right to be free from torture and cruel, inhuman, and degrading treatment or punishment is a non-derogable right derived from the fundamental right to human dignity. There can be no excuse for the use of torture – not a state of war, a national emergency or public disorder can be invoked as a justification for the use of torture. Through this right the South African Constitution follows international law that has given the prohibition of torture the status of *jus cogens* or a peremptory norm. It carries the same compelling normative weight as the prohibition of slavery and genocide.

At the international level, and primarily driven by the so-called ‘war on terror’, there have been efforts at remoulding what has become accepted in international law to be torture. One such attempt was the memo by the US Head of Office of Legal Council in which it was concluded that:

Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term’s common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind."²

This attempt at redrafting the definition of torture and the general thrust of the ‘war on terror’ has indeed placed at risk many of the achievements in the development of human rights law of the past fifty years. At a time when South Africa is still building a democracy and gaining a deeper understanding of constitutional rights, it is of the utmost importance to be extremely vigilant in overseeing the development of human rights standards. Despite the widely publicised and well-documented use of torture by the apartheid regime, there has been a remarkable paucity in the public discourse about torture and ill-treatment. Perhaps this is a consequence of a resistance to accept that torture happens even in a constitutional democracy, or perhaps that torture and ill-treatment is overshadowed by other human rights demands. It may also be that current victims of torture and ill-treatment are mostly common law offenders and not political activists fighting for a morally justifiable cause. In preventing and combating torture it is necessary to take a robust position in supporting the absolute prohibition of torture and ill-treatment. It is necessary to place the South African state under the magnifying glass and to

¹ Steve Biko Memorial Lecture delivered by the President of South Africa, Thabo Mbeki, on the occasion of the 30th Anniversary of the death of Stephen Bantu Biko, Cape Town, 12 September 2007, <http://www.info.gov.za/speeches/2007/07091314151001.htm> Accessed on 25 September 2005.

² Memorandum for Alberto R. Gonzales, Counsel to the President, Written by Jay C. Bybee, *Re. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, p. 12.

critically examine legislation, policies and practices against the absolute prohibition of torture and ill-treatment, especially when it deprives people of their liberty. It is only through promoting transparency and accountability that headway can be made in the quest to eradicate torture and ill-treatment.

This publication is a guide to the UN Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT) for the South African context. The guide is furthermore aimed at civil society organisations and those interested in human rights. Such a guide is necessary in order to give CAT meaning and significance in the local context. It is not only a guide, but also a reflection on the growing body of work done by stakeholders in South Africa over the past five years in preventing and combating torture. This publication aims to provide guidance on how the CAT can be used as a resource in South Africa to eradicate torture and ill-treatment. To achieve this objective, three stakeholders need to cooperate with this common purpose in mind. These are government, the national human rights institutions (NHRI) and civil society organisations.

Chapter 1 deals with the absolute prohibition of torture from the perspective of international law. Chapter 2 focuses on framing the problem in a South African context, and also describes the current legislative framework applicable to places where people are deprived of their liberty. Chapter 3 provides an overview of the content of CAT, and deals in more detail with South Africa's obligations under the Convention. Chapter 4 reviews the work of the UN Committee against Torture and pays particular attention to South Africa's interaction with the Committee. Chapter 5 deals with a number of significant recent court decisions related to torture and ill-treatment. The last chapter provides an overview of important domestic and international institutions active in the field of preventing and combating torture.

Chapter 1: The absolute prohibition of torture in international law

A short history of the prohibition of torture

For many centuries torture was regarded as a legitimate and necessary means of obtaining information in judicial processes. Its use by the Spanish Inquisition is well known. It was used not only to extract information, but also to punish offenders. The graphic description, related by Foucault, of the execution of Damiens in 1757 bears testimony to this.³ The unreliability of information obtained through torture, as well as increasing revulsion for its inhumanity, led to its official abandonment over time.⁴ Despite official denial, it is regrettably the case that torture is still widely used to obtain information and punish people. The ‘war on terror’ and in particular the actions of the USA have again demonstrated the willingness, enthusiasm and ability of democracies to resort to torture and ill-treatment.

Following the Second World War, and with the international community acutely aware of the atrocities committed, the absolute prohibition of torture and cruel, inhuman and degrading treatment or punishment (CIDT) was included in the Universal Declaration of Human Rights adopted in 1948 by the UN General Assembly.⁵ Other human rights instruments adopted by the UN after 1948 affirmed this prohibition, but failed to develop the mechanism to enforce it. The brutal overthrow of Dr Allende’s government in Chile in 1973 by the military and the ensuing widespread and systematic human rights violations, including torture, by the Pinochet junta and its supporters, moved the UN General Assembly to take action. This it did by formulating a rule of general international law on the prohibition of torture, and providing for redress to victims of torture, a process that resulted in the adoption of the *UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1975.⁶

Even though the Declaration clarified the position in respect of international law, it still fell short in not providing a mechanism of enforcement. The death of Steve Biko in 1977 under torture at the hands of the apartheid police moved the General Assembly to start work on what would result in CAT and adopted by the General Assembly in 1984.⁷ Three years later, in 1987, CAT entered into force. Over the next 20 years the overwhelming majority of UN member states

³ The execution order detailed how ‘flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers’ and that the hand with which he committed the crime must be burnt with sulphur and so forth. Eventually he will be quartered by four horses. (Foucault M (1977) *Discipline and Punish – the birth of the prison*, Penguin Books , London, pp. 3-6)

⁴ Robertson G (2006) *Crimes against Humanity*, Penguin Books, London, p. 264

⁵ Article 5

⁶ Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975

⁷ Robertson G (2006) *Crimes against Humanity*, Penguin Books, London, p. 265

would sign and ratify CAT, thereby affirming the absolute prohibition of torture as a general rule of international law.⁸

The status of the prohibition of torture

Today, the international ban on the use of torture has the enhanced status of a peremptory norm of general international law.⁹ This means that it “enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated¹⁰ from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”¹¹

This prohibition of torture imposes on states obligations which are owed to all other members of the international community; each of these obligations has a correlative right.¹² It signals to all states and to the people under their authority that “the prohibition of torture is an absolute value from which nobody must deviate.”¹³ At the national level it de-legitimizes any law, administrative or judicial act authorising torture.¹⁴

Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Because the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they be a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become “like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”,¹⁵ and torture itself as an act of

⁸ As at July 2008 only the following countries have signed but not yet ratified CAT: Comoros, Dominican Republic, Guinea-Bissau, Gambia, India, Nauru, Pakistan, Sao Tome and Principe, and Sudan. (<http://www2.ohchr.org/english/bodies/ratification/9.htm>)

⁹ See the House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at Paras 147-157.

¹⁰ When states become parties to international human rights treaties, they are allowed to ‘suspend’ some of the rights under those treaties in certain situations or circumstances until the situation or circumstance that gave rise to the ‘suspension’ has come to an end. This is called derogation. For example, a state may ban people from travelling to some parts of the country during an outbreak of an epidemic. This may be interpreted by some people to mean that their right to freedom of movement has been infringed.

International and national human rights law permit such derogations.

¹¹ *Prosecutor v Furundzija* op cit Para 153.

¹² Ibid at Para 151. In other words, all countries of the world are ‘hurt’ when a person is subjected to torture by another country. It does not matter whether the person tortured is a citizen of country A or B. All countries have a duty to ensure that torture is not committed by their officials and also that it is not committed by other countries.

¹³ Ibid at Para 154.

¹⁴ Ibid at Para 155.

¹⁵ *Filartiga v Pena-Irala* [1980] 630f (2nd Series) 876 US Court of Appeals 2nd Circuit at 890.

barbarity which “no civilized society condones,”¹⁶ “one of the most evil practices known to man”¹⁷ and “an unqualified evil”.¹⁸

Following from the status of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as “they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution”.¹⁹ The CAT therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, CAT places the obligation on states to **either prosecute or extradite** any person suspected of committing a single act of torture. Doing nothing is not an option.

Although South Africa does not have the crime of torture defined on the statutes, common law crimes such as assault and attempted murder have been used to prosecute officials. This is, however, not satisfactory and the use of common law is, according to the Committee against Torture, inadequate to prosecute perpetrators of torture:

By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention’s overarching aim of preventing torture and ill treatment. Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself and c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.²⁰

Signing and ratification

In the above, reference was made to the signing and ratification of CAT by states. A few comments are needed to explain these two concepts.

By signing a convention, a state expresses, in principle, its intention to become a party to the convention or protocol. However, signature does not, in any way, oblige a state to take further action (towards ratification or not). If a state has **signed** a convention or protocol, it ‘is obliged to refrain from acts which would defeat the object and purpose of a treaty’, even if it does not

¹⁶ *A (FC) and others v Secretary for the State for the Home Department* op cit at Para 67. Even states that use torture never say that they have a right to torture people. They either deny the allegations of torture or they try to justify it by calling it different names such as ‘enhanced interrogation techniques’ or ‘intensive interrogation.’ They know that torture should not be used under any circumstances.

¹⁷ Ibid at Para 101.

¹⁸ Ibid at Para 160.

¹⁹ *Ex parte Pinochet* (no. 3), 2 All ER 97, pp 108-109 (Lord Browne-Wilkinson) citing *Extradition of Demjanjuk* (1985), 776 F2d 571 in Robertson, G. (2006) *Crimes against Humanity – the struggle for global justice*, Penguin, London, p. 267.

²⁰ Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 11

take active steps to implement the convention or protocol.²¹ In the context of CAT this means that a state that has signed it, will refrain at minimum from committing acts of torture. **Ratification** involves the legal obligation for the ratifying State to apply the convention or protocol and to be bound by it.²² These two actions have placed significant obligations on South Africa to take measures to prevent and combat torture and CIDT. South Africa is not only obliged to refrain from actions that would defeat or undermine the objectives of CAT (a negative duty), but it must as a result of ratification implement measures to give effect to the objectives of CAT (a positive duty). Moreover, the international community can hold South Africa accountable to its obligations under CAT.

²¹ Article 18 of the Vienna Convention on the Law of Treaties, 1969.

²² “Frequently asked Questions on the Hague Convention”,
[Http://www.hcch.net/index_en.php?act=faq.details&fid=38](http://www.hcch.net/index_en.php?act=faq.details&fid=38); See also definition of ‘ratification’ in Vienna Convention on the Law of Treaties, 1969.

Chapter 2: Framing the problem in the South African context

Torture in South Africa

The use of torture in South Africa dates back to the earliest colonial times.²³ Its use must also be assumed during the several military conflicts that shaped South African history. For example, concentration camps used by the British during the Second Anglo-Boer War inflicted enormous suffering on Boer women and children and was viewed at the time by the international community as genocide.²⁴ More recent is the widespread and systematic use of torture by the apartheid regime; the study by Foster *et al*, released in 1985, provides a grim yet empirical account of the wide array of torture techniques used by the apartheid security authorities.²⁵ The wide range of torture techniques used by the apartheid security forces in combination with each other, the repeated periods of detention, disappearances, and ultimately deaths in detention victimised not only individuals and their kin, but also a society. South Africa has a long, deep and regrettable history in the use of torture.

The Truth and Reconciliation Commission (TRC) report on gross human rights violations²⁶ is extensive; nearly 4 800 incidents of torture were recorded. It is also noteworthy that the use of torture against political opponents increased from the early 1960s after state security officials received training in interrogation and counter-insurgency from France, Italy, Chile and Argentina.²⁷ Regarding torture, the TRC found “that the use of torture in the form of the infliction of severe physical and/or mental pain and suffering for the purposes of punishment, intimidation and the extracting of information and/or confessions was practiced systematically particularly, but not exclusively, by the security branch of the SAP throughout the commission’s mandate period.”²⁸ It is unfortunate that limited information on the use of torture emerged from the former government’s submission during the TRC and that even fewer perpetrators were prosecuted. As a result the Amnesty Committee of the TRC dealt with only a limited number of cases relating to torture.²⁹

²³ Van Zyl Smit (1992) *South African Prison Law and Practice*, Butterworths, Durban, p. 7.

²⁴ Packenham T (1999) *The Boer War*, Jonathan Ball Publishers, London, pp. 250

²⁵ Foster D, Davis D and Sandler D (1987) *Detention and Torture in South Africa*, James Currey, London. A preliminary report of this research was already available in 1985. For a further account of torture under apartheid see Suttner R (2001) *Inside Apartheid’s Prison*, Ocean Press, New York.

²⁶ Gross human rights violations were defined as killing, torture, abduction or severe ill-treatment, or any attempt, conspiracy, incitement, instigation, command or procurement to commit any of these acts.

[s1(ix) Promotion of National Unity Act, 34 of 1995]

²⁷ Truth and Reconciliation Commission (2003) Vol. 2 Chapter 3 Para 121 - 126

²⁸ Truth and Reconciliation Commission (2003) Vol. 2 Chapter 3 Para 220.

²⁹ ‘The Amnesty Committee received applications specifying only ninety cases of torture or assault. In addition, seventeen applications or investigations involved the use of torture and assault against an unspecified number of victims. A small number of applications involved torture in formal custody. These figures stand in sharp contrast to the 4792 torture violations recorded in HRV statements.’ [Truth and Reconciliation Commission (2003) Vol 6 Section 3 Chapter 1 para 43] For a more detailed description of

South Africa's recent political history made the drafters of the Constitution alive to the issue of torture and the importance of including the right to be free from torture into the Constitution. The right to be free from torture therefore found its way into the Interim Constitution³⁰ and the final Constitution³¹ under the heading 'Freedom and security of the person'.

The recent political history, especially during the 1980s, and the widespread use of torture by the apartheid regime against political opponents, had the unintended consequence that it left many South Africans with the impression that torture is used only against political opponents, and that since South Africa is now a constitutional democracy, torture does not happen anymore. A further perception is that criminal offenders and suspects do not hold the same moral position as political detainees, and when subjected to torture or ill-treatment, they do not invoke the same moral condemnation. The high levels of crime of the last 15 years and the extensive victimisation of South Africans have created an environment that is less sympathetic towards criminal detainees and suspects. This has even prompted politicians to make statements fuelling a departure from constitutional principles and the rule of law in order to inflict justice.³²

It is therefore important to understand 'torture', not only in the historical South African sense, but also in the much broader contemporary sense that it is envisaged by the Constitution and accepted in international law. Not only political prisoners are at risk of torture, but also common law prisoners, children in secure care facilities, and those in a host of other situations where people are deprived of their liberty at the mercy of officials of the state.³³

In the post-1994 era it has indeed been difficult for human rights activists to secure widespread acknowledgment that torture is still taking place, and furthermore, to move government to take active steps to eradicate torture. Sporadic media reports of allegations of torture have not fallen on a receptive audience; even the extensive work of agencies tasked to investigate allegations of torture and ill-treatment, such as the Independent Complaints Directorate (ICD), has been marginalised.

It is widely accepted that many of the practices of the past in the state's security and law enforcement agencies have survived, and that these sub-cultural traits are difficult to eradicate. Prison systems and police forces are close-knit communities; the wall of silence and reluctance to change is often notorious. Acknowledging and giving full recognition to prisoners and

the work of the TRC Amnesty Committee see Sarkin J (2004) *Carrots and Sticks – the TRC and the South African Amnesty Process*, Intersentia, Antwerp.

³⁰ Section 11(2) Act 200 of 1993

³¹ Section 12(1)(e) Act 8 of 1996

³² The now much-publicised statements to a gathering of police officials by the Deputy Minister of Safety and Security, Susan Shabangu, were extremely unfortunate. She reportedly said, referring to criminal suspects: 'You must kill the bastards if they threaten you or the community. You must not worry about the regulations. That is my responsibility. Your responsibility is to serve and protect.' ('We can't just shoot: cops' IOL, Reported by Ayanda Mhlongo, 15 April 2008

http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20080415103721868C917016

³³ Muntingh L (2008) *Preventing and combating torture in South Africa – a framework for action under CAT and OPCAT*, CSPRI and CSVR, Bellville and Johannesburg, p. 4.

suspects is often actively resisted in various forms, giving rise to attitudes and conditions in which torture and ill-treatment prevail with impunity.

Efforts to hold officials accused of gross rights violations accountable have seldom succeeded. Investigations are undermined, witnesses may be intimidated, fellow officials maintain a wall of silence, cases are withdrawn and trials, if they do proceed to this level, drag on forever. The cumulative effect is a culture of impunity, leaving officials with the impression that ‘nothing will happen’.

Even though South Africa ratified CAT in 1998, few measures have been taken to give effect to the obligations under this convention, despite the fact that government has admitted that torture continues to take place³⁴ and that the Chairperson of the SAHRC warned against complacency in respect of torture: ‘12 years into democracy it can be easy to be seductively relaxed and forget to look at issues of torture, inhuman, degrading and cruel treatment or punishment’.³⁵

Constitutional requirements

Because people deprived of their liberty are at risk of torture and ill-treatment, the Constitution, in section 35, spells out in unusual detail the rights of arrested and detained persons. It must be assumed that this level of detail was informed by the violations that many anti-apartheid activists suffered after being taken into custody. The UN Special Rapporteur on Torture attached great significance to the deprivation of liberty in understanding torture: ‘It is the powerless of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure’.³⁶ People deprived of their liberty do not have freedom of choice; they are entirely dependent on the officials detaining them. Any pressure exerted on a person deprived of his or her liberty must therefore be seen as an interference with the dignity of that person.³⁷ Dignity, as a constitutional value, has been discussed at length in a number of Constitutional Court cases³⁸; it has been concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.³⁹ Further, that the right to dignity is at the heart of the right not to be tortured or to be treated or

³⁴ SAHRC (2006) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)*, SAHRC, Johannesburg, p.136.

³⁵ SAHRC and APT (2006) *Report: Roundtable Discussion on the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, April 2006, http://www.sahrc.org.za/sahrc_cms/downloads/OPCAT%20Roundtable%20Discussions%20Report.pdf, Accessed 26 June 2008

³⁶ Nowak M and McArthur E (2006) ‘The Distinction between torture and cruel, inhuman or degrading treatment’ *Torture*, Volume 16, Number 3, p. 151.

³⁷ Ibid

³⁸ *S v Williams* 1995 (3) SA 632 (CC); *Minister of Home Affairs v Nicro* 2004 (5) BCLR (CC), *S v Mkwanyane* 1995 (3) SA 391 (CC)

³⁹ Chaskalson, A. (2002) Human dignity as a Constitutional Value. In Kretzmer, D. and Klien, E. (eds), *The Concept of Human Dignity in the Human Right Discourse*, The Minerva Centre for Human Rights the Hebrew University of Jerusalem Tel Aviv University, p. 134.

punished in a cruel, inhuman or degrading way.⁴⁰ The right to dignity exists, however, not only to protect individuals against conditions adversely affecting them; it also places a positive obligation on the State. The State is obliged to act proactively to prevent people's dignity from being negatively affected.

Even though dignity is a founding value of the Constitution, it is 'a difficult concept to capture in precise terms'.⁴¹ It should also be acknowledged that, since South Africa is a young constitutional democracy, the value of dignity is often poorly understood and has difficulty in taking root when many people continue to suffer the indignities of socio-economic deprivation. Whether one is referring to people deprived of their liberty or people living in informal settlements without the most basic of services, both present situations where people's rights are at risk or have already been violated. The right to dignity is an absolute one and people are not more or less deserving of it; it has universal application and cannot be derogated from. Bringing the right to dignity forth in tangible terms is of course more challenging than debating it in legal and scholarly texts. In this regard the Constitutional Court has shown great understanding in the challenges facing the government⁴², but has also been firm in ensuring that the rights of people deprived of their liberty are not eroded.⁴³

Current legislative framework

Even though the Constitution guarantees the right to freedom from torture and cruel, inhuman or degrading treatment or punishment⁴⁴, there is no specific law criminalising torture. As will be discussed further in more detail, criminalising torture is a specific requirement of CAT. The fact that South Africa does not have legislation criminalising torture does not mean that there are no legislated standards for the treatment of people deprived of their liberty. In the past 15 years, much has been done to enact new legislation setting standards for the treatment of people deprived of their liberty, and to establish procedural safeguards as well as oversight mechanisms in some instances, i.e. police custody and prisons.

People are deprived of their liberty involuntarily in numerous institutions. These are: police detention cells; prisons; the foreign national repatriation centre; psychiatric hospitals; substance abuse treatment centres; child and youth care centres⁴⁵; military detention barracks; and places where private security personnel are deployed. It is acknowledged that each of the sectors reviewed here, are in themselves a field of study in respect of the requirements of CAT. The intention is to provide a basic description here, and to highlight aspects of the applicable legislative framework.

⁴⁰ Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 276

⁴¹ Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 273

⁴² *Government of RSA and Others v Grootboom and Others* 2001(1) SA 46 (CC)

⁴³ *Minister of Home Affairs v Nicro and Others* 2005 (3) SA 280 (CC).

⁴⁴ Section 12(e) Act 108 of 1996

⁴⁵ The Children's Amendment Act (41 of 2007) has brought the various institutions where children can be detained under one umbrella term, namely child and youth care centres and reformatories, schools of industry; places of safety; secure facilities for children are now referred to as such.

Police

To date the South African Police Services (SAPS) is the only government department that has developed a policy on the prevention of torture (in 1998), acknowledges the risks involved, and is therefore categorical in its prohibition:

*The Policy makes it clear that no member may torture any person, permit anyone else to do so, or tolerate the torture of another by anyone. No exception will serve as justification for torture - there can simply be no justification, ever, for torture. Any order by a superior or any other authority that a person be tortured is therefore unlawful and may not be obeyed. The fact that a member acted upon an order by a superior will not be a ground of justification for torture.*⁴⁶

The SAPS Disciplinary Regulations do, however, not pay specific attention to the manner in which the police should treat suspects, and thus how a transgression will be dealt with. It is assumed that this matter is covered by a general obligation to comply with “*the Act, regulations or legal obligations*” as well as common and statutory law.⁴⁷

Prisons

The Correctional Services Act (111 of 1998) states that, amongst others, the purpose of the correctional system is to detain ‘all prisoners in safe custody whilst ensuring their human dignity.’⁴⁸ The Act (Chapter 2) and its accompanying Regulations⁴⁹ describe the general requirements pertaining to prison conditions and the treatment of prisoners. These are augmented by Chapter 2 of the Regulations. The more recent *White Paper on Corrections in South Africa* emphasises the rights of prisoners and their detention under conditions of human dignity that are in line with international human rights standards.⁵⁰ The White Paper does, however, not spell out which international standards are being referred to, but it must be assumed that the UN Standard Minimum Rules for the Treatment of Prisoners would be the starting point. The White Paper, as a policy document does, however, not go into any further detail in this regard. The B-Orders of the Department of Correctional Services (DCS) are, on the other hand, replete with detailed descriptions and requirements for the detention of prisoners, but the B-Orders are regarded as out of date by the DCS and are thus being overhauled. The phrasing ‘torture, cruel, inhuman and degrading treatment or punishment’ has, however, not entered the policy jargon of the DCS, neither is there any policy similar to that of the SAPS, in respect of the prevention of torture or cruel, inhuman and degrading treatment or punishment. Given the challenges that the DCS faces (e.g. overcrowding), this is a sore omission. The DCS is, however, by law obliged to submit certain mandatory reports to the Judicial Inspectorate for Correctional Services (JICS). These reports relate to deaths in custody, the use of solitary confinement, the use of mechanical restraints and segregation.⁵¹ An amendment to the

⁴⁶ SAPS (undated) Policy on the prevention of torture and the treatment of persons in custody of the South African Police Service.

⁴⁷ Department of Safety and Security SAPS Discipline Regulations, Regulation 20 (a) and 20 (z).

⁴⁸ Act 111 of 1998 S 2(b)

⁴⁹ Correctional Services Regulations (GNR 1337).

⁵⁰ Department of Correctional Services (2005) *White Paper on Corrections in South Africa* (2005), Pretoria, para 5.1.1.

⁵¹ Sections 15, 25, 30 and 31 of Act 111 of 1998.

Correctional Services Act now also makes it mandatory for heads of prisons to report any incident to the Office of the Inspecting Judge where force has been used against a prisoner.⁵²

Repatriation centre

Lindela, outside Krugersdorp, is South Africa's only detention facility for foreign nationals who are deemed to be in the country illegally and who are to be deported. Detaining illegal or undocumented foreign nationals in facilities that are separate from those for criminal offenders is in line with good practice guidelines, such as those developed by the European Committee for the Prevention of Torture (ECPT)⁵³, and as is required by article 17(3) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.⁵⁴ The same convention further requires, in article 10, that 'No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Foreign nationals are detained here in terms of Section 34 of the Immigration Act (13 of 2003) as amended by the Immigration Amendment Act (19 of 2004).⁵⁵ Furthermore, such detention must be in compliance with the 'minimum prescribed standards protecting his or her dignity and relevant human rights.'⁵⁶ The 2005 regulations to the Immigration Act sets the minimum standards of detention in Appendix B and bear notable resemblance to the standards of detention described in the Correctional Services Act.⁵⁷ It should furthermore be noted that the operation of the Lindela Repatriation Centre has been sub-contracted by the Department of Home Affairs to a private company.⁵⁸ It is not known whether the contract between the Department of Home Affairs and the private operator covers the conditions of detention and the prevention of torture and CIDT.⁵⁹ A further shortcoming in respect of the Lindela Repatriation Centre is that there is no designated oversight structure similar to the JICS.

Psychiatric hospitals

The involuntary placement of citizens in psychiatric establishments is provided for in the Mental Health Care Act (17 of 2002), and is further supported by the General Regulations accompanying the Act.⁶⁰ Of particular concern in psychiatric hospitals are: the use of patients as auxiliary staff

⁵² Section 26 of the Correctional Services Amendment Bill 32 of 2007 amends section 32 of the principal Act to include "(6) All instances of use of force in terms of subsections (2) and (3) must be reported to the Inspecting Judge, immediately."

⁵³ The ECPT Standards: "*Substantive sections of the ECPT's General Reports*", (2004) Council of Europe, p. 41.

⁵⁴ Adopted by General Assembly resolution 45/158 of 18 December 1990

⁵⁵ S 13 of 2002 as amended by the Immigration Amendment Act, 19 of 2004.

⁵⁶ S 34(1)(e)

⁵⁷ Immigration Regulations, GN R616 in GG 27725 of 27 June 2005, Annexure B: Minimum Standards of Detention. (In *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs intervening)* 2005 (1) SA 247 (C), the Regulations published under GenN 352 in GG 24952 of 8 March 2004 were declared *ultra vires* and were set aside.)

⁵⁸ 'Tender gekonkel oopgevlek' *Die Burger* (16 November 2006) p. 8.

⁵⁹ Efforts by Lawyers for Human Rights (LHR) to obtain a copy of the service level agreement have been unsuccessful to date. (Telephonic interview with LHR Representative (Johannesburg) 30 April 2007).

⁶⁰ Mental Health Care Act (17 of 2002) General Regulations, No. 7578, Vol 452, 14 February 2003, No. 24384.

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.⁶¹ The standards of treatment and required conditions in facilities are set out in Sections 9, 10 and 11 of the Mental Health Care Act. Section 9 deals with consent to care, treatment and rehabilitation services and the admission of users of the health care system to such facilities.⁶² Section 10 protects users of the health care system against unfair discrimination. Section 11(1) deals specifically with exploitation and abuse by any person, body and organisation providing services under the Act, and places a guarantee of protection and care on all system users.⁶³ Section 11(2) further places an obligation on any person who witnesses the abuse of a mental health care system user to report this in the prescribed manner.⁶⁴ Chapter 4 of the Mental Health Care Act establishes Mental Health Review Boards whose responsibility it is to monitor system performance and the rights of mental health care system users.⁶⁵ It appears that while the Mental Health Care Act has the intention of protecting the rights of system users, the mechanisms for achieving this are not well developed. It must also be inferred that the absolute prohibition of torture has not been communicated to staff, as there is no reference to it in the regulatory or legislative frameworks.

Substance abuse treatment centres

At the time of writing the Prevention of and Treatment for Substance Abuse Bill (B12 of 2008) was before Parliament and had not been finalised. Treatment centres that focus on rehabilitation from substance abuse and addiction are established in terms of the Prevention and Treatment of Drug Dependency Act (20 of 1992). The Act does not prescribe any standards in respect of protection against torture and CIDT. The Regulations to the Act⁶⁶ provide clarity on some of the operational matters, but generally are weak in protecting the rights of patients and ensuring the implementation of a proactive human rights regime.

An interesting development in furthering the rights of detained persons in substance abuse treatment centres are the *Minimum norms and standards for in-patient treatment centres*

⁶¹ Council of Europe (2004)The ECPT Standards: "Substantive sections of the ECPT's General Reports", Council of Europe, pp.51 – 60.

⁶² Consent for admission to a mental health care facility can be given by the health care user him- or herself. Admission may also be authorised by a court or a Review Board, or due to mental illness, a person may be admitted to a facility if any delay in treatment may result in the severe consequences as set out in s9(c)(i)-(iii) of the Act.

⁶³ Every person, body, organisation or health establishment providing care, treatment and rehabilitation services to a mental health care user must take steps to ensure that -
(a) users are protected from exploitation, abuse and any degrading treatment;
(b) users are not subjected to forced labour; and
(c) care, treatment and rehabilitation services are not used as punishment or for the convenience of other people.

⁶⁴ A person witnessing any form of abuse set out in subsection (1) against a mental health care user must report this fact in the prescribed manner.

⁶⁵ Lund C, Stein DJ and Flusher AJ (2007) 'Editorial' SAMJ , Vol. 97, No. 5, p. 352.

⁶⁶ Regulations under the Prevention and Treatment of Drug Dependency Act, 1992 (Act 20 of 1992), No. 14759, 30 April 1993, No. R 721.

published by the Department of Social Development in 2005.⁶⁷ Chapter 8 of *The Minimum norms and standards* deals with the matters of abuse, exploitation and safety of patients. Abuse is defined in Standard 8.5 as ‘any activity or procedure that is negligent, demeaning, exploitative or abusive and/or threatens their physical, sexual, and emotional safety or their recovery process.’ The definition of abuse is further enhanced by Standard 8.7, which places a prohibition on activities that may be engaged in under the guise of behaviour management. Standard 8.11 deals with the use of seclusion and restraint and describes the procedure and requirements in detail. The *Minimum Norms and Standards for Inpatient Treatment Centres*⁶⁸ substantially clarify a range of matters by defining what is appropriate and inappropriate, and by detailing the duty of care and protection placed on centre managers. Whilst the Standards do not use the terminology of torture and CIDT, Standard 8.7 lists activities that have been associated with the abuse of patients in treatment centres. The conceptualisation of torture therefore needs to be seen within the framework that ill-treatment may take place supposedly for behaviour change or curative purposes. The level of detailed standards developed for treatment centres is regarded as positive and would facilitate the prevention of torture and CIDT, and the enforcement of legislation criminalising torture. The training of staff at government treatment centres on the *Minimum Norms and Standards* commenced in 2007. The expectation is that the staff from these facilities will in turn train the staff of privately operated facilities.⁶⁹

Children

Child and youth care centres (which now incorporate what was formerly known as places of safety, secure-care facilities, reformatories and schools of industries) are established in terms of section 195 of the Children’s Amendment Act (41 of 2007). It mandates the MEC for social development in that province to establish and operate child and youth care centres for that province. A child and youth care centre is a facility for the provision of residential care to more than six children outside the child’s family environment, but excludes a partial care facility, drop-in centre, boarding school, school hostel or residential facility attached to a school, a prison or any other facility that is maintained primarily for the tuition or training of children other than an establishment for children ordered by a court to receive training or tuition.⁷⁰

In respect of preventing torture and ill-treatment, the Children’s Act takes a four-pronged approach. Firstly, it establishes minimum norms and standards with reference to child protection⁷¹, and for child and youth care centres.⁷² Secondly, it places a general responsibility on persons who may have contact with children to report to the appropriate authorities or the police any suspected abuse or neglect.⁷³ Thirdly, it compels the Department of Social Development or a designated child protection organisation to conduct an investigation into the reported suspicion of neglect or abuse of a child⁷⁴ or to conduct an inspection of a centre

⁶⁷ National Department of Social Development *Minimum norms and standards for inpatient treatment centres* (2005).

⁶⁸ National Department of Social Development *Minimum norms and standards for inpatient treatment centres* (2005).

⁶⁹ Telephonic interview with representative from the Dept of Social Development, 24 April 2007.

⁷⁰ s191(1)

⁷¹ s106

⁷² s194

⁷³ s110(1-3)

⁷⁴ s110(5-6)

operating as an unregistered centre.⁷⁵ Fourthly, it provides for a Quality Assurance Process (QAP) of a child and youth care centre.⁷⁶

At the time of writing, the Regulations to the Children's Act had not been finalised, but it can be expected that at least some of the positive features of the previous regulations⁷⁷ will be incorporated into the new regulations. For example, very specific guidance was given on the rights of children (see Regulation 31) and the duties of care of facility managers. In fact, Regulation 32(3) lists the particular activities and management practices that are expressly forbidden.⁷⁸

The training of child care workers was only recently formalized in terms of unit standards for both auxiliary (in April 2005) and professional child care workers (in April 2007). The unit standards deal with the Regulations and legislation, and therefore deal with the protective

⁷⁵ s304(1)

⁷⁶ s211

⁷⁷ No. 18770, issued on 31 March 1998.

⁷⁸ The following prohibited behaviour management practices shall not be used by any person in a children's home, place of safety, school of industry, shelter or by a foster parent:

- a) Group punishment for individual behaviour;
- b) threats of removal, or removal from the programme;
- c) humiliation or ridicule;
- d) physical punishment;
- e) deprivation of basic rights and needs such as food, clothing, shelter, bedding;
- f) deprivation of access to parents and family;
- g) denial, outside of the child's specific development programme, of visits, telephone calls or correspondence with family or significant others;
- h) isolation from service providers and other children admitted to the children's home, place of safety, school of industry, shelter or in the custody of a foster parent; other than for the immediate safety of such children or such service providers in the children's home, place of safety, schools of industry, shelter or in the custody of a foster parent, as the case may be, only after all other possibilities have been exhausted, and then under strict adherence to policy, procedure, monitoring and documentation;
- i) restraint, other than for the immediate safety of the children or service providers in the children's home, place of safety, schools of industry or shelter, as the case may be, and only as an extreme measure: Provided that such a measure is governed by specific policy and procedure, can only be undertaken by service providers trained in this measure, and must be thoroughly documented and monitored;
- j) assignment of inappropriate or excessive exercise or work;
- k) undue influence by service providers regarding their religious or personal beliefs including sexual orientation;
- l) measures which demonstrate discrimination on the basis of cultural or linguistic heritage, gender, race, or sexual orientation;
- m) verbal, emotional or physical harm;
- n) punishment by another child; and
- o) behaviour modification such as punishment, reward systems, or privilege systems, other than as a treatment or development technique within a documented individual treatment or development programme which is developed by a team which the child is part of and monitored by an appropriately trained multi-disciplinary team.

measures in the Act and Regulations. They do, however, not deal with the prohibition of torture or CAT.⁷⁹

Military detention

The Military Discipline Supplementary Measures Act (16 of 1999) provides for a separate system of courts, investigative procedures, prosecuting authority and court procedure. In support of the Military Discipline Supplementary Measures Act there is the Military Discipline Code (MDC),⁸⁰ collectively ‘aimed at the maintenance of discipline essential for a fighting force that is necessary in peacetime as it is in wartime’.⁸¹ The types of punishment that military courts can impose differ in some respects from those that can be imposed by the civilian criminal courts. Section 12 of the Military Discipline Supplementary Measures Act, read together with Sections 32, 92 and 93 of the MDC set out the different punishment options. Some of the punishments listed (e.g. field punishment and corrective punishment) may, upon closer scrutiny, be found to be in contravention of the Constitution and CAT, as they entail the forced performance of physical exercise.⁸² Confinement to barracks imposes additional duties and orders on the person and prohibits him or her from other extra-mural and leisure activities. In section 120 the MDC provides for the establishment of detention barracks and the formulation of regulations to manage such facilities.⁸³ ⁸⁴ Detention barracks are not subject to independent oversight and there is only an internal complaints mechanism. In overview, there does not appear to be anything in the existing legislation and regulations governing the detention of persons in military facilities that could be regarded as reflecting in any sense the objectives of CAT. In view of this it is unlikely that the staff working in such facilities have received training on the provisions of CAT and the absolute prohibition of torture.

⁷⁹ Telephonic interview with representative from the National Association of Child Care Workers, 25 April 2007.

⁸⁰ As the First Schedule to the Defence Act 44 of 1957 which was not repealed by Act 42 of 2002.

⁸¹ M Carnelley ‘The South African Military Court System – Independent, Impartial and Constitutional?’ (2005) 33 *Scientia Militaria* 77.

⁸² Defence Act 44 of 1957, Military Discipline Code, Schedule 1: Field punishment may be imposed only outside the Republic of South Africa and entails ‘the performance in custody in the field of such labour and extra drills and duties as may be prescribed’. Military Discipline Supplementary Measures Act 16 of 1999, section 1(viii): Corrective punishment means ‘additional supervised training, work or drill for two hours per working day, done or carried out within unit lines’.

⁸³ There are two such facilities, one in Wynberg (Cape Town) and one in Bloemfontein, which are part of the Military Police.

⁸⁴ At the time of writing it was understood from the Department of Defence (DoD) that regulations pertaining to detention barracks were in the process of being redrafted and had not yet been submitted for promulgation. It therefore is not possible at this stage to assess the regimes and management practices that apply to the detention barracks. (Telephonic interview with representative from the Office of the Chief: Legal Services, DoD, on 1 October 2008.)

Chapter 3: The UN Convention against Torture and South Africa

Overview of CAT

A complete version of CAT is attached as Appendix 1; this section will provide an overview of the Convention's content. CAT consists of three parts, with a total of 33 articles. Part 1 of the CAT describes what torture is and what must be done by States Parties in their jurisdictions to prevent and combat torture. Part 2 of CAT establishes a treaty monitoring body (the Committee against Torture) and explains the relationship and interaction between the Committee and States Parties, as well as the Committee and individuals. Part 3 deals with administrative and legal provisions. Each of these three parts is described in more detail below with reference to the core issues in each article. A more detailed discussion follows below in 'The Duties of South Africa under CAT'.

Part 1 of CAT

Part 1 of CAT (Articles 1- 16) deals with the definition of torture and the measures States Parties must implement to give effect to the prevention and combating of torture and CIDT:

- Article 1 - provides the definition of torture
- Article 2 - states the overall duty of states to implement measures and that no exceptional circumstance is a justification for torture
- Article 3 - requires adherence to the principle of *non-refoulement*⁸⁵
- Article 4 - states the duty to criminalise torture in domestic law
- Article 5 - states the duty to establish jurisdiction over acts of torture
- Article 6 - states the duty to arrest and investigate any person who is suspected of having committed torture
- Article 7 - states the duty to either prosecute or extradite a person who is suspected of having committed the crime of torture
- Article 8 - provides for the extradition of perpetrators and suspected perpetrators of torture between states, in the existence or absence of extradition treaties.
- Article 9 - provides for mutual assistance in civil proceedings in relation to the crime of torture
- Article 10 - states the duty to educate and train all relevant personnel on the absolute prohibition of torture

⁸⁵ *Non-refoulement* is a principle of customary international law that prohibits states from returning a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' Article 33 of the Convention relating to the Status of Refugees (Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950)

- Article 11 - states the duty to systematically review policies, practices and procedures relating to the treatment of people deprived of their liberty
- Article 12 - states the duty to ensure prompt, thorough and impartial investigations by competent authorities
- Article 13 - states the duty to ensure that the right to lodge a complaint alleging torture is upheld
- Article 14 - states the duty to ensure redress to victims of torture
- Article 15 - gives the rule regarding evidence obtained through torture
- Article 16 - extends the prohibition of torture to CIDT with particular reference to Articles 10, 11, 12, 13

In Part 1 of the Convention the distinction can also be drawn between judicial means of protection against torture (i.e. criminalisation, investigation, arrest, prosecution, punishment and extradition) and non-judicial means of protection against torture (i.e. education, training, policies, policy review and practice review.⁸⁶

Part 2 of CAT

Part 2 of CAT (articles 17 – 24) establishes the Committee against Torture as treaty monitoring body and explains the relationship between the Committee and States Parties to the Convention:

- Article 17 – establishes a Committee of ten experts, the election procedure and the term of office
- Article 18 – mandates the Committee to elect its office bearers and develop its own rules of procedures, and describes operational matters in respect of expenses
- Article 19 – requires that States Parties to the Convention submit an Initial Report to the Committee within one year of ratification and then every four years thereafter, or as is required, on measures taken to give effect to the Convention
- Article 20 – if the Committee receives reliable information on the systematic use of torture, it may in consultation with the State Party concerned investigate such claims
- Article 21 – the Committee may receive information from other States Parties if it is believed that a State Party is not fulfilling its obligations under CAT, provided that the State Party concerned made a declaration recognising the competence of the Committee to receive such reports
- Article 22 - the Committee may receive information from individuals claiming to be victims of violations of the Convention, provided that the State Party concerned made a declaration recognising the competence of the Committee to receive such reports
- Article 23 – explains the status of Committee members on missions
- Article 24 – requires that the Committee submit an annual report to the States Parties and the UN General Assembly.

Part 3 of CAT

⁸⁶ Evans M (2002) 'Getting to grips with Torture' *International and Comparative Law Quarterly* April 2002, p. 1. Although the distinction was made by Evans in respect of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), it also applies to CAT.

Part 3 of the Convention (Articles 25 -33) deals with administration, amendments to the CAT and the duties of the UN Secretary-General:

- Article 25 - opens CAT for signature and ratification
- Article 26 – opens CAT to accession by states⁸⁷
- Article 27 – provides for the entry into force of CAT after the twentieth state has ratified or acceded to the Convention
- Article 28 – provides for declarations not recognising the competence of the Committee in respect of Article 20
- Article 29 – sets the procedures for amendments to the Convention
- Article 30 – describes the procedure for dealing with disputes between States Parties arising from the interpretation of the Convention
- Article 31 – provides for the denunciation of the Convention by a State Party and the procedures for this
- Article 32 - explains the duties of the UN Secretary-General in respect of CAT with reference to informing UN members with particular reference to signatures, ratifications, accessions, entry into force, amendments and denunciations
- Article 33 – deals with the official languages of the UN and distribution of the Convention to all States.

A definition of torture and CIDT

Defining torture proved to be a challenging task, given the wide range of contexts, but more importantly, the vast array of means and situations that can be exploited to inflict torture and CIDT. The Universal Declaration of Human Rights (1948) states in Article 5 the right to be free from torture and cruel, inhuman or degrading treatment or punishment. The International Covenant on Civil and Political Rights (1966) (ICCPR) similarly, in Article 7, confirms the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. Other instruments predating the adoption of CAT also make reference to torture, again without defining it (e.g. Geneva Conventions with reference to common Article 3 and the Additional Protocols I and II). The first instrument defining torture is the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1975).⁸⁸ It would, however, take another nine years for the UN General Assembly to agree on a definition of torture when it adopted CAT in 1984.

CAT defines torture in Article 1 as follows:

⁸⁷ See Article 15 of the Vienna Convention on the Law of Treaties, 1969.

⁸⁸ Article 1: 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.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. (Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975)

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

Based on this definition, four conditions are required for an act to qualify as torture:

- **It must result in severe mental and/or physical suffering:** It must be emphasised that torture is not restricted to physical suffering resulting from, for example, beatings or electrical shocks. Mental or emotional pressure applied to a person may also constitute torture; for example, threatening to harm a person's family. The requirement that it must result in 'severe' suffering is not an absolute and objective standard and will depend on the facts of the case and the context in which the acts occurred.
- **It must be inflicted intentionally:** Article 1 requires that such acts must be inflicted intentionally for such purposes as obtaining information, a confession, or punishment, intimidation, or motivated by reasons of discrimination. It is important to note that the definition reads 'for such purposes as' and what follows should be understood to serve as examples and not an exhaustive list of purposes set down by the Convention. An act may therefore still meet the requirement of purpose if the purpose was something other than those listed in Article 1.
- **It must be committed by or with the consent or acquiescence of a public official:** An act of torture may be committed directly by a public official, for example, by assaulting a criminal suspect. It may also be committed by a person who is not a state official, but with the consent of a state official. An act of torture may also occur if a state official omits or fails to do something that could have prevented the infliction of severe mental and/or physical suffering being inflicted upon another person by non-state officials.
- **It excludes pain and suffering as a result of lawful actions:** The fact that something is 'lawful' does not mean that it is necessarily consistent with the objectives of CAT. For example, punishments such as the death penalty and corporal punishment will inflict severe physical and mental suffering. The Constitution of Botswana allows for corporal punishment to be inflicted as a form of punishment even though Botswana ratified CAT in 2000.⁸⁹ The legal situation in South Africa in respect of punishment is fortunately clearer since the abolition of both the death penalty and corporal punishment. There are, however, other areas of state operations where force is used, that could fall in the

⁸⁹ Upon ratification, Botswana entered the following reservation:"The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana."

<http://www2.ohchr.org/english/bodies/ratification/9.htm#reservations> Accessed 3 July 2008.

The Special Rapporteur on Torture has specifically asked for corporal punishment as a form of punishment

to be abolished in all jurisdictions. [UN Special Rapporteur on Torture (undated) *General*

Recommendations of the Special Rapporteur on Torture,

<http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm> Accessed 4 July 2008.]

grey area of what is lawful and what is not, for example, whether the use of force in quelling a prison riot exceeded the minimum threshold.

Whereas CAT defines torture in Article 1, no definition is provided for CIDT; this has been the subject of much scholarly writing as well as court decisions.⁹⁰ The key question is whether something is inherently torture or, if it becomes torture when a certain threshold is transgressed and CIDT meets the requirements of the definition of torture? The UN Declaration against Torture, in Article 1.2, refers to aggravation: ‘Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’ The CAT definition does, however, not make the link that torture is an aggravated form of CIDT, but the Committee against Torture invokes the concept of ‘degree of severity’ to distinguish torture from CIDT.⁹¹ Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment are left to courts to decide.⁹² A growing body of international case law on this issue provides increasing guidance and South African courts should take note of these.⁹³

Scholars have also spent many hours questioning the relationship between torture, on the one hand, and CIDT, on the other hand. Can acts that do not in themselves constitute torture, amount to torture when applied over a prolonged period? When does cruel, inhuman or degrading treatment become torture? These are vexing questions that will keep courts and scholars occupied for decades to come. Despite these challenges, it should be noted that both torture and CIDT are prohibited under CAT (see Articles 1 and 16), and that protection against CIDT is also guaranteed in Section 12 (e) of the South African Constitution. There is an obligation on States Parties to prevent both torture and CIDT. Experience has also demonstrated that the conditions that give rise to CIDT frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent CIDT.⁹⁴

In an article that pre-dates General Comment 2 of the Committee against Torture, the current UN Special Rapporteur on Torture takes a view different from that of the Committee on the distinction between torture and CIDT. He argues that while a proportionality test⁹⁵ can be applied when a person is free and the state (e.g. the police) uses force to achieve a legitimate aim such as arrest, the same proportionality test cannot be applied when a person is deprived of his or her liberty:

⁹⁰ For a discussion on changes in the interpretation of the definitions of torture see Rodley N (2002) ‘The Definitions of Torture in International Law’ *Current Legal Problems*, Vol. 55, pp. 467-493.

⁹¹ UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 10.

⁹² See *Ireland v UK* 1976 2 EHRR 25; Rodley N.S. (2002) ‘The Definition of Torture under International Law’ *Current Legal Problems*, Oxford University Press, Vol. 55, pp. 467-493.

⁹³ See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002; Cantoral Benavides Case (2000) I-A Ct. HR, Ser. C, No. 69 (Peru);

⁹⁴ UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 3.

⁹⁵ The Special Rapporteur refers to the proportion of force used to achieve a legal objective and whether the force used was proportional to the situation. The Committee against Torture refers to ‘degrees of severity’.

[this] has led me to the conclusion that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim. . . As soon as the person concerned is, however, under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted. If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession or information, it must even be considered as torture. It is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test.⁹⁶

The duties of South Africa under CAT

This section deals with the duties of South Africa under CAT as they are described in Part 1 and Part 2 of the Convention. Where appropriate some contextual information is provided to explain particular obligations and issues.

The duty to prevent torture and CIDT

Article 2(1) of the Convention requires South Africa to ‘take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction’. Even though the major thrust of the CAT is to criminalise torture and ensure the prosecution of perpetrators, it clearly states that prevention is better than cure. It encourages the state to use the established and accepted means at its disposal (legislative, administrative and judicial) to prevent torture and then provides the mandate to use any other measures that are effective in preventing torture. This positive obligation to protect people’s right to be free from torture is in line with the duty placed on the state by the Constitution: ‘The state must respect, protect, promote and fulfil the rights in the Bills of Rights.’⁹⁷

Years of research and experience in the prevention of torture in other jurisdictions have demonstrated that visiting and monitoring places of detention is the most effective mechanism in preventing torture and ill-treatment.⁹⁸ The JICS, established under the Correctional Services Act, fulfils such a duty by means of Independent Prison Visitors (IPV) who regularly visit prisons, conduct inspections and hear complaints from prisoners. A similar system does, however, not exist for police cells, military detention barracks, the immigration centre, psychiatric hospitals, and child and youth care centres.

The Optional Protocol to CAT (OPCAT) provides the framework for such a visiting mechanism for places where people are deprived of their liberty. South Africa signed OPCAT in September 2006

⁹⁶ Nowak, M and McArthur E (2006) ‘The distinction between torture and cruel, inhuman or degrading treatment’ *Torture* Vol. 16 No. 3, pp. 150-151

⁹⁷ S 7(2) of the Constitution

⁹⁸ Ludwidge, F. (2006) The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture, *Helsinki Monitor*, 1, p.70.

but has not yet ratified it, and a visiting mechanism has to date not been established or designated.⁹⁹

The duty to abide by the peremptory norm

In the above ('The status of the prohibition of torture') it was explained that the prohibition of torture is a peremptory norm of general application in international law. Articles 2(2) and 2(3) of CAT give specific guidance on this, stating that there is no justification, not even exceptional reasons, for the use of torture. Five reasons that have been commonly used as a justification for torture are listed and specifically excluded. These are: a state of war, the threat of war, internal political instability, any public emergency, and orders from a superior officer. Whereas the first four reasons refer to larger scale situations, such as war or political instability, orders from a superior officer refers to adhering to the prohibition on an individual level. In effect it means that every official, in his or her individual capacity, has a duty to uphold the prohibition of torture. Even if a superior officer instructs a junior to commit an act of torture, the duty rests with the junior officer to refuse to carry out the order because it is an inherently illegal order and a violation of the prohibition of torture.

The Constitution, in sections 12(d) and 12(e), ensures the right to be free from torture and CIDT. In section 37 the Constitution deals with calamities of a societal scale under the heading 'States of emergency' and therefore speaks to the conditions described in Article 2(2) of CAT. Under such a state of emergency it is possible that certain rights may be curtailed, for example freedom of movement when a highly infectious disease is spreading through the population. However, section 37 also includes a Table of Non-Derogable Rights. These are rights that may never, not even under a state of emergency as defined in the Constitution, be derogated or departed from. The right to be free from torture and the right to be free from treatment or punishment that is cruel, inhuman or degrading are included in the Table of Non-Derogable Rights. CAT therefore does not place any higher duty on South Africa in this respect than what the Constitution already imposes. Adherence to the Constitution will therefore ensure compliance with the peremptory norm on the prohibition of torture, even under exceptional circumstances.

In recent years the 'war on terror' has raised vexing questions about the use of torture and what qualifies as torture. A well-known example is the scenario of the ticking bomb, the main features of it being as follows:¹⁰⁰ A terrorist has been captured. He knows where a large bomb that will explode soon is hidden in a very crowded area, which would result in the deaths of tens if not hundreds of people. The terrorist does not want to disclose the locality of the bomb. These appear to be exceptional circumstances - if many lives can be saved by torturing one person to obtain information regarding the locality of the bomb so that it can be defused, is this not justifiable?

The scenario provides an interesting exercise in philosophical and moral debate, but it is not based on reality and must not be used to justify the use of torture and CIDT to serve some

⁹⁹ For more information on OPCAT see Muntingh L (2008) *Preventing and combating torture in South Africa – a framework for action under CAT and OPCAT*, CSPRI and CSVR, Bellville and Johannesburg.

¹⁰⁰ For a full description of the ticking bomb scenario see APT (2007) *Defusing the Ticking Bomb Scenario: Why we must say No to torture, always*, APT, Geneva,
http://www.apt.ch/component/option,com_docman/task,cat_view/gid,115/Itemid,59/lang,en/

higher moral objective, such as saving lives. The ticking bomb scenario creates doubt about the absolute prohibition of torture; proponents of the ticking bomb scenario would like to see broad acceptance of a legal provision for the use of torture in exceptional cases. The scenario is also based on a number of assumptions that can be easily debunked, as they are designed to point to a particular moral dilemma and are not based on reality. Allowing the use of torture in one ‘exceptional situation’ removes the force of the peremptory norm prohibiting torture. Moreover, allowing torture in one situation opens the door for it to be allowed in another and yet another situation; it opens the door to legally violate peremptory norms in international law and places the legal notion of human dignity under attack. On the ticking bomb scenario, the Association for the Prevention of Torture (APT) concludes: ‘Torture is of the same species as genocide and slavery. The political and legal projects that have become associated with the ticking bomb scenario must be rejected in precisely the same way we would meet any proposal for the use of genocide or slavery: with condemnation, shame, abhorrence, and a resounding and absolute “NO”.¹⁰¹

The duty to protect foreign nationals

When people’s safety and lives are endangered, they have the right to leave that state and be permitted entry into the first country they come to where they fear no persecution.¹⁰² In the aftermath of the Second World War, the Universal Declaration of Human Rights (1948) (UDHR) established this right: ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’. The exception to this right is that it is not extended to individuals fleeing from prosecutions resulting from non-political crimes or acts contrary to the purposes and principles of the UN.¹⁰³ However, under the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, the definition of refugees is extended to people fleeing from, amongst others, ‘events seriously disturbing the public order’.¹⁰⁴ The first duty is therefore to allow foreign nationals entry and protection provided that they have a well founded fear of persecution should they remain in the country of origin.

Three years after the adoption of the UDHR, the Convention on the Status of Refugees (CSR) was adopted in 1951.¹⁰⁵ This CSR affirmed the right to seek asylum as set out in the UDHR, but importantly, it placed a further duty on states. A State Party to the Convention cannot expel or return (‘refoulere’) a person to a country where that person’s ‘life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.¹⁰⁶

It is from this basis that Article 3 of CAT obliges States Parties not to return or extradite a person to another state where there are ‘substantial grounds for believing that he would be in danger

¹⁰¹ APT (2007) *Defusing the Ticking Bomb Scenario: Why we must say No to torture, always*, APT, Geneva, p. 23, http://www.apt.ch/component?option=com_docman/task,cat_view/gid,115/itemid,59/lang,en/

¹⁰² Robertson G (2006) *Crimes against Humanity*, Penguin Books, London, p. 111.

¹⁰³ UDHR Article 14.

¹⁰⁴ Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969/1974

¹⁰⁵ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950

¹⁰⁶ Article 33

of being subjected to torture'. In reaching a conclusion on whether there are grounds to believe that a person would be in danger of being subjected to torture, the state concerned should take into account all relevant information and pay particular attention to the existence of reports indicating 'a consistent pattern of gross, flagrant or mass violations of human rights'. The violations are therefore not restricted to torture alone, but would include any other violations of a significant nature or scale. The European Court of Human Rights (ECtHR) has set an even lower standard by referring to the existence of a 'real risk' that the person in question may be subjected to torture if he is returned to that jurisdiction.¹⁰⁷

The obligation to *non-refoulement* was the substance of a Constitutional Court judgment in 2001 in *Mohamed and another v President of the Republic of South Africa and six others*.¹⁰⁸ The Court found that Mohamed was handed over to US authorities unlawfully and in violation of his constitutional rights. (The case is discussed in more detail in Chapter 5.) Khalfan Khamis Mohamed, a suspect in the 1998 bombings of the US embassies in Tanzania and Kenya, was arrested by South African authorities cooperating with the FBI in October 1999 in Cape Town. He was handed over to agents of the FBI and transferred to the USA to stand trial in New York, without seeking assurances from US authorities that he would not face the death penalty there. Given the severity of the charges against Mohamed, he was exposed to receiving the death penalty if convicted. In the judgment, the Constitutional Court notes the importance of not drawing a distinction between deportation and extradition; it does not matter how a person is removed from one state and handed over to another: 'All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case'.¹⁰⁹ It proceeds to note South Africa's obligation in respect of *non-refoulement*, as it had ratified CAT less than a year earlier to its handing Mohamed over to US authorities.¹¹⁰

The Mohamed case pointed to a serious failing of the state in protecting individuals against torture and CIDT in respect of Article 3 of CAT. It would, however, not be long before similar cases emerged, namely that of the Pakistani national, Khalid Rashid, and two Jordanian nationals. In 2006 Amnesty International (AI) reported its concerns to the Committee against Torture regarding the treatment of asylum seekers, illegal immigrants and terrorism suspects. AI raised particular concerns about *refoulement* and gave a detailed account of events surrounding the handing over of Khalid Rashid to Pakistani authorities on 6 November 2005. AI cited two further cases, the one involving Mohammed Hendy and the other Jamil Odys (both Jordanian nationals) who in April 2004 were arrested by the police, who suspected them of links to terrorist organisations. They were held *incommunicado* in police cells in Pretoria. Odys was deported, whereas Hendy's lawyers were able to secure his release through a *habeas corpus* action in the High Court. The AI submission also noted with concern a statement made by the Commissioner of Police to Parliament in May 2004 that the security services had in April of that

¹⁰⁷ *Saadi v Italy*, ECtHR, Application 37201/06, Delivered 28 February 2008, see paras 125, 128, 138, 140 and 146

¹⁰⁸ CCT 17/01

¹⁰⁹ Para 60

¹¹⁰ Para 60

year arrested and deported a number of ‘terrorism suspects’ but he refused to provide further details.¹¹¹

South Africa has also become the destination of choice for many refugees in Africa; political instability in Zimbabwe has added to the influx of political and economic refugees. Large scale and indiscriminate deportations of foreign nationals create the real risk of violations of Article 3 of CAT as well as the Convention on the Status of Refugees.¹¹² The Refugees Act (130 of 1998) uses wording similar to that of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa to prevent that a refugee is returned to a state where 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 that ‘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.’¹¹³

The duty to criminalise torture in domestic law

States parties to CAT have, in accordance with Article 2, a duty to take effective legislative, administrative, judicial or other measures to prevent acts of torture. While Article 4 places a very specific duty in respect of legislative measures, this should not be regarded as the only legislative duty. States may expand on this and use legislation to give effect to other measures referred to in CAT. It will be argued here that South Africa requires comprehensive legislation aimed at implementing CAT¹¹⁴ and that this legislation should not be restricted to the narrow task of defining torture as a crime in domestic legislation. In this regard the Robben Island Guidelines offer advice.¹¹⁵

Article 4 of CAT places a duty on States Parties to the Convention to enact legislation criminalising all acts of torture, attempts to commit torture, and complicity or participation in torture. To make torture an offence under domestic legislation explicitly signifies an important shift in acknowledging the nature of torture as defined in the Convention and the obligations arising from the Convention. It gives recognition to the fact that torture is different from assault or attempted murder, and that torture is an extremely serious offence:

The deliberate abuse of an individual’s physical and psychological integrity, in a way that is designed specifically to undermine their dignity, when this act is perpetrated by or on

¹¹¹ Amnesty International (2006) *South Africa – briefing for the Committee against Torture*, AFR 53/002/2006, London, p. 1.

¹¹² In 2006 it was reported that South Africa deported in excess of 3000 Zimbabweans, many of whom were ‘genuine asylum seekers’. “South Africa Criticized for Zimbabwe Deportations” World Press, Reported by Ambrose Musiyiwa, 14 January 2006

<http://www.worldpress.org/Africa/2215.cfm> See also “Group Saves 12 Refugees From Deportation” AllAfrica.com, Reported by Ella Smook, 17 December 2007,

<http://allafrica.com/stories/200712171599.html>

¹¹³ Section 2 Refugees Act (130 of 1998)

¹¹⁴ Such legislation may also address obligations under OPCAT and will need to be addressed once South Africa ratifies OPCAT.

¹¹⁵ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa, The African Commission on Human and Peoples’ Rights, meeting at its 32nd ordinary session, Held in Banjul, The Gambia, from 17th to 23rd October 2002

*behalf of someone with the very responsibility to protect rights, is devastating and disorienting to victims. Torture is not only intended to extract information or obtain a confession: its aim is the deliberate destruction of bodily and physical integrity in order to stifle dissent, intimidate opposition and strengthen the forces of tyranny. Torture aims to disorientate people to such a degree that their personalities and identities are destroyed.*¹¹⁶

Legislation dealing with the criminalisation of torture needs to address a number of substantive issues and South Africa is assisted in this regard by the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (The Robben Island Guidelines).¹¹⁷ Even though the Robben Island Guidelines leave much to be desired¹¹⁸, they remain an important contribution to the prevention and combating of torture in Africa and should be seen as part and parcel of the development of the Africa-region human rights instruments.

The definition of torture enacted in domestic legislation need not be a carbon copy of the CAT definition but must cover at minimum the elements of torture defined in Article 1, and meet the requirements of Article 4.¹¹⁹ This is also affirmed by Article 4 of the Robben Island Guidelines. An important aspect of Article 4 of CAT is that it also covers the attempt to commit torture, as well as those persons who are complicit or participate in the commission of torture. Those who torture are often assisted or encouraged by others, or may indeed be 'the tool in the hands of someone else', but this does not absolve them from or dilute their criminal responsibility.¹²⁰ Experience has also shown that states which have enacted specific legislation implementing the measures of CAT (including criminalising torture), and not relying on universal jurisdiction or humanitarian law to prosecute perpetrators, have shown themselves to be more open to try torture cases.¹²¹ The Robben Island Guidelines also encourage African states to pay particular attention in their laws criminalising torture to the prevention and prohibition of gender-based forms of torture and CIDT, as well as the torture and CIDT of young people.¹²² Seen together, CAT and the Robben Island Guidelines enable a definition of torture starting from a set of core elements which can be expanded to allow for the local context and conditions.

¹¹⁶ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London, <http://www.redress.org/publications/PoliceComplaints.pdf>, Accessed 5 February 2006.

¹¹⁷ Adopted by the African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

¹¹⁸ Mujuzi DJ (2006) *Safeguarding the Right To Freedom From Torture In Africa: The Robben Island Guidelines*, Dissertation submitted to the Centre For Human Rights, Faculty Of Law, University Of Pretoria in partial fulfilment of the requirements for the award of a Master Of Laws Degree (LLM in Human Rights and Democratisation in Africa, University Of The Western Cape, p. 57.

¹¹⁹ Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 8

¹²⁰ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Marthinus Nijhof Publishers, Dordrecht, pp. 129-130

¹²¹ Fernandez L and Muntingh L (forthcoming) *The Criminalisation of Torture in South Africa*, pp. 9-10.

¹²² Article 5 of the Robben Island Guidelines

With reference to Article 5 of CAT, the Robben Island Guidelines encourage states to **establish jurisdiction** over territories¹²³ under their control, offences covered by the definition of torture, over people (nationals and non-nationals) alleged to have committed torture, and victims of torture who are nationals of the state. The Robben Island Guidelines make specific reference to Article 5(2) of CAT to ensure that states do not provide a safe haven for perpetrators of torture and that the legislation criminalising torture must compel the state to either prosecute or extradite to be prosecuted a person suspected of having committed torture. Reference is further made in the Robben Island Guidelines that 'national courts' must have jurisdiction to prosecute cases of torture. This is not without reason and is firstly to ensure that military courts (or other specialist domestic and/or internal tribunals) do not have jurisdiction over the crime of torture, as these courts may be protective of military personnel, and secondly, to ensure that a court with the appropriate sentencing jurisdiction deals with cases of torture. In South Africa it would be inappropriate for a magistrate's court with a maximum sentence jurisdiction of three years imprisonment to deal with cases of torture.

Article 8(1) of CAT encourages states to ensure that torture is an **extraditable offence** and Article 7 of the Robben Island Guidelines supports this. Under current legislation, an extraditable offence is an offence 'which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State'.¹²⁴ Even though South Africa has not criminalized torture and would have to rely on common law crimes to prosecute perpetrators of torture, a charge of assault with intent to cause grievous bodily harm or attempted murder, would cross the six months imprisonment threshold. However, in the case of torture that did not involve physical assault a substitute common law offence attracting a sentence of six months or longer imprisonment may be problematic. If torture is indeed criminalized and a minimum sentence of six months or more imprisonment is set down, this hurdle would disappear. Both CAT, in Article 8, and the Extradition Amendment Act facilitate the extradition of suspects under international treaties and South Africa's ratification of CAT provides the basis for extraditions with other States Parties to the Convention.¹²⁵ The Robben Island Guidelines also encourage states that the extradition of a person suspected of having committed the offence of torture should be done expeditiously to avoid the impression of impunity, thereby facilitating redress to the victims of torture.

Substantively, Articles 9, 10 and 11 of the Robben Island Guidelines repeat what the CAT states in Article 2 and **affirms the peremptory norm status** of the prohibition of torture. In respect of the criminalization of torture, it is therefore proposed in the Robben Island Guidelines that legislation should specifically exclude the following as justifications or reasons for the use of torture and/or CIIDT: a state of war, the threat of war, internal political instability, any public emergency, and superior orders. Attention is furthermore drawn to "Notions such as 'necessity', 'national emergency', 'public order', and '*ordre public*'" as further reasons that may never be

¹²³ 'Territory' is used here to refer to geographical territory as well as ships and aircrafts registered to that state.

¹²⁴ s1(a) Extradition Amendment Act (77 of 1996)

¹²⁵ 'extradition agreement' means an agreement in force or deemed to be in force under section 2 including a multilateral convention to which the Republic is a signatory or to which it has acceded and which has the same effect as such agreement;". S1(b) Extradition Amendment Act No. 77 of 1996

invoked for the use of torture and/or CIDT. On the other hand, Article 13 of the Robben Island Guidelines absolves from punishment persons who refuse orders from a superior to commit acts amounting to torture and CIDT.

Article 4.1 of CAT notes that the **punishment** for torture should reflect the grave nature of the crime. The Robben Island Guidelines (Article 12) use similar wording: 'Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence'. Importantly, no exceptions are allowed and there can be no talk of amnesty. The Committee against Torture has recently expressed itself strongly in this regard: 'The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment or perpetrators of torture or ill-treatment violate the principle of non-derogability.'¹²⁶ Given the wide disparity in how different states punish offenders, neither CAT nor the Robben Island Guidelines give specific guidance, such as that the punishment must be imprisonment or even a minimum term of imprisonment, or that it may not be a non-custodial sentence. What is considered a light sentence in one country may be considered severe in another. The Committee against Torture has also not provided specific guidelines in this regard, although research conducted which solicited the individual opinions of Committee members found them supporting a custodial sentence of between six and 20 years.¹²⁷

The **production of and trade in equipment** used in torture and CIDT is not an issue specifically addressed in CAT and the Robben Island Guidelines therefore make a useful contribution in identifying this (in Article 14) as a substantive issue to be covered in domestic legislation criminalising torture.¹²⁸ Even though torture can be perpetrated with a wide range of equipment from plastic bags, pliers, rubber tubing and so forth, certain equipment does make it easier, as the president of one electroshock equipment manufacturing company explained: "*It's possible to use anything for torture, but it's a little easier to use our devices.*"¹²⁹ There is also specific equipment that can be used for no other purpose than torture such as thumbscrews, or equipment used for executions, such as gallows or electric chairs. With reference to the values of the South African Constitution, the manufacturing and trade in such equipment would be unacceptable. The use of electroshock equipment was of particular concern to the Jali Commission: "Evidence relating to C-Max Prison showed that prisoners were routinely stripped naked and searched, sometimes in front of female warders, handcuffed, assaulted and shocked with mini electrical shields before they were admitted to their cells."¹³⁰ South Africa also has a significant number of companies trading in electroshock equipment and 25 such companies were identified between 2000 and 2006.¹³¹ There is little doubt that in Africa alone there is a

¹²⁶ Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 5.

¹²⁷ Ingelse C (2001) *The UN Committee against Torture: An Assessment*, Kluwer Law International, p. 342.

¹²⁸ See also Thomas M (2006) *As used on the Famous Nelson Mandela – underground adventures in the arms and torture trade*, Ebury Press, Great Britain.

¹²⁹ John McDermit, president of Nova Products, Inc; quoted in an interview with Anne-Marie Cusa, *The Progressive*, September 1997 cited in CSPRI Newsletter No. 20, 'As Used on the Famous Nelson Mandela - the use of mechanical restraints on prisoners and detainees'

¹³⁰ Jali Commission Final Report Vol. 1 p. 37.

¹³¹ CSPRI Newsletter No. 20, "As Used on the Famous Nelson Mandela" - the use of mechanical restraints on prisoners and detainees"

growing market for these companies, and that few controls exist to regulate the end use of electroshock or other equipment.

In 2005 the Council of Europe adopted a regulation that would prohibit the manufacture of and trade in certain equipment, and regulates it in respect of others that could be used to commit torture and CIDT.¹³² This regulation came into effect in July 2006 and covers the following categories of equipment: goods designed for the execution of human beings; goods designed for restraining human beings; portable devices designed for the purpose of riot control or self-protection, and substances for the purpose of riot control or self-protection and related portable dissemination equipment. With a view to developing comprehensive South African legislation preventing and combating torture, the Council of Europe Regulation provides valuable guidance.

CAT also places a duty on States Parties to **systematically review policies, practices and procedures** in respect of interrogation rules as well as the custody and treatment of persons deprived of their liberty. For legislative purposes, this requirement should be read in conjunction with the reporting requirement under Article 19 of CAT (see discussion below under “The duty to report”) providing for periodic reporting to the Committee against Torture on measures taken to give effect to the objectives of the Convention. Legislation aimed at implementing CAT should therefore also cover the reporting duty as well as the regular and systematic review of practices and procedures pertaining to people deprived of their liberty. The four-year cycle of reporting provides a reasonable time frame for such a review to take place in, even if this is done on a sector-by-sector basis.

The duty to investigate and arrest suspected perpetrators of torture

Ensuring that there is no safe haven for perpetrators of torture is a central objective of the Convention; Articles 5 - 9 deal with this in a fair amount of detail. While Article 5 compels states to establish jurisdiction over acts of torture and suspected perpetrators of torture, Article 6 obliges a state to arrest (or take other legal measures against) a person suspected of having committed torture once it is satisfied that this it is necessary to do so, based on the available information. In short, if a state knows something, it must act on this information and prevent that this person evades the law. Based on risk of flight or other circumstances of the case, the state may use measures other than arrest and custody to ensure a person’s presence, for example house arrest. The state must immediately make a preliminary enquiry into the facts of the case, whether this is in relation to criminal or extradition proceedings.

Knowledge of a suspected perpetrator of torture present in its jurisdiction may also come to a state through information provided by another state, especially through a request for extradition. Because of the possible risks associated with wrongful extraditions¹³³, the Convention includes a number of procedural safeguards to protect the person suspected of having perpetrated torture. The first is that the law of the state in which he is arrested applies in respect of criminal and extradition proceedings. Secondly, the person must be allowed to

¹³² Council of Europe Regulation concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, Council Regulation (EC) No 1236/2005. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:200:0001:0019:EN:PDF>

¹³³ See Article 3 and the discussion above on the cases of Mohamed and Rashid.

communicate directly with the representative of the state of which he is a national, or if he/she is a stateless person¹³⁴, the representative of the country in which he/she normally resides. Thirdly, a person arrested and detained may only be detained for so long as it 'is necessary to enable criminal or extradition proceedings to be instituted'; detention without trial is therefore not a possibility.

The duty to either prosecute or extradite

Whereas Article 5 obliges states to establish jurisdiction, Article 7 compels states to exercise this jurisdiction by submitting for prosecution or extradition the alleged perpetrator of torture.¹³⁵ Pursuant to the objective that there shall be no safe haven for the perpetrator of torture, the obligation is simple: **submit for prosecution or extradite**; doing nothing is not an option. As is the case with Article 6, procedural safeguards are built in. Firstly, cases must be submitted to the competent authorities for prosecution to ensure that a procedurally fair decision is reached, based on the applicable laws. Secondly, the relevant authority needs to reach its decision in the same manner as it would in the event of other serious cases. Thirdly, the laws of evidence shall be no less stringent than what is required. Fourthly, Article 7(3) provides a general requirement of fair treatment at all stages of proceedings.

The question arises as to how long a state should wait for an extradition request from another state if it is aware of a suspected perpetrator in its territory or already has this person in custody. If the person is in custody, the state should take proactive steps to establish if an extradition request can be expected from the relevant state. Such proactive steps should take the form of questions to the other state through the normal diplomatic channels.¹³⁶ The general intention is to retain momentum in such a case and it would 'not be consistent with the general purpose of the Convention to defer prosecution for a long time under the pretext that an extradition request will be made'.¹³⁷

A state may also be faced with the scenario that an extradition request is not forthcoming from the state in whose territory the torture was committed and it then has the duty to prosecute. This may present particular problems in respect of calling witnesses and gathering evidence. It is not the intention of CAT to have alleged perpetrators of torture prosecuted on insufficient or inadequate evidence, thus the procedural safeguard that standards of evidence shall be no less stringent than applies to cases of other serious crimes.

¹³⁴ A stateless person is defined as: 'a person who is not considered as a national by any state under the operation of its law.' (Article 1, Convention relating to the Status of Stateless Persons Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A(XVII) of 26 April 1954.)

¹³⁵ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhof Publishers, Dordrecht, pp.136

¹³⁶ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhof Publishers, Dordrecht, pp. 137.

¹³⁷ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhof Publishers, Dordrecht, pp. 137.

Extradition is a complex field of law and forms an integral part of the Convention. Article 8 attempts to remove legal barriers through a number of mechanisms. It firstly states that in existing treaties between States Parties, it is assumed that torture is an extraditable offence, and further, that in future treaties, it will be included as an extraditable offence. Secondly, in the absence of a treaty and this being a condition for extradition, the requesting state can use CAT as the legal basis for the extradition request. Thirdly, if an existing treaty is not a condition for extradition, torture shall be recognised as an extraditable offence subject to the laws of the requested state. Fourthly, some extradition treaties and national laws require that the extraditable offence should have been committed in the territory of the requesting state for the requested state to extradite the suspect to the former. Thus, as a general rule such States cannot extradite a torture suspect to stand trial in the courts of the requesting State unless the offence was committed in the jurisdiction of the latter. Article 8(4) creates an exception to that general rule by providing that for extradition purposes, offences under CAT shall be considered to have been committed in the territories of the states requesting the extradition.

A fifth mechanism to assist in inter-state cooperation and thus also extraditions, is found in Article 9, requiring that States Parties ‘shall afford each other the greatest measure of assistance’ in criminal proceedings against perpetrators of torture. This is of particular importance when a prosecution is instituted in a state other than the one in which the torture was committed. The Convention also recognises that existing treaties may already deal with mutual legal assistance, in which case the obligation under CAT shall be carried out in conformity with such treaties.

The duty to educate and train all personnel

Noting that Article 2 obliges States Parties to take a range of measures to **prevent** torture, Article 10 gives direction to this by requiring that information and education regarding the absolute prohibition of torture are ‘fully included in the training material’ of all officials. It is specifically officials who are involved in the custody, interrogation and treatment of individuals subject to arrest, detention or imprisonment that must be properly trained in this regard. In addition to training, officials must receive a specific instruction regarding the prohibition of torture. Although the Convention may create the impression that this only refers to government officials, it must be emphasised that privately run facilities, such as the Lindela Repatriation Centre, fall within the scope of the Convention and the personnel working there are under the same obligations as government officials.¹³⁸ Moreover, the training of officials is not only limited to the prohibition of torture but also covers the prohibition of CIDT.¹³⁹ It is furthermore recommended that such information also be included in the training that NGOs do with other NGOs.¹⁴⁰

¹³⁸ ‘For example, where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the state function without derogation of the obligation of state officials to monitor and take all effective measures to prevent torture and cruel, inhuman or degrading treatment or punishment.’ Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 17

¹³⁹ Article 16

¹⁴⁰ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht, pp. 142.

Ensuring that personnel are properly trained means that they know and understand the Convention, and that they must be able to deal with high-risk situations. These are crucial steps in preventing and eradicating torture and CIDT. Effective training of this nature is also not to be superficial nor a once-off affair, but should be comprehensive, repeated and updated on a continuous basis. Personnel must receive comprehensive information that will assist them in completing their duties in adherence to the prohibition of torture and CIDT, and relevant domestic laws. There is indeed a wide array of international instruments that should be drawn upon in this regard.¹⁴¹ Ensuring that personnel working with people deprived of their liberty are properly informed and trained on a continuous basis communicates clearly what is expected and what will not be tolerated. It also enables officials to deal with potential problems proactively. The value of these measures should never be underestimated, let alone neglected.

The duty to review policies, procedures and practices

At present it is only the South African Police Services (SAPS) that has a policy on the prevention of torture.¹⁴² No other government departments, especially those that work with people deprived of their liberty, have developed a policy on the prohibition and prevention of torture and CIDT. Article 11 of the Convention requires South Africa to ‘keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subject to any form of arrest, detention or imprisonment in any territory under its jurisdiction’. The purpose of this systematic review is preventive in nature and should presumably be based on identified gaps and shortcomings and how these can be addressed and/or improved upon to prevent torture and CIDT. It should also be noted that Article 16 specifically refers to Article 11 in extending the prohibition of CIDT.

¹⁴¹ In respect of the justice system the following instruments are noted: Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Rules for the Protection of Juveniles Deprived of their Liberty ; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); Guidelines for Action on Children in the Criminal Justice System; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers Guidelines on the Role of Prosecutors; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Declaration on the Protection of All Persons from Enforced Disappearance; Basic Principles and Guidelines on the Right to a Remedy and Reparation; International Convention for the Protection of All Persons from Enforced Disappearance (not yet into force).

¹⁴² ‘Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service’ http://www.saps.gov.za/docs_publs/legislation/policies/torture.htm. Accessed 16 July 2008.

Article 11 does not specify what ‘systematic’ means in practical terms, but systematic would in the first instance mean that such a review is methodical, thorough and comprehensive, not only in scope but also in depth. It would therefore cover all areas where people are deprived of their liberty, and all newly identified concerns, emanating from, for example, case law. There is no requirement as to how regularly such a review should be done, but ‘keep under systematic review’ implies that it should be done regularly, and that such rules, instructions, methods and practices should not be left to become dated and irrelevant. The question on the regularity of a systematic review, required by Article 11, should therefore take its cue from Article 19(1); not necessarily implying that this should be done every four years but that there should at minimum be a plan for systematic review coinciding with the four-year cycle of reporting.¹⁴³

An easily overlooked aspect of Article 11 is the reference to the systematic review of practices and conditions of custody. This would require that designated persons would visit and investigate places where people are deprived of their liberty, to inspect these places and report on their findings. Such a system already exists in respect of prisons by means of the JICS and its IPVs. This is unfortunately the only structure conducting proactive visits to places of detention and not even the ICD conducts proactive visits to police holding cells.

The duty to investigate

Whenever there are ‘reasonable grounds’ to believe that torture and/or CIDT has taken place, the state has a duty to ensure that this is promptly investigated by competent authorities in an impartial manner. The threshold of ‘reasonable grounds’ for initiating an investigation is important, as it does not require a complaint to be lodged by the victim. Victims often do not report victimisation for fear of reprisal, or they are not able to complain. For the purposes of initiating an investigation, it really does not matter where the suspicion comes from.¹⁴⁴ Other international instruments regarding the treatment of people deprived of their liberty err on the side of caution. The *Standard Minimum Rules for the Treatment of Prisoners*¹⁴⁵ obliges the State to deal with any complaint ‘[u]nless it is evidently frivolous or groundless’¹⁴⁶, and the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*¹⁴⁷ does not qualify this obligation, providing simply that ‘every request shall be promptly dealt with and replied to without delay.’¹⁴⁸ Research by the Redress Trust suggests that a state will have violated a victim’s rights by failing to investigate despite the existence of an ‘arguable claim’ – the merits of which are determined on a case-by-case-basis.¹⁴⁹ An allegation is ‘arguable’ when it is supported ‘by at least some other evidence, be this witness testimonies or medical evidence

¹⁴³ Muntingh L and Fernandez L (forthcoming) ‘A review of measures in place to affect the prevention and combating of torture with specific reference to places of detention in South Africa’

¹⁴⁴ Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Marthinus Nijhof Publishers, Dordrecht, pp. 144.

¹⁴⁵ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁴⁶ Rule 36 (4).

¹⁴⁷ Adopted by General Assembly resolution 43/173 of 9 December 1988.

¹⁴⁸ Principle 33 (4).

¹⁴⁹ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p.13.

or through the demonstrated persistence of the complainant.¹⁵⁰ European courts have also come up with the notion that an investigation should be triggered by a ‘reasonable suspicion’.¹⁵¹

Undertaking investigations **promptly** is equally important. There are, however, no international guidelines as to what ‘prompt’ means.¹⁵² Perhaps the most concrete meaning was given by the ECtHR in its decision in *Assenov and Others v Bulgaria*, suggesting that ‘prompt’ means ‘in the immediate aftermath of the incident, when memories are fresh’.¹⁵³ The Committee against Torture has, however, found individual breaches of Article 12 due to excessive delay before the commencement of an investigation, in one case 15 months¹⁵⁴ and in another 18 months.¹⁵⁵

A high premium is furthermore placed on the **impartiality** of the investigation, as this is central to its credibility remaining intact. The term ‘impartiality’ means free from undue bias and is conceptually different from ‘independence’, which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The two notions are, however, closely interlinked, as a lack of independence is commonly seen as an indicator of partiality.¹⁵⁶ The ECtHR has stated that ‘independence’ not only means a lack of hierarchical or institutional connection, but also practical independence.¹⁵⁷ The ECtHR has also stressed the need for the investigation to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as in theory, to maintain public confidence in the adherence to the rule of law by authorities, and to prevent any appearance of collusion in or tolerance of unlawful acts.¹⁵⁸

The duty to accept complaints and protect witnesses and victims

Even though the state has a duty to investigate any case where there are reasonable grounds to believe that an act of torture and/or CIDT has taken place, Article 13 formalises the important duty of making available a complaints mechanism. Article 13 gives everyone who claims to have been tortured or subjected to CIDT the right to complain and to have the case examined promptly and impartially by the competent authorities. Supported by Article 12, these are the essential requirements of a complaints and investigative regime envisaged by CAT. Any

¹⁵⁰ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p.13.

¹⁵¹ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London, p.13.

¹⁵² For an overview of international statements, declarations, reports, and case law on the elusive meaning of ‘prompt’, see Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London, pp. 15-17.

¹⁵³ *Assenov and Others vs Bulgaria* (1999) 28 EHRR 652.

¹⁵⁴ *Halimi-Nedzibi v Austria*, complaint 8/1991, A/49/44, Annex V, p. 40, § 15, Reported in C Ingelse (2001) *The UN Committee against Torture: An assessment* , p. 356.

¹⁵⁵ *Dragan Dimitrijevic v Serbia and Montenegro* 207/02 CAT/C/33/D/207/2002(2004)

¹⁵⁶ Redress Trust *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities* (2004) The Redress Trust, London, p. 17.

¹⁵⁷ *Finucane vs United Kingdom* (2003) 22 EHRR 29 para 68.

¹⁵⁸ *Assenov and Others v Bulgaria* (n 125) para 140.

complaints mechanism should thus be accessible to victims and furthermore, should protect victims from secondary victimisation. It should further be pointed out that the investigation of a complaint of torture is not subject to the lodging of a complaint, and an investigation should commence if there are reasonable grounds to believe that torture has taken place.¹⁵⁹ A further duty imposed by Article 13 is that such a complaints mechanism must be accessible in any territory and thus at all facilities under its jurisdiction. There are therefore no territories or facilities under the state's jurisdiction that are excluded. Violations of Article 12 (a duty to investigate) and Article 13 (a duty to ensure redress, see discussion below) do, however, not require that there must be a finding that torture and/or CIDT have in fact been committed; the duty to investigate stands independent of the duty not to torture.¹⁶⁰

The findings of a study conducted by The Redress Trust¹⁶¹ across many countries highlight a number of problems in connection with the lodging of complaints.¹⁶² From the research, it is evident that even when survivors of torture know about the existence of complaints procedures, they seldom know how to go about lodging their complaints. Those survivors who do know how to lodge a complaint tend to refrain from doing so because of the number of hurdles, both physical and otherwise, that they are likely to encounter.¹⁶³ Once victims lodge their complaints, they are often forced to endure deliberately manufactured situations, the combined purpose of which is to undermine, if not to sabotage, a complaint. Perpetrators often pressurise the victim to withdraw the complaint, even to the point of offering them bribes.¹⁶⁴ Very often, victims do not pursue their complaints out of fear of suffering physical harm, including threats to their lives, as well as the lives of their families, witnesses and human rights

¹⁵⁹ C Ingelse (2001) *The UN Committee against Torture: An assessment*, p. 336.

¹⁶⁰ Joseph S (2006) 'Committee against Torture – Recent Jurisprudence' *Human Rights Law Review* Vol. 6 p. 574.

¹⁶¹ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London,

¹⁶² Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London,

¹⁶³ These impediments are known to be the following:

- the geographic remoteness of the complaints office, which is a thoroughly bedevilling hurdle for people in rural areas;
- fears of personal safety on the part of the survivors, especially where a complaints-receiving office is located in the very same office where the torture took place;
- reluctance to bring a complaint because of a sense of shame resulting from what the victim endured (for example sexual assault); a real or perceived lack of openness and approachability in the people staffing the complaints office;
- officials having a rude and dismissive attitude;
- the need to appear in person, coupled with the intimidating formalities of making sworn written statements or affidavits accompanied by a raft of other documents to establish probable cause.(Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and Responsibilities of Authorities*, The Redress Trust, London, <http://www.redress.org/publications/PoliceComplaints.pdf> , Accessed 5 February 2006, p. 17.)

¹⁶⁴ A UN Working Group on Pre-trial Detention reported in 2005 that in South Africa accused persons in police custody were vulnerable to being pressurised into renouncing their rights. See UN Working Group Police accountability- Promoting civilian oversight available at

<http://www.policeaccountability.co.za/Currentinfo/ci-detail.asp?art-ID=400>

lawyers.¹⁶⁵ Where complaints are lodged in good time, cases tend to drag on endlessly, resulting in proceedings being discontinued.¹⁶⁶ In many countries that lack such legislation dealing specifically with torture, the laws of prescription apply. This means that after a period of time a complaint prescribes or expires, which disregards the fact that, like rape, one of the traumatic effects of torture is that victims do not rush to lodge the complaint immediately after they have been tortured. In countries without clear-cut rules governing the reporting and recording of complaints, the authorities who are entitled to receive complaints tend to enjoy wide discretionary power in dealing with complaints. In such countries, complaints may be dismissed at the reporting stage simply because the complainant, for want of evidence, is unable to name the alleged torturer.¹⁶⁷ Such complaints are then considered incomplete. It also is not unusual in the case of an unregulated procedure for the complaints officer to take down the complaint, only to deny afterwards that it was ever lodged. And because the complainant is not given a copy of the complaint, the matter simply peters out.¹⁶⁸ But, even where complaints procedures exist, officials in some countries are known not only to refuse to receive complaints, but also to suppress or destroy whatever evidence there is that implicates alleged perpetrators.¹⁶⁹

Against this background it is evident that there is a real need to review the current range of complaints mechanisms and procedures for people deprived of their liberty. The development of minimum standards for complaints procedures may be able to address some of the current shortcomings.

The duty to ensure redress to victims of torture¹⁷⁰

Article 14 of CAT requires that each State Party ensure that the victim of torture obtains redress under the legal system of that State Party. The victim must have an enforceable right to fair and adequate compensation and is entitled to be given an opportunity to rehabilitate as fully as possible. Should the torture result in the victim's death, the deceased's dependants have a right to compensation. This provision does not affect whatever other right to compensation the victim has under national law.¹⁷¹

"Redress" entails officially recognising that the victim has been harmed; "compensation" mostly means the payment of money. The latter also encompasses physical, mental, and social rehabilitation – the three M's, namely moral, monetary and medical.¹⁷² Compensation does not mean a mere symbolic payment; it must be fair and adequate.

¹⁶⁵ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p.36.

¹⁶⁶ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p. 34.

¹⁶⁷ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p. 37.

¹⁶⁸ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p. 37.

¹⁶⁹ Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p. 37-38.

¹⁷⁰ The discussion below is a summary from Muntingh L and Fernandes L (forthcoming) *Criminalisation of Torture in South Africa*.

¹⁷¹ Art 14(2).

¹⁷² CAT/SC/SR 36 Para 21; CAT/C/SR 197 para 32; CAT/C/SR 232 para 22.

Although Article 14 does not expressly apply in cases of CIDT, the Committee against Torture has considered it applicable in cases of disappearances.¹⁷³ This interpretation is in line with the more generally worded Art 7 (3) of the ICCPR and the earlier practice of the Human Rights Committee. But there is no reason why it cannot be extended to cases of cruel, inhuman, or degrading treatment apart from disappearances.¹⁷⁴

The question that begs asking though is who is responsible for paying compensation? This is a crucial issue, given the fact that the perpetrator of torture usually does not have the means to pay (adequate) compensation, especially if the conviction results in a prison sentence, which is what one expects. According to the Committee against Torture, it seems that the victim must first try to obtain compensation from the perpetrator, and only in the event that this fails should the state assume responsibility.¹⁷⁵

The Committee against Torture has rejected the argument that the state's liability should depend on the perpetrator being held criminally liable. Similarly, the state does not escape liability merely because the suspect has not been charged or identified.¹⁷⁶ The state must accept responsibility for compensation if individual responsibility for torture cannot be established.¹⁷⁷ This follows from the fact that an act of torture violates the state's international law obligations, thus placing on it a duty not only to punish the offenders, but also to award the victim appropriate reparations. The right to an effective remedy is laid down in several international instruments.¹⁷⁸

Practice shows that bringing a case of reparation for torture is not an easy matter. One reason for this is that many countries do not have the specific offence of torture which corresponds to the definition of Article 1 of CAT. The result is that the victim has to claim damages under the common law crime of assault, which carries a lesser penalty. Another reason is that where the suspected torturer has not been prosecuted in a criminal trial, the victim has difficulty securing evidence to substantiate a civil claim.¹⁷⁹ Also, in the case of South Africa and other common law countries, as opposed to France, for example, a victim is not allowed to double as a claimant of damages in both civil and criminal proceedings. In South Africa, the criminal court may award compensation only where the offence causes damage to property.¹⁸⁰

Unfortunately, the Committee against Torture has not developed clear and comprehensive guidelines on the question of reparation. The prevailing position is that the victim of torture should be allowed to use civil procedure to claim an award of damages, regardless of the

¹⁷³ CAT/C/SR 294 ADD 1 para 23.

¹⁷⁴ L Wendland *A Handbook on State Obligations under the Convention against Torture* (2002) p. 56.

¹⁷⁵ See CAT/C/SR 292 para 2.

¹⁷⁶ C Ingelse (2001) *The UN Committee against Torture: An assessment*, p. 371.

¹⁷⁷ C Ingelse (2001) *The UN Committee against Torture: An assessment*, p. 383.

¹⁷⁸ See Art 8 of the Universal Declaration of Human Rights, Art 2(3) of the ICCPR, Art 13 of the ECHR; Art 25 of the American Convention on Human Rights; and Art 7(1) of the 1981 African Charter on Human and People's Rights.

¹⁷⁹ Redress Trust Seeking reparation for torture survivors at
http://www.redress.org/local_remedies_torture.html

¹⁸⁰ Section 300 of the Criminal Procedure Act 51 of 1977. See Du Toit et al *Commentary to the Criminal Procedure Act* (2004) 29-2 to 29-3.

outcome of the criminal proceedings against the alleged torturer.¹⁸¹ It also has been suggested that it would be even better if victims did not have to go through the courts and that instead they be given an automatic right to compensation, redress and rehabilitation by the authorities.¹⁸²

In an effort to provide guidance on this issue the UN General Assembly adopted 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’ (also known as the Van Boven-Bassiouni Principles) in 2005.¹⁸³ This international instrument is not binding nor does it create a new obligation, but it does ‘identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law’.¹⁸⁴ Five principles are outlined forming the core of reparation:

- **Restitution** ‘should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.’
- **Compensation** places the emphasis on monetary compensation that must be appropriate and proportional to the gravity of the violation that has occurred. To determine compensation the following variables are important: physical or mental harm; lost opportunities, including employment, educational and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- **Rehabilitation** should include medical and psychological as well as legal and social services.
- **Satisfaction** should include any or all of the following:
 - effective measures aimed at stopping continued violations;
 - verification of the facts and full and public disclosure of the truth of the violation, provided that such a disclosure does not pose a risk to the victim, the family of the victim or witnesses;
 - a search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
 - an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

¹⁸¹ Wendland L (2002) *A Handbook on State Obligations under the Convention against Torture* p. 55; C Ingelse (2001) *The UN Committee against Torture: An assessment*, p. 383.

¹⁸² C Ingelse (2001) *The UN Committee against Torture: An assessment*, 383.

¹⁸³ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹⁸⁴ 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, Annex ‘Preamble’.

- a public apology, including acknowledgement of the facts and acceptance of responsibility;
- judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred, in international human rights law books and educational material at all levels, and in international humanitarian law training.
- **Guarantees of non-repetition** should include any or all of the following:
 - ensuring effective civilian control of military and security forces;
 - ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
 - strengthening the independence of the judiciary;
 - protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
 - providing, as priority and on a continued basis, human rights and international humanitarian law education to all sectors of society, and training for law enforcement officials as well as military and security forces;
 - promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
 - promoting mechanisms for preventing and monitoring social conflicts and their resolution;
 - reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The duty to reject statements obtained under torture

The use of statements obtained under torture in any proceedings is prohibited by the Convention in Article 15. The only exception allowed for is when such statements are used as evidence in proceedings against the person accused of perpetrating torture. As such, the aim is to demonstrate that torture has taken place, and not to accept that the actual information obtained through torture is true. The general purpose of Article 15 is echoed in the Constitution. Firstly, that any accused person may not be compelled to make any confession or admission that could be used in evidence against that person, and secondly, that evidence ‘obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.’¹⁸⁵ The right to be free from torture would immediately satisfy this requirement. For recent case law on this issue see Chapter 5.

The duty to report on measures taken

Under Article 19(1) States Parties are obliged to submit an Initial Report within twelve months after ratification of CAT. After submitting this Initial Report States Parties have a duty to report

¹⁸⁵ Section 35(1)(c) and 35(5)

every four years to the Committee on progress made towards implementing measures to give effect to the Convention. The UN Secretary-General is also mandated to distribute these reports to all States Parties to the CAT.¹⁸⁶ In order to avoid the lengthy repetition of historical and general statutory and policy provisions in the Initial and Periodic Reports, general reporting guidelines in respect of the International Human Rights Instruments require States Parties to submit a “common core document” that provides an overall description of human rights in the territories of the respective state, and secondly, the submission of treaty-specific reports.¹⁸⁷ This split reporting is evidently a measure aimed at improving efficiency and at preventing States Parties from repeating general information in respect of human rights issues in that state for each treaty-specific report.

The Initial Report

Even though South Africa has already submitted its Initial Report, it is important to reflect on the requirements of this report. The Committee against Torture issued the “Guidelines on the form and content of Initial Reports under Article 19 to be submitted by States Parties to the Convention against Torture” (the Guidelines) and these note at the outset that the Initial Report should cross refer to the “common core document” and not repeat what is already stated there.¹⁸⁸

Given the fact that the common core document is supposed to describe the overall historical, constitutional, statutory and policy framework of the State Party, the intention is that the Initial Report will then aim at providing the Committee with recent information on measures taken by the State Party to give effect to its undertakings under the CAT.¹⁸⁹ The Guidelines direct the State Party towards providing evidence of measures taken to give effect to the Convention, as opposed to describing the overall legislative framework; “the Committee envisages receiving specific information related to the implementation of the Convention to the extent that it is not covered by the core document”. The Committee therefore expects the report to:

Provide an overview of the practical implementation of the Convention at the federal, central, regional and local levels of the State, and indicate any factors and difficulties that may affect the fulfilment of the obligations of the reporting State under the Convention. The report should include specific information related to the

¹⁸⁶ Article 19(2) The Secretary-General of the United Nations shall transmit the reports to all States Parties.

¹⁸⁷ UN International Human Rights Instruments (2004) *Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties*, HRI/MC/2004/3, 9 June 2004

<http://daccessdds.un.org/doc/UNDOC/GEN/G04/421/61/PDF/G0442161.pdf?OpenElement>

¹⁸⁸ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, par 3.

¹⁸⁹ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by states parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, par 1. This is also the same wording used in Article 19(1).

implementation of the Convention in such circumstances. Relevant documentation collected by the authorities or other private or public institutions is welcome.¹⁹⁰

The Guidelines further emphasise the need to report on the actions of the executive, the proactive measures put in place (e.g. training programmes), the distribution of functions in the executive, and the assessment of the effectiveness of measures taken to implement the provisions of CAT. It is not necessary to describe these in detail here, but it is clear that the Guidelines are aimed at ensuring that the Committee is provided with the relevant information that would allow it to make a well-informed assessment of the current situation with reference to the State Party's obligations under CAT. To facilitate such a report, the Committee recommends that there should be broad-based consultations with stakeholders in the preparation of the report and refers specifically to national institutions promoting and protecting human rights, as well as non-governmental organisations.¹⁹¹

Periodic Reports

The Committee has similarly issued guidelines in respect of Periodic Reports submitted under Article 19(1).¹⁹² The Periodic Report should be presented in three parts as set out below:

- *Part 1 - Information on new measures and new developments relating to the implementation of CAT.* This section of the report should follow the order of Articles 1 to 16 and should provide detailed information on:
 - Any new measures taken by the State Party to implement the Convention during the reporting period. Since many states are late in their reporting, it should be noted that the reporting period covers the period from the date when the last report was submitted to when the current report is submitted, and not necessarily the last four years.
 - Any new developments which have occurred during the same period and are relevant to implementation of the Convention;
 - Any change in the legislation and in institutions that affect the implementation of CAT in any territory under its jurisdiction, particularly in places of detention and on training given to law-enforcement and medical personnel;
 - Any new case law of relevance for the implementation of the Convention;
 - Complaints, inquiries, indictments, proceedings, sentences, reparation and compensation for acts of torture and other cruel, inhuman or degrading treatment or punishment;
 - Any difficulty which would prevent the State Party from fully discharging the obligations it has assumed under the Convention.
- *Part 2 - Additional information requested by the Committee.* This part should contain any information requested by the Committee and not provided by the State Party, during

¹⁹⁰ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, par 5.

¹⁹¹ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, par 4.

¹⁹² Committee against Torture (1998) *General guidelines regarding the form and contents of periodic reports to be submitted by States Parties*: 02/06/98 CAT/C/14/Rev.1.

the Committee's consideration of the State Party preceding report. If the information has been provided by the State Party through other established procedures, it need not be repeated.

- *Part 3: Compliance with the Committee's conclusions and recommendations.* This part should provide information on measures taken by the State Party to comply with the conclusions and recommendations of the Committee in respect of the State Party's Initial and Periodic Reports.

Three issues are thus important in respect of reporting: the regularity of reporting, the quality and scope of the report, and the desired inclusive nature of report preparation. It should be borne in mind that the report is not an end itself but forms the basis for dialogue between the Committee and the State Party. This may lead to further decisions and actions by the Committee, for example, to their requesting additional information or even visiting the State Party if the Committee deems it necessary.¹⁹³ The interaction between the Committee and South Africa is described further in Chapter 4.

¹⁹³ UN Committee Against Torture (2002) *Rules of Procedure*, CAT/C/3/Rev.4, 9 August 2002, Rules 67 and 80.

Chapter 4: The Committee against Torture and South Africa

Mandate and functions of the Committee

The Committee against Torture (the Committee) is the treaty monitoring body in respect of CAT; its core function is to monitor the implementation of CAT by States Parties. The Committee consists of ten independent experts of high moral standing, recognised for their competence in the field of human rights. They serve in their personal capacity on the Committee and are elected by secret ballot by the States Parties from a nomination list compiled by the States Parties. Members to the Committee are elected for a term of four years and can be re-elected if re-nominated.¹⁹⁴ The Committee elects its own officers, such as chairperson and deputy chairperson, for a period of two years.¹⁹⁵ The Committee meets in Geneva twice per year for three weeks, during which it conducts its business. The Committee membership as well as the Committee's programme is available on its website.¹⁹⁶

The Committee has at its disposal five mechanisms for monitoring the implementation of CAT:

Examining and commenting on Initial and Periodic Reports submitted under Article 19:

States Parties are required to submit regular reports to the Committee on how the Convention is being implemented in their territories, as explained above. Non-governmental organisations, national human rights institutions (NHRI), and other UN agencies may also comment in writing and/or verbally on a State Party's report and these submissions will be taken into account in the discussions between the Committee and the State Party delegation. The Committee considers these reports and prepares "Concluding Observations". The Concluding Observations will note and acknowledge positive developments, as well as problem areas. The Committee may request the State Party to respond to specific issues in its following Periodic Report, or if it is a more urgent matter, it may request that particular issues be reported on within a shorter time frame, for example within 12 months. This mechanism forms an important part of the Committee's work and the Concluding Observations should be seen as the continuously evolving agenda for dialogue between the Committee and the State Party concerned.

General Comments: As is the case with other treaty monitoring bodies, the Committee can also issue General Comments. These are considered authoritative comments on specific thematic issues reflecting the Committee's interpretation and views. The Committee has, to date, issued two such General Comments, the first on *non-refoulement* (Article 3) and the second on the overall duty of States Parties to implement the Convention (Article 2).¹⁹⁷

¹⁹⁴ Article 17

¹⁹⁵ Article 18

¹⁹⁶ <http://www2.ohchr.org/english/bodies/cat/index.htm>

¹⁹⁷ Both are available on the Committee's website.

Confidential enquiry under Article 20: The Committee may invite the State Party concerned to cooperate, on a confidential basis, in the investigation of reliable claims that torture is being used systematically in its territory. One or more members of the Committee will be tasked to investigate the claims. If the State Party cooperates, the Committee may visit the State Party to investigate the claims further. Based on the findings of the Committee member(s) investigating the claims, the Committee will communicate its findings and recommendations to the State Party confidentially. The Committee may, however, after consultation with the State Party publish a summary of its investigation, findings and recommendations in its annual report. The Committee may also publish the full report if the relevant State Party agrees.¹⁹⁸ This mechanism is, however, subject to the State Party recognising the competence of the Committee under Article 20 (see Article 28).

Inter-state complaint: A State Party to the Convention may report, under Article 21, to the Committee that another State Party is not fulfilling its obligations under the Convention. The mechanism is however subject to three important conditions. Firstly, the State Party reporting the problem must have made a declaration that it recognises the competence of the Committee to receive such reports in respect of itself. Secondly, the State Party in respect of which such a report is made must have made a declaration that it recognizes the competence of the Committee to receive such reports from other States Parties. Thirdly, the Committee will only deal with the matter once it has established that all domestic remedies have been invoked and exhausted, unless there would be an unreasonable delay or the chances of effective relief to the victim(s) of the violation are unlikely.

Individual complaints: Under Article 22 the Committee can also, under certain circumstances, receive communications or complaints from individuals, or on behalf of individuals, claiming that their rights under the Convention have been violated. Communications or complaints received in this manner shall be considered in a closed session of the Committee; the Committee will then forward its views to the individual(s) and the State Party concerned. This mechanism is, however, subject to several conditions:

- The State Party concerned must have made a declaration recognizing the competence of the Committee to receive such communications or complaints
- The Committee shall not consider communications that are anonymous, or which it considers to be an abuse of this mechanism, or are incompatible with the intentions of the Convention
- The Committee shall not consider communications and investigate a matter if it has been or is being investigated under another international mechanism or procedure
- The Committee will only, as is the case under Article 21, deal with the matter once it has established that all domestic remedies have been exhausted, unless there would be an unreasonable delay or the chances of effective relief to the victim(s) of the violation are unlikely. Indications are that the Committee is increasingly acting on individual complaints.¹⁹⁹

¹⁹⁸ See for example Committee against Torture (2007) *Report on Brazil produced by the Committee under Article 20 of the Convention and Reply from the Government of Brazil*, 23 November 2007, CAT/C/39/2,

¹⁹⁹ See for example the five cases brought against Tunisia since 1996, reported on the website of the Office of the High Commissioner for Human Rights.

Despite these mechanisms, the enforcement of the Convention remains problematic. Based on the global legal order of nation states and respect for their sovereign equality and non-interference in domestic affairs, the enforcement of human rights standards remains a challenge.²⁰⁰ States are able to evade their responsibilities and thwart the aims of the Convention. However, regional human rights mechanisms, the Universal Periodic Review and the International Criminal Court, in cases of war crimes and crimes against humanity, are new(er) mechanisms that need to be utilised parallel to the existing UN mechanisms such as CAT and its Committee.

NGO cooperation with the Committee

Torture is not something that states will readily admit in their periodic reports and the Committee, as is the case with other treaty monitoring bodies, is therefore highly reliant on information from other structures, such as non-governmental organisations, other UN bodies and NHRI. The provisions of CAT, the *Rules of Procedure of the Committee*²⁰¹, and the *Working Methods of the Committee*²⁰² are therefore facilitative and supportive of stakeholder participation in the work of the Committee, and in particular in relation to the initial and periodic reports. In this section the various mechanisms for interaction between the Committee and non-governmental organisations are described.

List of issues: In an effort to streamline and focus its discussions in respect of Periodic Reports, the Committee amended its procedures in 2004 to provide for “a list of issues” to be communicated to the State Party approximately one year in advance of the consideration of the State Party’s Periodic Report.²⁰³ Responding to these issues will meet the State Party’s periodic reporting obligations under Article 19. The intention is that the State Party concerned should distribute the list of issues widely, including to civil society organisations. The list of issues is also made available on the Committee’s website and is thus accessible to civil society organisations. Civil society organisations may also make submissions to the Committee in respect of issues that they would like to see included in the list of issues communicated to the State Party in preparation of the Periodic Report. This is an opportunity for civil society to influence the agenda for dialogue between the Committee and the State Party. It is also the opportunity to have specific questions answered or issues addressed if these are included by the Committee into the list of issues.

Periodic and Initial reports: To facilitate a comprehensive and accurate Initial Report, the Committee recommends that there should be broad-based consultations with stakeholders in the preparation of the report and refers specifically to national institutions promoting and protecting human rights, as well as non-governmental organisations.²⁰⁴ The Guidelines request, in particular, information on the process followed to ensure such consultation, presumably for

²⁰⁰ Boulesbaa A (1999) *The UN Convention against Torture and the Prospects for Enforcement*, Martinus Nijhof Publishers, the Hague, p. 302

²⁰¹ Committee Against Torture (2002) *Rules of Procedure*, CAT/C/3/Rev.4, 9 August 2002

²⁰² Committee Against Torture, *Working Methods*

<http://www.ohchr.org/english/bodies/cat/workingmethods.htm>

²⁰³ UN Committee Against Torture, *Working Methods*, par III(A)

²⁰⁴ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, par 4.

the Committee to assess the scope and depth of such consultations, and also to help it reflect on the State Party's efforts to prepare the report in a transparent and inclusive manner. The document entitled *Working Methods of the Committee* also supports the involvement of national institutions and non-governmental organisations in the process of consultations that would lead to the preparation of reports by States Parties.²⁰⁵ The guidelines for Periodic Reports are not as detailed as the guidelines for Initial Reports, but read together with the overall procedures and working methods of the Committee, the intention is clear that the Committee wants to see civil society involvement in the preparation of both Initial and Periodic Reports. As South Africa has already submitted an Initial Report, and there was no consultation with either civil society or NHRI in its preparation, this opportunity has now passed. However, the preparation of Periodic Reports should provide an opportunity for civil society and NHRI involvement; fora for this need to be created.

Shadow Reports: Once a State Party has submitted its Initial or Periodic Report, civil society organisations have the opportunity to submit, within a specified time frame, written information in the form of shadow reports. The aims of the shadow report are to provide additional and/or alternative information in response to the Periodic Report. This is probably the most frequently used and most accessible avenue for civil society participation in the work of the Committee and is provided for under the Committee's Rules of Procedure:

The Committee may invite specialized agencies, United Nations bodies concerned, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council to submit to it information, documentation and written statements, as appropriate, relevant to the Committee's activities under the Convention.²⁰⁶

The *Working Methods of the Committee*, through Rule 62, also invites non-governmental organisations to the activities of the Committee. Non-governmental organisations usually engage with the Committee pursuant to Rule 62 by way of written reports, copies of which are provided to the State Party concerned – unless the authors object.

Shadow reports may provide a comprehensive overview in respect of all articles of CAT or may elect to focus on one or more particular themes or Articles. There are no prescripts in this regard. Civil society organisations are also free to compile one coordinated response or to make individual submissions in respect of a Periodic Report. There is no limit on the length of shadow reports, but it is advisable to prepare reports that are concise, accurate, based on evidence and to the point, as the Committee members have to deal with large volumes of reports.

Oral submissions: The Committee meets twice per year for three weeks in Geneva, usually in May and November. A session during which a Periodic or Initial Report is considered follows a particular format and is spread over three days as follows:

- Day 1: A closed session of 45 minutes with NGOs
- Day 2: An open session of approximately 2 hours in the morning with the government delegation presenting the Periodic or Initial Report during which the report is presented and the Committee is in dialogue with the delegation.

²⁰⁵ UN Committee Against Torture, *Working Methods*, par II.

²⁰⁶ UN Committee Against Torture (2002) *Rules of Procedure*, CAT/C/3/Rev.4, 9 August 2002, Rule 62(1).

- Day 3: An open session of approximately 2 hours during which the State Party delegation responds to Committee questions posed during the session on Day 2.

Representatives of civil society organisations who have made written submissions may formally brief the Committee orally during the session when the State Party's report is considered, without State Party representatives being present (the closed session on Day 1).²⁰⁷ In the past, civil society groups engaged with the Committee on the Initial and Periodic Reports of State Parties in an informal manner. However, since 2004 such contributions have taken on a formal character, with representatives from civil society now being afforded a confidential session with the Committee on the basis of written submissions made to the Committee in advance of such a session.²⁰⁸ This confidential session takes place prior to the Committee's interaction with the government delegation, which is a session open to the public. Although the session with the civil society representatives is scheduled for only 45 minutes, it provides an important opportunity for all the Committee members to interact with these stakeholders in a formal manner. During this session civil society representatives can raise and/or emphasise any particular issues with the Committee, and also answer specific questions from Committee members. This procedure is a significant improvement because, as was noted above, prior to 2004 the interaction between Committee members and civil society representatives occurred informally outside of the Committee meeting.²⁰⁹ However, representatives from civil society may still seek to engage committee members informally and create opportunities for this.

In its interaction with the State Party delegation on Day 2, the Committee may pose questions to the delegation on which it must respond, as far as possible, during the session on Day 3. Civil society representatives are free to respond in writing to these questions as well and submit their responses in writing to the Committee Secretary by the end of business on Day 2. The responses should clearly indicate the question that was asked, the name of the Committee member who asked the question and who is providing a response to the question. The sessions on Day 2 and Day 3 are for dialogue between the Committee and the State Party delegation; civil society representatives are not permitted to participate but may observe.

It should be noted that civil society organisations that wish to make oral submissions to the Committee in Geneva will be responsible for their own transport and accommodation costs. This places an obvious limitation on the extent of civil society participation in oral submissions. It is furthermore advisable to cooperate with other NGOs who are also making oral submissions as well as organisations that are experienced in the workings of the Committee.

Concluding Remarks and follow-up: In respect of each Initial or Periodic Report the Committee appoints two committee members, known as country rapporteurs, who will be responsible for studying the report and any additional submissions. Based on these, the two country rapporteurs will draft conclusions and recommendations to be presented and, if approved, adopted by the Committee. The adopted Conclusions and Recommendations are forwarded to the State Party concerned and, within 24 hours, made public at an open meeting of the Committee, released through the media and posted on the Committee's website. The

²⁰⁷ UN Committee Against Torture, *Working Methods*, Par VIII

²⁰⁸ UN Committee Against Torture (2004) *Summary record of the second part (public) of the 619th meeting*, 12 August 2004. CAT/C/SR.619/Add.1.

²⁰⁹ Ibid.

Conclusions and Recommendations follow a standard format consisting of a brief introduction followed by sections noting positive aspects, subjects of concern to the Committee and related recommendations.²¹⁰

The Committee may identify certain issues on which it would like more immediate feedback, instead of waiting for the next Periodic Report. It can request that this information be submitted within one year. For this purpose the Committee will appoint a rapporteur who will be responsible for follow-up in respect of the Conclusions and Recommendations.²¹¹

During the follow-up period civil society organisations may forward any pertinent information to the follow-up rapporteur. It is advisable that such information should be directly applicable to the issues raised by the Committee in the Conclusions and Recommendations. Civil society organisations may also respond in writing to the specific issues raised by the Committee for a response within one year. It is, however, advisable to wait for the State Party response, or the due date to pass, whichever comes first, before a response is submitted to the Committee Secretary who will forward this information to the follow-up rapporteur.

Individual complaints under Article 22: As South Africa has recognised the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their rights have been violated by a State Party under the Convention, this will be described briefly here.²¹² For a full description of this procedure, it is advisable to study the Committee's Rules of Procedure (Rules 96 to 115) as well as the webpage "Human Rights Treaty Bodies - Individual Communications -23 FAQ about Treaty Body complaints procedures".²¹³

For an individual to lodge a complaint with the Committee three requirements need to be met at the outset:

- The State Party must recognise the competence of the Committee to receive and consider individual complaints under Article 22 and South Africa has done this
- The same complaint is not already under investigation by another procedure of international investigation or settlement
- The individual has exhausted all domestic procedures, unless the use of these remedies will result in an unreasonable delay or is unlikely to bring effective relief.²¹⁴

In addition to these three requirements, the Committee also advises that a complaint may be rejected if it is 'manifestly unfounded' or if the time lapse has been so long that consideration of the complaint by the Committee and the State Party will be 'unduly difficult'.

²¹⁰ Committee Against Torture, *Working Methods*, Para III(C)

²¹¹ Committee Against Torture, *Working Methods*, Para IV

²¹² UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, para 26

²¹³ 'Human Rights Treaty Bodies - Individual Communications -23 FAQ about Treaty Body complaints procedures' <http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact> Accessed 19 July 2008.

²¹⁴ Article 22(5)

Once a complaint has been received the Committee may ask for further information, within a set time frame, to establish at least the following:

- The name, address, age and occupation of the complainant and verification of his/her identity;
- The name of the State Party against which the complaint is directed;
- The object of the complaint;
- The provision or provisions of the Convention alleged to have been violated;
- The facts of the claim;
- Steps taken by the complainant to exhaust domestic remedies;
- Whether the same matter is being examined under another procedure of international investigation or settlement.

If the Committee has registered the complaint, it will invite the State Party to comment within six months on the admissibility and the merits of the complaint. Depending on the reaction of the State Party, one of two options will be followed:

- If the State Party comments only on the admissibility of the complaint within two months, the complainant is given four weeks to comment on the submissions. The Committee will then make a decision on the admissibility of the complaint. If the case is considered inadmissible, it is closed. If the complaint is admissible, the State Party has four months to comment on the merits of the case. The complainant then has six weeks to comment on the merits, following which the Committee can take a final decision on the substance of the case.
- If the State Party comments on the admissibility and the merits (usually at the six-month point), the complainant has six weeks to comment on its submissions. The Committee is then in a position to make a combined decision on the admissibility and merits of the case.

As a limited number of cases are brought before the Committee through this mechanism, cases are usually concluded within one to two years.

Some cases may require more urgent attention and interim measures may be requested from the Committee to prevent irreparable harm as a result of torture. Such cases usually arise in the context of deportations where the complainant faces a foreseeable risk of torture in the receiving state. In such instances, the Committee's Special Rapporteur on New Complaints and Interim Measures will decide if a request to the State Party for interim measures will be made under the applicable rule (Rule 108).

Although the complaint will usually be dealt with based on documents, the Committee may, to assess the merits of the complaint, require the attendance in person of the complainant or the State Party. In such instances, the other party will be entitled to attend as well. However, if the complainant is not able to attend, his or her case will not be adversely affected.

If the Committee finds in favour of the complainant, it will communicate its views and recommendation(s) to the State Party with a request for feedback on their implementation within 90 days. The State Party is obliged to provide this feedback.

South Africa and the Committee against Torture

History, signing, ratification and declarations

Between January 1993 and November 2007, South Africa ratified 12 major UN human rights instruments.²¹⁵ This was indicative of South Africa's re-acceptance into the international community; the process of signing started even prior to the Interim Constitution being adopted. After South Africa signed CAT on 29 Jan 1993, prior to the adoption of the Interim Constitution²¹⁶, it ratified CAT on 10 December 1998 together with three other conventions.²¹⁷

Importantly, South Africa recognises the competence of the Committee against Torture to receive and consider inter-state complaints under Article 21. South Africa also recognises the competence of the Committee against Torture to receive and consider individual complaints under Article 22. In line with Article 30, South Africa recognises the competence of the International Court of Justice to settle a dispute between two or more State Parties regarding the interpretation or application of the Convention. South Africa has also not expressed any reservations in respect of any article of the Convention. As such, CAT applies to South Africa to its fullest extent.

A further development in the prevention and eradication of torture is the Optional Protocol to the Convention against Torture (OPCAT). In 2002 OPCAT was opened for signature and South Africa signed it on 20 September 2006 but had, at the time of writing, not yet ratified it. Please see Appendix 3 for a copy of OPCAT.²¹⁸

Table 1 below sets out South Africa's history and future interaction with the Committee.

Table 1

Cycle	Action step	Actual	Done
	Signing	Jan 1993	Yes
Start cycle	1st Ratification	Dec 1998	Yes
	<i>Initial Report due</i>	<i>Jan 2000</i>	
	Initial Report submitted	Jun 2005	Yes

²¹⁵ See Appendix 2 for a full listing.

²¹⁶ Act 200 of 1993. Section 11 of the Interim Constitution reads: '(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

²¹⁷ These are: The International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination, and The Convention on the Prevention and Punishment of the Crime of Genocide.

²¹⁸ For a summary description of obligations under OPCAT see Muntingh L (2008) *Preventing and combating torture in South Africa - A framework for action under CAT and OPCAT*, CSVR and CSPRI, Cape Town.

Cycle	Action step	Actual	Done
	Committee considered Initial Report and issued Concluding Remarks	Nov 2006	Yes
	<i>Response by South Africa on specific questions due</i>	<i>Nov 2007</i>	
End cycle	1st Response by SA to specific questions raised in the Concluding Remarks submitted.		No (July 2008)
Start cycle	2nd Committee calls for submission on list of issues	Aug 2007	Yes
	Committee sends list of issues to SA	Nov 2008	
	<i>Periodic report due</i>	<i>Dec 2009</i>	
End cycle	2nd Committee considers Periodic Report and issues Concluding Remarks	Not yet scheduled	

South Africa's Initial Report

South Africa's Initial Report was submitted in June 2005 although this report was already due in January 2000. It was considered in November 2006 at the Committee's 37th Session in Geneva. An overview of the report is presented here - the full report should be consulted for more detail.²¹⁹ At the outset the Committee remarked that the report did not fully conform to the Committee's guidelines for the preparation of Initial Reports, not least because it limited "itself to statutory provisions rather than analysing the implementation of the Convention's provisions".²²⁰ A large part of the report could in fact have been dealt with in the common core document as the Guidelines suggest. The report itself is furthermore dated 2002, placing a second limitation on its scope and depth.²²¹

Part I of the 88-page report (28 pages in length) deals with pre- and post- apartheid history of South Africa. Part II (8 pages) describes South Africa's political structure, the legal framework within which human rights are addressed, and the available remedies and rehabilitation programmes that exist in South Africa. It focuses mainly on the Bill of Rights, describing the duties and functions of the national institutions for the promotion and protection of human rights. Part III (59 pages) deals with the individual articles of CAT and the South African situation. The report describes a number of legislative and policy reforms undertaken since 1994 to strengthen the protection of human rights. It also refers to the relevant case law. The report refers to problems faced by the government in realising human rights, and notes, for example, that the government is faced with severe prison overcrowding. It also discusses the work of oversight agencies such as the ICD and the JICS, as well as the contributions of non-governmental organisations in protecting human rights.

²¹⁹ A copy of South Africa's Initial Report is available on the Committee against Torture website at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/437/42/PDF/G0543742.pdf?OpenElement>

²²⁰ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006. par 3.

²²¹ Republic of South Africa (2002) *Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005.

South Africa has to be commended for submitting its Initial Report, albeit late, as well as for the honesty in reporting on some of the sensitive issues, such as the handing over of a terrorism suspect, Mr. Mohammed, to US authorities without seeking assurances that he would not face the death penalty in that country.²²² The report also lists several cases of complaints lodged with the ICD against police officers for assault and offences that could be construed as torture.²²³

The time period covered by the report (1999 to 2001) and its lateness (by six years) are, however, significant limitations, eroding its relevance and accuracy. The second limitation is its lack of depth. While it describes constitutional, legislative and policy measures adopted in line with CAT, it seldom moves beyond this to provide critical insight into the success or failure of measures taken to give effect to the objectives of CAT. The Guidelines are clear on what the Initial Report should contain in respect of each article:

Cases or situations of violation of the Convention, the reasons for such violations and the measures taken to remedy the situation. It is important for the Committee to obtain a clear picture not only of the legal situation, but also of the de facto situation.²²⁴

The Initial Report must have left the Committee with an adequate description of the legal situation but failed to provide sufficient detail to give insight into the practical state of affairs regarding adherence to CAT.

Civil society responses to the Initial Report

Three international non-governmental organisations²²⁵ and three domestic non-governmental organisations submitted reports to the Committee in response to the Initial Report.²²⁶ Five of the organisations also made oral submissions to the Committee in Geneva in November 2006 during the 37th session of the Committee.²²⁷

None of the civil society submissions provided a comprehensive shadow report on CAT in response to the Initial Report but chose rather to highlight particular themes and issues. While the Initial Report covered the period 1999 to 2002, the civil society submissions were not limited to this period and provided more current information. In fact, most of the civil society submissions focussed on current policy and practice, emphasising issues of concern and

²²² Republic of South Africa (2002) *Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005, paras 102 – 106. The case of Mr. Mohammed ended up in the Constitutional Court as *Mohammed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

²²³ Republic of South Africa (2002) *Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005, paras 152 – 157.

²²⁴ UN Committee against Torture (2005) *Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, Par 6.

²²⁵ These organisations were Amnesty International (AI), the Global Initiative to End All Corporal Punishment of Children (only written submission), and the World Organisation Against Torture.

²²⁶ The three submissions from domestic non-governmental organisations came from the Civil Society Prison Reform Initiative (CSPRI) and the Children's Rights Project (CRP), both projects of the Community Law Centre (University of the Western Cape), and the Centre for the Study of Violence and Reconciliation (CSVR).

²²⁷ All the relevant documentation and submissions are available on the Committee website at <http://www.ohchr.org/english/bodies/cat/cats37.htm>

implementation challenges in South Africa's measures, or lack thereof, to give effect to the Convention. A general articulated concern was, however, the lateness of the report, as well as that it did not provide an adequate description of the measures undertaken and the problems encountered in giving effect to the Convention. Also worth noting is that the three South African organisations made supplementary submissions in response to questions raised by the Committee, to which the South African government delegation responded the following day. The supplementary submissions are unfortunately not available on the Committee's website. A number of the issues raised by the civil society organisations in their written submissions will be highlighted below with reference to particular articles of the Convention.

Articles 2 and 4

The submissions by AI, CSPRI, and CSVR noted that inadequate legislative measures are in place in South Africa to criminalise torture. CSPRI commented specifically on the inadequacy of two draft bills aimed at criminalising torture. The organisations also commented critically on the inadequacy of the ICD when investigating police abuses. The submissions noted with grave concern that torture had not been criminalised in South Africa and that the definition of torture set out in Article 1 of CAT had not been incorporated into South African law, as is required by Article 4 of that Convention, although a bill had been drafted. For example, CSPRI observed:

To inspire public confidence in the Government's determination to criminalise torture, an enactment that outlaws torture must provide a credible means for the victims of torture to bring the matter to the courts. The present Bill is conspicuously silent on this matter. The Country Report, on the other hand, refers to a host of enactments, constitutional bodies, judicial decisions, government initiatives and plans aimed at promoting human rights. No doubt, these are important and welcome advances in a country blighted by the inhumanity of apartheid, and need to be supported. But we need to realise, too, that successes on this front are limited to the goals they set out to achieve, and even then, their usefulness is limited to those who know about their existence and how to go about obtaining relief. None of the institutions referred to in the [Initial] Report can be said to be specifically geared to cases of torture, for this is an area that demands a great deal of investigative expertise, from the investigative stage, through the medical examination stage, right up to the prosecution of the crime.²²⁸

Article 3

AI's submission raised concerns under Article 3 of CAT in respect of the treatment of asylum seekers, illegal immigrants and terrorism suspects. Following from this, it raised particular concerns about *refoulement* and gave a detailed account of events surrounding the handing over of Khalid Rashid to Pakistani authorities on 6 November 2005, as described in the section 'The duty to protect foreign nationals'. AI cited two further cases, the one involving Mohammed Hendy and the other Jamil Odys (both Jordanian nationals), also described above in the section 'The duty to protect foreign nationals'. The submission also noted with concern a statement made by the Commissioner of Police to Parliament in May 2004 that the security services had in April of that year arrested and deported a number of "terrorism suspects". It also noted with

²²⁸ Muntingh L and Fernandez L (2006) *Civil Society Prison Reform Initiative (CSPRI) Submission to the UN 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 Of Punishment"*, CSPRI, Bellville, para 17.

concern that the Police Commissioner refused to provide further details of these deportations.²²⁹

In its submission, the CSVR expressed concern about the long delays experienced by asylum seekers and pointed out that they often wait as long as four years to have their refugee status determined. It is reportedly during this period that asylum seekers are extremely vulnerable to police harassment. Using the experience of Zimbabwean nationals as an example, the CSVR submitted that torture survivors seeking asylum in South Africa are at a real risk of being returned to their country of origin in violation of Article 3 of the Convention, as “the rights of torture survivors to be protected and granted asylum are quite restricted in South Africa”.²³⁰

Articles 10

The lack of public knowledge and more specifically, the lack of training received by officials in South Africa in respect of CAT and the absolute prohibition of torture were raised as concerns by CSPRI in its submission.

Article 11

Whereas the Initial Report dealt with an overview of the legislative and policy framework, the submission by CSPRI referred to two specific cases, one involving the death of a female prisoner (M. Syfers) at Pollsmoor Prison and one involving the alleged mass assault of prisoners that took place at St Alban’s Prison in July 2005.²³¹ The two cases demonstrated the problems occurring at ground level and the apparent reluctance of authorities to conduct criminal investigations of alleged acts of torture and abuse. The submission further recommended the more active involvement of the JICS in monitoring the investigation of such cases.

Article 12

This article requires State Parties to ensure that the competent authority promptly and impartially launch an investigation when there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. Given this requirement, the submissions by AI, CSPRI and CSVR raised concerns about the adequacy of investigations into alleged abuses by officials of the SAPS and the DCS. AI also highlighted the remarks made by the Commissioner of Police in May 2006 questioning the usefulness of the ICD in providing oversight over the SAPS. These submissions provided detailed descriptions of problems encountered in this regard and cited cases where investigations have failed. Both the CSPRI and AI submissions raised concerns about the independence, impartiality and effectiveness of the ICD and the AI

²²⁹ Amnesty International (2006) *South Africa – briefing for the committee against torture*, AFR 53/002/2006, London, p. 1.

²³⁰ Motala A, Ernest C, Bruce D and Dissel A (2006) *Submission by the Centre for the Study of Violence and Reconciliation to the UN Committee against Torture in response to “The Republic of South Africa – first Country report on the Implementation of the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment”*, Centre for the Study of Violence and Reconciliation, Johannesburg, p. 7.

²³¹ Muntingh L and Fernandez L (2006) *Civil Society Prison Reform Initiative (CSPRI) Submission to the UN 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 Of Punishment’*, CSPRI, Bellville, pp 19-20

submission referred to a “systematic failure to investigate and bring to justice perpetrators of torture”.²³²

Article 13

The CSPRI submission emphasised the problems in the prison system with respect to investigations and highlighted the secondary victimisation of alleged victims of torture, as well as the undermining of investigations by corrupt and complicit officials. The present practice that members of the SAPS investigate complaints laid by prisoners against prison officials in assault cases, for example, was regarded as a serious flaw in the investigative regime.

Article 14

In its submission, CSVR highlighted the absence of prosecutions of crimes committed under apartheid and drew the Committee’s attention to the Prosecution Policy of the National Director of Public Prosecution (NDPP) which would effectively “grant impunity” to perpetrators who did not participate in and/or make a full disclosure to the TRC. It argued that this “obliterates the rights of victims of torture during the apartheid era to obtain redress”²³³ and thus that this policy was in contravention of the obligations that South Africa had undertaken in terms of article 14 of CAT. CSVR also noted that rehabilitation services for victims of torture are virtually non-existent in South Africa. The AI submission raised similar concerns about prosecutions and emphasised that amnesties granted by the TRC left victims and families of victims without recourse to civil claims and criminal prosecutions. The submission further noted the tardiness of government in making a decision in respect of reparations paid to victims of gross human rights violations committed under apartheid and that the amount (R30 000.00) was substantially less than what was recommended by the TRC.²³⁴

Article 16

All six organisations made comments in respect of Article 16 covering the following concerns: deaths in custody (police cells and prisons); use of excessive force by SAPS and DCS officials; prison overcrowding; the general conditions faced by prisoners; excessively long periods that detainees spend awaiting trial; rape in prisons; HIV/AIDS in prisons and access to anti-retroviral therapy; the use of violence by vigilante groups; trafficking of prisoners for sex; and long prison sentences. The submissions by the CRP and Global Initiative focused exclusively on corporal punishment of children and acknowledged that although corporal punishment had been outlawed in South Africa, it was still taking place on a wide scale in state institutions and perpetrators were seldom prosecuted. The submission by the World Organisation Against Torture provided a general overview of the violent nature of South African society and emphasised in particular the vulnerability and large-scale victimisation of women and children, with reference to rape and other sexual crimes.

²³² Amnesty International (2006) *South Africa – briefing for the committee against torture*, AFR 53/002/2006, London, p. 7.

²³³ Motala A, Ernest C, Bruce D and Dissel A (2006) *Submission by the Centre for the Study of Violence and Reconciliation to the UN Committee against Torture in response to “The Republic of South Africa – first Country report on the Implementation of the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment”*, Centre for the Study of Violence and Reconciliation, Johannesburg, p. 5.

²³⁴ Amnesty International (2006) *South Africa – briefing for the committee against torture*, AFR 53/002/2006, London, pp. 13-14

Concluding Remarks on the Initial Report

The Committee, in its Concluding Remarks, expressed its “profound satisfaction for the termination of the apartheid regime” and also welcomed South Africa’s Initial Report.²³⁵ It noted that although the report was submitted late and did not fully comply with the Guidelines, the Committee was able to establish, through dialogue with the delegation, a clearer picture of measures taken to implement the provisions of the Convention.²³⁶ The Committee commended South Africa for a number of positive developments and noted, in particular, the peaceful transition to democracy, the adoption of a progressive Constitution (with specific reference to section 12 of the Constitution which deals with freedom and security of the person), the ratification of a wide range of international human rights instruments, and the adoption of progressive legislation and the establishment of institutions to promote and protect human rights.²³⁷ The Committee furthermore acknowledged the post-apartheid challenges facing South Africa.²³⁸

In respect of Articles 1, 4 and 15, the Committee lamented the absence of legislation criminalising torture, and further urged South Africa to adopt legislation implementing the absolute prohibition on torture, prohibiting the use of any statement obtained under torture and establishing that superior orders cannot be invoked as a justification of torture.²³⁹ In respect of Article 3, the Committee emphasised the obligation of *non-refoulement* and requested the South African government to provide it with updated information on the status of Mohamed and Rashid. The Committee also expressed concern about the situation of non-citizens, their treatment and specifically the situation at the Lindela Repatriation Centre²⁴⁰, and thus it recommended thorough and independent investigations into complaints, as well as the establishment of an effective monitoring mechanism.²⁴¹

²³⁵ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.paras 2 & 3.

²³⁶ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 3.

²³⁷ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, paras 5-8.

²³⁸ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 11.

²³⁹ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, paras 13 & 14.

²⁴⁰ The Lindela Repatriation Centre (Lindela) serves as a centralised detention facility for the apprehension of undocumented migrants awaiting determination of their legal status in South Africa and/or deportation. (Human Rights Commission (2000) *Lindela at the Crossroads for Detention and Repatriation - an assessment of the conditions of detention by the South African Human Rights Commission*, Johannesburg, p. 7)

²⁴¹ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 16.

A number of concerns relating to Article 12 were raised by the Committee. Mindful of the risk of impunity, and referring to crimes committed under apartheid, the Committee encouraged the South African government to bring to justice the persons responsible for the institutionalisation of torture as an instrument of oppression. The Committee expressed particular concern about those officials who did not apply for amnesty and/or did not make a full disclosure to the TRC about their crimes. It linked this concern also to the wide discretionary powers given to the NDPP to decide on the prosecution of alleged perpetrators of human rights abuses, and argued that this in effect resulted in a *de facto* situation of impunity. Linked to crimes committed under apartheid, the Committee noted that not all victims of gross human rights violations had been compensated.

The high number of deaths in detention prompted the Committee to recommend the improvement of the investigative regime that would allow for perpetrators of torture to be brought to justice. The Committee also linked the wide discretionary powers of the NDPP to decide on which cases to prosecute, to the weakness in current investigations.²⁴²

The Committee noted that complaints mechanisms in places of detention are not adequate and that this further weakened the ability to bring perpetrators of torture to justice. It therefore urged the South African government to improve legal aid mechanisms to ensure that victims of torture can exercise their rights under the Constitution and seek redress.²⁴³

With reference to Articles 11 and 16, the Committee noted a number of concerns relating to detention conditions, overcrowding of facilities, human trafficking, lack of oversight and access to services. It urged the South African government to adopt effective measures, including legislation, to improve the situation. Also in relation to Article 16, the Committee noted the high levels of violent crime perpetrated against women and children and recommended that the South African government “should adopt all necessary measures to prevent, combat and punish violence against women and children”.²⁴⁴ It also urged the South African government to take effective measures to ensure that the legislation banning corporal punishment in state institutions such as schools and prisons is indeed implemented and that this is monitored.²⁴⁵

Civil society organisations noted the general lack of public knowledge on CAT. The Committee acknowledged this and linked it to the fact that the South African government recognised the Committee’s competence to receive individual communications under Article 22. However, no such communications had been received by the Committee since ratification and the South

²⁴² UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 18.

²⁴³ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 20.

²⁴⁴ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 23.

²⁴⁵ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 25.

African government was therefore urged to widely disseminate CAT, and information regarding CAT, in all the appropriate languages.²⁴⁶

As a general comment, the Committee requested South Africa to:

'provide in its next periodic report detailed disaggregated statistical data on complaints related to acts of torture, or cruel, inhuman or degrading treatment committed by law enforcement officials as well as of the investigations, prosecutions and convictions relating to such acts, including with regard to the abuses reportedly committed by South African peacekeepers. It further requests the State Party to provide detailed information on compensation and rehabilitation provided to the victims.'²⁴⁷

It also requested detailed information on the bill criminalising torture, as well as on progress made with regard to child justice legislation. The Committee also requested feedback within one year after issuing of its report²⁴⁸ on the following issues: the cases of Mohammed and Rashid; the situation of non-citizens and their treatment; efforts to strengthen legal aid; violence against women and children; statistical data on complaints and investigations into torture, and, importantly, the criminalisation of torture.²⁴⁹

The Committee also raised a number of issues that were not explicitly noted in the civil society organisations' submissions. The first concerns clarification on South Africa's jurisdiction over acts of torture in cases where an alleged offender is present in any territory under its jurisdiction. It furthermore requested information on progress made towards enacting child justice legislation,²⁵⁰ as well as any other legislation that may contribute towards the implementation of the Convention. It similarly requested information on training programmes for law enforcement officials as well as on monitoring mechanisms in mental health and other welfare institutions. The Committee also requested information on measures undertaken to prevent and prohibit the production, trade and use of equipment specifically designed to inflict torture or other cruel, inhuman and degrading treatment.

In evaluating the influence of civil society on this process, it could plausibly be argued by the participating civil society organisations that their impact may be measured by looking at the congruence between the issues they raised with the Committee in their submissions and the issues of concern raised by the Committee in its Concluding Remarks. There is admittedly no

²⁴⁶ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 26.

²⁴⁷ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 27. During the Committee's interaction with the government delegation it became evident that some committee members were concerned about the behaviour of SANDF personnel as part of peacekeeping forces in Africa.

²⁴⁸ This deadline passed in November 2007.

²⁴⁹ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, par 29.

²⁵⁰ Child justice legislation was not raised by any of the civil society organisations in their original submissions, but was raised by the CRP in a supplementary submission following a question from a Committee member.

proof that a concern identified by a civil society organisation was included in the Concluding Remarks because of the input by one of the civil society organisations, since the Committee might have included an issue of its own accord. In this regard it must be noted that the Committee does not reference or motivate why indeed it is raising a particular concern. However, it is gratifying to note that when comparing the issues raised by the civil society organisations in their submissions with the concerns raised by the Committee in the Concluding Remarks, there seems to be a great degree of congruence which might at least provide anecdotal proof that the civil society organisations made a real difference to the process.

In conclusion, it appears that there were in fact very few issues raised by civil society organisations that did not find their way into the Concluding Remarks. The six submissions by civil society organisations enabled the Committee to substantiate with more recent information a number of the issues raised in the Concluding Remarks. The Committee went further and prioritised a number of these, reflected by its request for feedback on selected concerns within one year, as noted above.

Key issues for reform

Based on the responses from the Committee the following are identified as key issues for reform in South Africa.²⁵¹

- Enact legislation criminalising torture based at minimum on the definition in Article 1. Further, such legislation must provide for penalties giving recognition to the seriousness of the crime of torture.
- Enact legislation implementing the principle of the absolute prohibition of torture, prohibiting the use of any statement obtained under torture and establishing that orders from a superior may not be invoked as a justification of torture.
- South Africa must ensure that under no circumstances are persons expelled, extradited or returned to a state where they may be subject to torture.
- All necessary measures should be taken to prevent and combat the ill-treatment of non-citizens detained in repatriation centres, especially in the Lindela Repatriation Centre. Non-citizens must be provided with adequate information about their rights. An effective monitoring mechanism should be established for these centres and all allegations of ill-treatment should be thoroughly investigated.
- The necessary measures should be taken by South Africa to establish its jurisdiction over acts of torture in cases where the alleged offender is present in any territory under its jurisdiction, either to extradite or prosecute him or her.
- Consideration must be given to bringing to justice persons responsible for the institutionalisation of torture as an instrument of oppression to perpetuate apartheid, and to granting adequate compensation to all victims.
- All deaths in detention and all allegations of acts of torture or CIDT committed by law enforcement personnel must be promptly, thoroughly and impartially investigated to bring the perpetrators to justice.
- Strengthen legal aid to assist victims of torture and CIDT to seek redress.

²⁵¹ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture - South Africa CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.*

- Translate and disseminate the CAT in all appropriate languages, and disseminate in particular to vulnerable groups.
- Implement measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of all those deprived of their liberty, in particular regarding health care.
- Children must at all times be detained separately from adults.
- Establish an effective monitoring mechanism for persons in police custody.
- Adopt legislation and other effective measures to prevent, combat and punish human trafficking, especially that of women and children.
- Ensure that legislation banning corporal punishment is strictly implemented, in particular in schools and other welfare institutions for children, and establish a monitoring mechanism for such facilities.
- Submit statistics to the Committee on the prevalence of torture and the prosecution of perpetrators
- Distribute the Committee's *Concluding Remarks* widely in the appropriate languages.

Chapter 5: Recent case law

This chapter provides summaries of six recent court decisions dealing with Articles 3, 11, 15 and 16 of CAT. The cases described deal with the use of evidence obtained under torture; the deportation and extradition of foreign nationals; the conditions of detention for children; conditions of detention under police custody; and the seeking of diplomatic assurances.

The use of evidence obtained through torture

Article 15 of CAT requires that any statement obtained though torture may not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made. The Constitution in section 35(5) affirms this prohibition: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

The use of a statement obtained under torture to secure the conviction of a criminal suspect was the central issue in *Mthembu v S* heard by the Supreme Court of Appeal (SCA) in 2008.²⁵² The torture was, however, not directed against the appellant but against the state's chief witness, one Ramseroop, who implicated the appellant in several crimes through narrative and real evidence. At the trial, four years later, Ramseroop disclosed that he had been assaulted and tortured before leading the police to the key evidence incriminating the appellant. The central question was whether the evidence disclosed and pointed out by Ramseroop could be used against the appellant to secure his conviction.

The appellant, a former a police officer, was convicted in the Verulam Regional Court on two counts of vehicle theft and two counts of robbery involving more than R68 000. He received a prison sentence of eight years for the vehicle thefts and a further 15 years for robbery - in total 23 years imprisonment. He appealed to the Durban High Court against his convictions and sentence. Although the convictions were confirmed the sentences were reduced to a total of 17 years imprisonment. The Durban High Court also granted leave to appeal to the SCA, consequently this decision.

In late January 1998 the appellant brought Ramseroop a Toyota Hilux vehicle to repair. He was accompanied by another person, one Mhlongo. A few days later he returned to collect the vehicle, again accompanied by Mhlongo, and paid Ramseroop for the work done. In early February 1998 the appellant brought Ramseroop another vehicle, a Toyota Corolla, with an instruction to do repairs and spray painting on the vehicle. A few days later the appellant returned and paid Ramseroop for the work done. He, however, left the vehicle with Ramseroop. Upon departing he left a large metal box with Ramseroop with the instruction to dispose of it. Ramseroop, however, decided to keep the metal box and hid it in the ceiling of his house. On 19 February 1998 the police arrived at Ramseroop's house informing him that they were investigating the whereabouts of a stolen vehicle. Ramseroop immediately started telling the

²⁵² *Mthembu v The State* (64/2007) [2008] ZASCA 51 (10 April 2008)

police about the Toyota Corolla and at the request of the police, pointed out to them where it was parked on his property. After establishing that the vehicle was stolen, the police took Ramseroop into custody.

It was after Ramseroop was taken into custody that matters became problematic:

'It is common cause that after Ramseroop was taken into custody on 19 February, the police at Tongaat assaulted him severely. The assaults included torture through the use of electric shock treatment. Ramseroop's uncontested evidence was that he received a 'terrible hiding' on the evening after he had been taken into custody. Thereafter assaults continued until the morning of the 21st when he took the police to his home to show them where he had hidden the metal box.'²⁵³

It was also a result of the torture that Ramseroop took the police to the residence of Mhlongo where the Toyota Hilux vehicle was discovered. There was evidence that persons arrested at Mhlongo's residence were also subjected to torture although this did not have a material bearing on the case. The discovery of the Toyota Hilux and the metal box, the latter being material evidence to the robberies, were therefore a result of the torture inflicted on Ramseroop.

In the judgment, Cachalia J refers to the pre-constitutional era where 'courts generally admitted all evidence, irrespective of how it was obtained' and that it was left to the discretion of the judge to determine what evidence would be inadmissible, and that a stricter approach was followed in respect of statements compared to real (physical) evidence. In short, 'the fruit of the poisonous tree was not excluded'.²⁵⁴ In the constitutional era this position had changed; reference is made in the judgment to emerging jurisprudence holding that 'proof of an involuntary pointing out by an accused person is inadmissible even if something relevant to the charge is discovered as a result thereof'.²⁵⁵

Evidence improperly obtained from a person other than the accused is a new dimension to the debate and this case was, according to Cachalia J, the first to deal with this issue. Relying on what is called a 'plain reading' of section 35(5) of the Constitution, it is found that it would not only apply to evidence obtained from the accused, but from any person. To strengthen its point, the Court then turns to the right to be free from torture in section 12 of the Constitution and supports this with the definition of torture in Article 1 of CAT, noting that South Africa ratified CAT in 1998. Relying further on case law from Ireland and the House of Lords it is concluded that to accept the discovery of the Hilux and the metal box would 'involve the State in moral defilement'.²⁵⁶

Ramseroop made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux [vehicle] and metal box was extracted through torture. It would have been apparent to him when he testified that, having been warned in terms of s 204 of the Act, any departure from his statement would have had serious consequences for him. It is also apparent from his testimony that, even four years after his

²⁵³ Para 17

²⁵⁴ Para 22

²⁵⁵ Para 23 referring to *S v January and Prokureur-Generaal, Natal v Khumalo*.

²⁵⁶ Para 32

torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.²⁵⁷

To admit Ramseroop's testimony regarding the Hilux [vehicle] and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.'²⁵⁸

The net result was that the convictions and sentences relating to the theft of the Hilux and the post office robbery (metal box) were overturned. Only the conviction related to the theft of the Corolla remained, and the sentence was adjusted from five years to four years. The Court was not pleased with the turn of events:

What has happened in this case is most regrettable. The appellant, who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have not only failed to investigate the case properly by not following elementary procedures relating to the conduct of the identification parade, but have also, by torturing Ramseroop and probably also Zamani Mhlongo and Sithembiso Ngcobo, themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held to account for their actions.²⁵⁹

In a demonstration of judicial activism, the court ordered that copies of the judgment be sent to the Minister of Safety and Security, National Commissioner of SAPS, Director of the ICD, Chairperson of the SAHRC, and the NDPP.

The principle of *non-refoulement*

Article 3 of CAT stipulates that no State Party shall expel, return ('refoul') or extradite a person to another state where that person may be at risk of being subjected to torture. In the aftermath of the 11 September 2001 and earlier attacks on the US, that country commenced with a worldwide campaign to identify and take into custody people it suspected of being terrorists or linked to terrorist organisations. This worldwide campaign has had significant implications for the protection of human rights at an international level, sufficiently so that the UN Commission on Human Rights appointed a Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism.²⁶⁰ The efforts of the USA to capture

²⁵⁷ Para 34

²⁵⁸ Para 36

²⁵⁹ Para 39

²⁶⁰ Resolution 2005/80

terrorists and persons suspected of terrorism was also felt in South Africa and was placed in 2001 before the Constitutional Court as *Mohamed v President of South Africa and six Others*.²⁶¹

The following provides a brief description of the facts of the case. Following the 1998 bombings of US embassies in Kenya and Tanzania a Federal Grand Jury in New York identified 15 men as suspects in connection with the two bombings. One of the men was Khalifin Khamis Mohamed, a Tanzanian national residing in Dar es Salaam. The day before the bombing he purchased a car, obtained a visitor's visa for South Africa and entered South Africa on 16 August 1998 via Mozambique. He eventually found accommodation and employment in Cape Town. A warrant for his arrest was issued by a New York court on 17 December 1998. Roughly a year later and by chance, an FBI agent investigating another case with which SAPS was providing assistance, identified Mohamed while searching through asylum seekers' records in Cape Town. Knowing that Mohamed would need to renew his refugee status application before 5 October 1999, SAPS and the FBI waited for him. On 5 October 1999 Mohamed arrived at the refugee reception centre where he was arrested by South African immigration officials and handed over to FBI officials. He was taken to a car in the basement of the building and transported to a holding facility at Cape Town airport. Here he was questioned and 'freely and unreservedly disclosed his part in the plot to bomb the two embassies'.²⁶² He furthermore explained that he feared for his life if he was returned to Tanzania and that he would prefer to be taken to the US. The next day he was flown out of South Africa to the US in the company of FBI agents. Two days later he appeared in court and the trial judge duly informed him that he faced the death penalty for a number of charges and that 'his surrender from South Africa had not been accompanied by an assurance by the US that he would not be subject to the death penalty'.²⁶³ If the South African government had sought such assurances, it was very likely that the US government would have given this as it did in the case of a co-conspirator handed over by German authorities. Following these developments, Mohamed launched court proceedings in South Africa on the basis that his removal from South Africa was unlawful and unconstitutional. This rested on two grounds. Firstly, that deportations and extraditions from South Africa are unlawful and unconstitutional if there is the risk that the person being extradited or deported may face the death penalty and no assurances to exclude the death penalty are given by the receiving state. Secondly, the procedure through which Mohamed was handed over to the US authorities was unlawful because it was a deportation procedure, whereas an extradition took place: "This was a 'disguised extradition' and such a manipulation of the law was a cynical and unlawful use of one procedure to achieve the result of another."²⁶⁴

The Court ruled in favour of Mohamed and made the following important points. Extradition is fundamentally different from deportation: 'Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such

²⁶¹ CCT 17/01

²⁶² Banda J, Katz A and Hübschle A (2005) 'Rights versus Justice – issues around extradition and deportation in transnational terrorist cases' *African Security Review* 14(4) p. 64

²⁶³ Banda J, Katz A and Hübschle A (2005) 'Rights versus Justice – issues around extradition and deportation in transnational terrorist cases' *African Security Review* 14(4) p. 64

²⁶⁴ Banda J, Katz A and Hübschle A (2005) 'Rights versus Justice – issues around extradition and deportation in transnational terrorist cases' *African Security Review* 14(4) p. 64

person in accordance with the provisions of its law.²⁶⁵ As important as this distinction may be, it becomes immaterial where the death penalty is involved and the handing over of Mohamed to the US without seeking assurances that he would not face the death penalty was unlawful. It notes further that Article 3 of CAT makes no distinction between deportation and extradition – it does not matter what procedure is used, the duty is to prevent that the person is exposed to the risk of torture or ill-treatment.²⁶⁶ By handing Mohamed over to the US, the South African immigration authorities failed to respect and protect his constitutional right to life, the right to dignity and the rights to be free from cruel, inhuman and degrading punishment.²⁶⁷

Mohamed further requested the Court to direct the South African government to seek diplomatic assurances that the death penalty would not be imposed. The urgency of the case prevented this from being a practical solution and the Court submitted a copy of the judgment to the trial court in New York. On the basis of his confession Mohamed was convicted and sentenced to life imprisonment without the possibility of parole. He is currently serving his sentence in a federal prison.

The care of children in state custody

Children are especially vulnerable when deprived of their liberty. Poor conditions of detention give rise to an environment that may amount to cruel, inhuman and degrading treatment or punishment. From experience it is also known that these conditions facilitate the occurrence of torture. In respect of children there is a very specific constitutional duty emphasizing that their rights and interest must be paramount in all decisions and that these rights are not subject to progressive realisation. The following two cases deal with children placed in the custody of the state, and point to the risks that children may face in such situations.

The George Hofmeyr School of Industries²⁶⁸

In 2005 the Pretoria High Court handed down two orders arising from an urgent application brought by the Centre for Child Law at the University of Pretoria on behalf of 11 girls who were learners at the George Hofmeyr School of Industries in Mpumalanga province. Their plight came to light when it was discovered that they were being held at the Bethal prison after they were removed from the George Hofmeyr School by the police following a charge of malicious damage to property laid against them by the principal of the school. They were in the prison wearing ‘only their shorty pyjamas, because this was what they were wearing when they were removed from the school by the police’. Lawyers attending to their case had them immediately removed from the prison and returned to the school. Further investigations by the lawyers revealed extremely disturbing events taking place at the school, such as girls being ‘sat on’ by other girls as a form of discipline, assaults, discrimination based on sexual orientation, inappropriate disciplinary measures, extensive self-mutilation by the girls, limited contact with families, restricted access to toilets, and various other prohibited behaviour management practices. The

²⁶⁵ CCT 17/01 Para 42

²⁶⁶ CCT 17/01 Para 60

²⁶⁷ Banda J, Katz A and Hübschle A (2005) ‘Rights versus Justice – issues around extradition and deportation in transnational terrorist cases’ *African Security Review* 14(4) p. 65

²⁶⁸ The description below is a summary of Skelton A (2005) ‘Court orders oversee transformation process at George Hofmeyer School’ *Child and Youth Care*, Vol 23 No. 5, pp. 16-18.

curator ad litem's report provides a detailed description of the problems found at the school.²⁶⁹ This information was placed before the court and the result was a progressive decision to deal with the problems of the school.

The first order stemmed from an urgent application heard on a Friday night in chambers and included the following:

- The 11 girls were to be returned immediately to the school
- A *curator ad litem* for the children was to be appointed to look after their legal interests
- The principal was to refrain from having children arrested and charged with minor offences
- The respective MECs for Education and Social Development (Mpumulanga), were to make immediate arrangements for the George Hofmeyr School to be subjected to a Developmental Quality Assurance process (DQA), in accordance with recognised policy and standards for developmental quality assurance for residential care and treatment
- The team that carried out the DQA had to be multi-disciplinary, comprising experts from both the government and non-government sector with expertise in child and youth care and children's rights; this team had to report back to court by 10 May 2005
- In the interim, the MEC for Education was to put in place the following support structures to prevent further incidents of suicide or self harm:
 - An advisor (expert in child and youth care) to support the management team at the school
 - A process to assess each child at the school according to developmental assessment practice in order to reinstate a therapeutic milieu and to stabilise the emotional well-being of the children
- The principal and certain staff members were also ordered not to assault children by "sitting on them" or in any other way
- That the children be allowed to visit a toilet at night and have reasonable contact with their parents.

The girls were taken back to school the following day and an advisor was appointed as well as a multi-disciplinary team made up of government and NGO persons to carry out the DQA, which was completed less than a month later.

A second order was made shortly after the reports from the *curator ad litem* and DQA team were placed before the court. The second order relied heavily on the recommendations of the DQA report and made these recommendations an order of the High Court. The order identified immediate actions as well as medium- to long-term actions aimed at the transformation of the school, but importantly, the court identified and set in place a monitoring mechanism.

The immediate actions, 28 in total, included the following:

- Containment issues:

²⁶⁹ Initial Report of the *Curator Ad Litem* Case No. 8523/2005, TPD

- Isolation of children to be used only as a last resort and as per legislation, standards and the Constitution
 - Children may not be locked in their rooms with no access to a toilet at night
- Contact with family
 - Contact with family may not be used as an incentive, privilege or punishment
 - Children to be allowed to make and receive calls to families
 - Children to be permitted regular visits to their families (as approved by head of therapeutic services and if indicated by child's IDP)
 - Letters to children may not be read by staff
 - Phone calls of the children may not be listened to
- Pocket money
 - All children to receive same amount of pocket money
 - Pocket money may not be used as incentive or punishment and may not be used to pay for education, care items or medical supplies
- Clothing
 - Children must be provided with adequate clothing
 - Children must be allowed to choose whether to wear uniform or own clothes out of school hours
 - Children can keep their own clothing
- Bedding
 - All children to be provided with the same bedding
 - No bedding to be removed for punishment
- Self mutilation – no self hurt (such as cutting or attempted suicide) may be punished, but must be dealt with in a therapeutic manner
- Use of children to control, escort, guard or discipline other children must cease immediately
- Punishment hostel – the use of one of the hostels as a “punishment” hostel was to cease immediately
- All forms of discrimination (such as discrimination towards sexual orientation) to cease
- Food – children to be provided with sufficient, nutritional and well-prepared food.

The Court was aware of the fact that bringing about sudden changes needs to be done carefully, and for that reason the order included the following clause: ‘The staff and all children are carefully, thoroughly and professionally informed of the foregoing changes ... in a manner which ensures each child’s well being and minimizes reactions which might cause children to harm each other or themselves, or harbour resentment towards children or staff.’

The order also referred to the medium- and long-term issues, and mindful of their possible implications, the court gave the Department of Education time to consider these. The main issues raised were the following:

- An Organisational Developmental Plan (ODP) based on the DQA recommendations would be drafted by the advisor and discussed with the Department and the school.
- The ODP would be implemented in the school
- The advisor would assist the school in drawing up and implementing suitable care and behaviour management procedures

- Developmental assessment of each child in the school should continue and be completed by 31 July 2005, and once completed the IDP for each child should guide activities, actions and decisions with regard to each child
- Staffing structures, numbers, hours and staff roles related to hostels and therapeutic services were to be urgently reviewed by the Department of Education
- Qualified child and youth care workers or youth workers were to be appointed as hostel staff by November 2005, with a ratio of 1 staff member to 12 children in hostels.
- Training, support and mentoring of the principal and staff was to be implemented
- A comprehensive strategic plan was to be drawn up by 15 June 2005 to change the hostel and behaviour management system from the level/point system to a developmental and therapeutic milieu.

The Court also took the innovative approach of “overseeing” that the orders were actually abided by, and requested certain reports back to court in order to track compliance with the orders. A review needed to be done by the DQA Team, and a report lodged with the court by 30 November 2005, by which time all recommendations should have been implemented. The respondents affected by the orders were ordered to report to the Court, to the *curator ad litem* and to their attorneys on a quarterly basis as to what steps had been taken to implement these orders.

The Centre for Child Law, in proceeding with legal action on behalf of these 11 girls, had decided on an approach which would promote the safety not only of these girls, but also the other girls in the facility. A more aggressive approach of asking for an immediate closure of the school and requesting the police and the Director of Public Prosecutions to investigate was considered. However, it was decided that a more developmental approach was the desirable route to go, as it would allow for the building and strengthening of capacity at the school, whilst ensuring that the infringements of rights cease immediately.

The Luckhof case²⁷⁰

On 30 June 2006 the High Court in Pretoria handed down a judgment focusing on the State’s duties with regard to children who are wards of the State. This case dealt primarily with the conditions of detention, at a school of industries (Luckhof High School), which can only be described as cruel, inhuman and degrading.

The case arose from an urgent application brought by the Centre for Child Law against the MEC for Education (Gauteng) and the principal of the school. The Centre, acting in the public interest and also on behalf of two children at the school, brought to the Court’s attention various violations of children’s rights taking place at the school. An affidavit placed before the court described the extremely poor physical conditions in which the children were housed, the lack of access control, the use of prohibited behaviour management practices and the absence of proper therapeutic and support services for children at the school. The following extracts from the judgment bear testimony to this:

²⁷⁰ Skelton A (2006) ‘Using the courts to protect the rights of children in care’ *Child and Youth Care Work*, Vol 24 No. 8, pp. 8-9.

All three hostels are in varying degrees of physical deterioration. Most dormitories have no windows. The floors are in poor conditions and there are no cubicles to provide privacy in the showers and in some instances no doors to toilets. There are broken windows and broken ceiling boards in the dormitories, meaning essentially that children are exposed to inclement weather in their sleeping quarters.

At this time of the year (June), and especially at the present moment, Gauteng experiences a windy season and a particularly cold snap, with temperatures dropping after sunset to zero degrees and less. There appears to be no heating in the dormitories at all, and in some instances there is no electricity. The children's beds consist of old dirty foam mattresses on old bed stands. Some of the beds examined had sheets and one blanket, others had two blankets. The blankets are thin and grey, such as those used in the prisons. The bedding looks old and dirty. . . . Some of the children do not have proper clothing, because they sell their clothes to outsiders to obtain money for drugs. . . . It would seem, therefore, that the first applicant is correct in its submission that these children removed from their parents and made wards of the state, are now living in conditions which may be poorer than the conditions they were removed from.²⁷¹

The applicants pointed out that these conditions infringe the children's rights guaranteed by section 28 of the Bill of Rights, as well as their rights to human dignity in section 10, and the right not be subjected to cruel, inhuman and degrading treatment. In order to remedy the situation, the Centre for Child Law asked the court to order the MEC for Education to immediately provide each child with a sleeping bag as protection from the extreme cold. It also asked that the Department:

- submit plans as to how they are going to deal with the perimeter and access controls
- hold a DQA process, the recommendations arising from said DQA to be presented to the court
- as an interim measure, appoint an advisor trained in child and youth care to support the management team
- undertake developmental assessments of all the children
- provide psychological and therapeutic support to the children.

The court ordered that the MEC must carry out these demands, and added time frames for the different aspects to be carried out. The Court agreed that it would continue to supervise the order, a fairly unusual step for a court. The judge said he thought this was necessary because it was evident from the papers before court that previous requests by staff working at Luckhoff School to their superiors, to improve the situation, had fallen on deaf ears.

The Court made very specific comments about the State's duties in respect of children who are wards of the State:

'I have to pause here, perhaps in a moment of exasperation, to ask: What message do we send the children when we tell them that they are to be removed from their parents because they deserve better care, and then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor state institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts,

²⁷¹ Centre for Child Law and Others v MEC for Education, Gauteng 2008(1)SA 223 (T) pp.5-6

and in the final analysis we hypocritically renege on the constitutional promise of protection.'

Both the above cases opted to use the existing mechanism of a DQA to remedy the situation, as opposed to following a more adversarial approach, but insisted that the DQA process be supervised by the court. The two cases also point out the critical importance of independent oversight. In both cases the conditions of detention might have been remedied if independent, and preferably civilian, oversight had intervened at an earlier stage.

Managing the risk of police detention

Every year hundreds of thousands of people are arrested and detained by the police. Even a short period in custody can have tragic consequences if the state fails to ensure safe custody. This case concerns the arrest and detention of a 19-year old man by the police in Gansbaai (Western Cape) in August 2003.²⁷² He was arrested for drunkenness in public shortly after midnight at a local bar and placed in the police holding cells at the Gansbaai police station from where he was released at approximately quarter to five the same morning. During his short stay in the police cells he was gang raped and forced to perform fellatio by an unknown number (estimated to be six) of his fellow detainees. Two issues were critical with regard to safe custody in this case. Firstly, that the holding cell was without a functioning light and therefore pitch dark, and secondly, the way in which the police monitored the detention of people in custody under these conditions was wholly inadequate.

The judgment goes to considerable length in explaining that the arrest of the claimant was not only unnecessary but also unlawful with reference to the Liquor Act.²⁷³ If his arrest was unlawful, so was his detention. Apart from this finding, the claimant's brother was present at the police station when he was brought there and the court enquired critically why the police had not released him into the care of his brother and why it had been deemed necessary to detain him.²⁷⁴ It appears from the judgment that it was the practice of the police in the area to detain any person suspected of having committed a petty offence, for four hours and sometimes up to eight hours; particularly, people who were regarded as drunk ought to be locked up for four hours.²⁷⁵

The central issue of the case was, however, that the police placed the claimant in a dark cell with other persons, some of whom were also arrested for being drunk in public, and that this created a risk situation ("n gevraarsituasie"). It was common cause that the police have a legal duty to protect the safety of persons they take into custody and therefore have a duty to manage risks as they may arise.

The architecture of the police station and its holding cells is also important in this matter. The holding cells are in a separate building from the police station offices, approximately a distance

²⁷² *B v Minister of Safety and Security*, Case 6688/2006, Cape High Court, Unreported, Delivered 13 May 2008.

²⁷³ Para 15.2.7

²⁷⁴ Para 17

²⁷⁵ 'Nearly every person who has committed a petty offence is summarily detained for four hours – in one case eight hours!' Own translation para 15.1.19

of 15 metres. The building for the holding cells has a solid steel door and grille gate which give access to a small courtyard area. Once inside, access to the three cells (two smaller and one larger) is gained through a solid steel door and grille gate at each of the cells. When the solid doors and grille gates are locked it is unlikely that a person sitting in the charge office would be able to hear what is happening in the holding cells. Further, opening the two sets of doors to access a cell takes some time, thus giving a clear signal well in advance to those in the cells that a police officer is approaching.

Although the police records (i.e. Occurrence Book) reflected that the cells were visited every hour on the hour and that there were no complaints recorded from the detainees, the Court rejected this version and pointed to several inconsistencies arising from the evidence given by the police, the inscriptions in the Occurrence Book and the police officers' diaries. In short, the court concluded that cell visits did not take place, but even if they did, they were not effective to ensure the safe custody of the claimant.²⁷⁶ It should furthermore be noted that if a person stands at the closed grille gate to the cell in which the claimant was held and looks in, there is a significant area that cannot be seen unless one opens the grille gate and enters the cell. It is in this 'blind spot' that the claimant testified that the rape took place. Add to this the fact that the cell was pitch dark and that the police had to use a torch to inspect the cells, the cell visits became meaningless even if they happened.

The Court then asks the question: what reasonable steps could the police have taken to prevent the assault of the claimant? Firstly, the detention of every arrested person for four hours, and detaining a person under the conditions prevailing on the night in question, were reckless. Secondly, under these conditions the logical step would have been to release the claimant on a J534 warning to appear in court and detention in a dark cell would have been avoided entirely, a risk the police admitted in evidence. Thirdly, despite the fact that the cell visits did not take place, even if they did take place, hourly visits would have been wholly insufficient under the prevailing conditions. The Court concluded that special arrangements should have been made for as long as there was no functioning light in the cell and suggests that a person should have been placed in the courtyard to supervise the cells.

Against the background of the constitutional duty placed on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights', the court found that the police, by arresting and unlawfully detaining the plaintiff under the conditions described above, violated his rights under section 12(c), namely to be free from violence, either from a public or private source. In view of this the court awarded an amount of R475 000, with further argument to be heard regarding future loss of earnings.

The case highlights two important issues. Firstly, that the State has a duty to protect people placed in its care and that this requires an active engagement with the situation at operational level. Situations are fluid and risks change, requiring a proactive approach on the part of officials to ensure that safe custody is guaranteed. Secondly, the current police standing orders require hourly visits, but this may in itself not be sufficient and was definitely insufficient on the night in question. In line with Article 11 of CAT it is required that the police standing orders must be kept under systematic review to make such changes and improve them to promote safe custody.

²⁷⁶ Para 43

Diplomatic assurances

The case of *Kaunda and others v the President of the Republic of South Africa and others*²⁷⁷ deals with the duties of the state to protect individuals from torture and CIDT in other jurisdictions. The case emanates from the planned coup in Equatorial Guinea for which a group of primarily South African mercenaries were recruited. Plans for the coup went awry and the applicants were arrested in Zimbabwe on 7 March 2004. Two days later another group of 15 men were also arrested in Equatorial Guinea and accused of being mercenaries and plotting a *coup* against the President of Equatorial Guinea. The majority of the detainees were South African nationals. It was the applicants' position that they could be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who had been arrested there. They held that if they were extradited they would not get a fair trial and, if convicted, that they stood the risk of being sentenced to death. In view of this, they claimed that the South African government was under an obligation to offer them diplomatic protection.

Although the application was dismissed, it brought greater clarity on the act of state doctrine and diplomatic assurance. Briefly, an act of state is 'the exercise by the executive branch of government of a sovereign, discretionary power performed in respect of other (foreign states), in terms of the prerogative power to conduct foreign affairs'. ²⁷⁸ The central issue is that an act of state is an exercise of sovereign power and therefore not subject to judicial review, the reason being that 'in matters of public policy implications, the executive knows best'.²⁷⁹ The question was then whether the situation in which the applicants found themselves was justiciable – did the government have an obligation and could the Court compel the government to act in a particular manner?

The decision by the Court referred to the decision in *Mohamed* (discussed above) and the minority decision by O'Regan J is instructive as it argues that 'all exercise of public power is to some extent justiciable':

'It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.'²⁸⁰

O'Regan J acknowledges that the executive must be given 'considerable latitude' in conducting foreign relations but proposed that the Court should declare that the executive is under a

²⁷⁷ CCT 23/04.

²⁷⁸ Tladi D and Dlagnekova P (2007) 'The act of state doctrine in South Africa – has *Kaunda* settled a vexing question?' *South African Public Law* Vol. 22 p. 445

²⁷⁹ Tladi D and Dlagnekova P (2007) 'The act of state doctrine in South Africa – has *Kaunda* settled a vexing question?' *South African Public Law* Vol. 22 p. 446

²⁸⁰ Para 228

constitutional obligation to take appropriate steps to provide diplomatic protection but that the executive is in the best position to determine what steps it should take.²⁸¹

The majority decision starts from the position that a request for diplomatic protection is unlikely to be refused, but should such a request be refused the decision would be justiciable and a court could order the government to take appropriate action.²⁸² The Court notes further that the assertion of diplomatic protection is essentially a function of the executive and the courts are ill equipped to deal with such matters. However, the courts are not without power in these matters and the majority decision states that if the executive refuses to consider a legitimate request, or deal with it in bad faith or irrationally, the court can intervene. Irrationality and bad faith are thus grounds on which a court may be persuaded to review a decision of the executive.²⁸³

The *Kaunda* case is significant as it firstly concluded that the actions of the executive are reviewable in respect of foreign relations and further, that it described the grounds on which a refused request for diplomatic assurance can be reviewed.

²⁸¹ Tladi D and Dlagnekova P (2007) 'The act of state doctrine in South Africa – has *Kaunda* settled a vexing question?' *South African Public Law* Vol. 22 p. 454

²⁸² Tladi D and Dlagnekova P (2007) 'The act of state doctrine in South Africa – has *Kaunda* settled a vexing question?' *South African Public Law* Vol. 22 p. 454

²⁸³ Tladi D and Dlagnekova P (2007) 'The act of state doctrine in South Africa – has *Kaunda* settled a vexing question?' *South African Public Law* Vol. 22 p. 455

Chapter 6: Domestic and international stakeholders in the prevention and combating of torture

Domestic

There are three important domestic institutions with a specific mandate to prevent and combat torture and ill-treatment: the JICS, the ICD, and the SAHRC. These are described briefly below.

Judicial Inspectorate for Correctional Services²⁸⁴

In terms of section 85(1) of the Correctional Services Act (the Act), the Judicial Inspectorate for Correctional Services (JICS) (formerly the Judicial Inspectorate of Prisons) is ‘an independent office under the control of the Inspecting Judge, who may be a judge or retired judge of the High Court, who is appointed by the President. Its objective is to ‘facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions in prisons.’²⁸⁵

The Inspecting Judge is required to submit a report on each inspection to the Minister of Correctional Services and must also submit an annual report to the President and the Minister of Correctional Services, who must table the report in Parliament. An amendment to the Correctional Services will now also require that the inspection reports be submitted to the relevant committees of Parliament.²⁸⁶ The Inspecting Judge may receive complaints from prisoners via a number of sources:

- the National Council for Correctional Services
- the Minister of Correctional Services
- the Commissioner
- a Visitors’ Committee, or
- an IPV.

A key function of the Office of the Inspecting Judge is the appointment of IPVs. They are lay persons who visit prisons to receive, record and monitor complaints directly from prisoners. The IPVs are the primary access route for prisoners to lodge complaints with an independent authority. IPVs also have unrestricted access to all prisoners, documents and buildings for the purposes of their work. They are also required to submit a quarterly report to the Inspecting Judge, which must include information on the duration and number of prison visits carried out and the number and nature of complaints dealt with or referred to the Visitors’ Committee. If

²⁸⁴ This section is based on Jagwanth S (2004) *A Review of the Judicial Inspectorate of Prisons of South Africa*, CSPRI research Report No. 7, Cape Town.

²⁸⁵ Section 85(2). Before the amendment of this section by section 31 of the Correctional Services Amendment Act 32 of 2001, the Inspectorate was also required to report on corrupt and dishonest practices in prisons.

²⁸⁶ Section 65 of the Correctional Services Amendment Act (25 of 2008) amending section 90(3) of the Act.

the Head of Prison refuses a request from an IPV relating to his or her functions, the dispute must be referred to the Inspecting Judge who may make a final ruling on the dispute.

When taking down a complaint, the IPV interviews the prisoner in private and records complaints in an official diary.²⁸⁷ The first step is to attempt to resolve the complaint internally through discussions with the Head of Centre. If this approach is not successful, the IPV must refer the matter to the Visitors' Committee in that management area. The Visitors' Committee will then attempt to resolve the matter through discussion with the Head of Centre, Area Manager and may also involve local stakeholders such as magistrates and prosecutors in this. If the complaint remains unresolved after the Visitors' Committee has attempted to address it, or if there is no Visitors' Committee in that area, it must be referred to the Inspecting Judge.

The Visitors' Committee referred to above consists of the IPVs in a particular management area, the Regional Co-ordinator and community members. It meets at least quarterly. The Committee considers and attempts to deal with unresolved complaints, and may submit to the Inspecting Judge those complaints that cannot be resolved by the Committee.

In addition to the general recording and investigation of complaints described above, there are also some other important functions that the Judicial Inspectorate fulfils:

- all deaths in prisons must be reported to the Inspecting Judge who may carry out an investigation or instruct the commissioner to carry out an investigation
- all cases of solitary confinement must be reported to the Inspecting Judge and he/she may set it aside²⁸⁸
- all cases of segregation must be reported to the Inspecting Judge and he/she may set it aside
- the Head of Centre must report the use of mechanical restraints (except handcuffs or leg-irons) to the Inspecting Judge
- all instances where force was used must be reported to the inspecting Judge
- in respect of prohibited publications, the Inspecting Judge must, on referral by an affected person, confirm or set aside a decision of the Commissioner of Correctional Services refusing that person permission to publish details of an offence for which a prisoner or person subject to community corrections is serving a sentence.

Contact details:

Complaints may also be directly lodged with the Office of the Inspecting Judge through its website or by post.

Website: <http://judicialinsp.pwv.gov.za/>

Tel: 021-421 1012

Postal address: Private Bag X9177, Cape Town, 8000

²⁸⁷ Section 93(1).

²⁸⁸ Please note that an amendment to the Correctional Services Act removed the term 'solitary confinement' and is now referred to as 'segregation'.

Independent Complaints Directorate

The Independent Complaints Directorate is a government department that was established in April 1997 to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service. It operates independently from the SAPS in the investigation of alleged misconduct and criminality by SAPS members. Its mission is to promote proper police conduct. Unlike the JICS, there is currently not a system in place that proactively visits places where SAPS detain persons. This is regarded as a shortcoming.

The ICD investigates the following matters:

- deaths of persons in police custody or as a result of police action, such as shooting or assault
- the involvement of SAPS members in criminal activities such as assault, theft, corruption, robbery, rape and any other criminal offences
- police conduct or behaviour which is prohibited in terms of the SAPS Standing Orders or Police Regulations, such as neglect of duties or failure to comply with the police Code of Conduct
- complaints about poor service given by the police
- failure to assist or protect victims of domestic violence as required by the Domestic Violence Act (DVA)
- misconduct or offences committed by members of the Municipal Police Services (MPS).

There are a number of matters that fall outside the scope of the ICD:

- complaints about incidents which occurred before its establishment in April 1997 and those which took place more than a year before they were reported to the ICD, unless there are exceptional circumstances.
- complaints against Correctional Services staff, court officials, and members of the South African National Defence Force.

Any person who was a victim, witness or representative of a witness or victim of police misconduct may lodge a complaint. Non-governmental and community-based organizations may also lodge a complaint regarding police misconduct.

A complaint may be lodged in person, by telephone, per letter or e-mail to any ICD office. The complainant must fill in a complaint registration form (Form 1), which can be obtained from any ICD office.

Contact details:

Website: <http://www.icd.gov.za>

E-mail: Info@icd.gov.za

Tel: (012) 320 0431

Postal address: Private Bag X941, Pretoria, 0001

South African Human Rights Commission

The mandate of the South African Human Rights Commission is set out in section 184 of the Constitution and its three main functions are to:

- promote respect for human rights and a culture of human rights
- promote the protection, development and attainment of human rights, and
- monitor and assess the observance of human rights in the Republic.

It is furthermore empowered to:

- investigate and to report on the observance of human rights
- to take steps to secure redress where human rights have been violated
- to carry out research, and
- to educate.

The overarching role of the Commission is to monitor the implementation of the Bill of Rights, monitor legislation and the implementation of legislation and to hold government and service providers answerable.²⁸⁹

In a more recent development, the SAHRC has taken an active interest in South Africa's compliance with international human rights treaties. In this regard, particular attention is being paid to OPCAT since South Africa signed it in 2006. The Commission has also established a Section 5 Committee on Torture, which includes representatives of other oversight structures, academia and non-governmental organisations.

Contact details:

Website: http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml
Tel No: 011-484 8300
Postal: Private Bag 2700, Houghton, Johannesburg 2041
Complaints: Ms Sebongile Mutlwane: smutlwane@sahrc.org.za
Fax: (011) 484 1360

International

Five international mechanisms are of particular significance to the prevention and combating of torture. These are: Special Rapporteur on Prisons and Conditions of Detention in Africa; UN Special Rapporteur on Torture; UN Working Group on Arbitrary Detention; the Universal Periodic Review mechanism; and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. These are described briefly below.

²⁸⁹ Dissel A (2003) *A Review of civilian oversight over Correctional Services in the last decade*, CSPRI Research Paper No. 4, Cape Town, p.36

Special Rapporteur on Prisons and Conditions of Detention in Africa²⁹⁰

The Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) was established by the African Commission on Human and People's Rights (ACHPR) (the Commission hereafter) in 1996 and is one of five Special Rapporteurs. According to the mandate of the SRP adopted by the Commission, the SRP is 'empowered to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights.'²⁹¹ In order to fulfil its mandate the Special Rapporteur will:

- examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;
- advocate adherence to the Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the Charter and with international law and standards;
- at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, by their families, representatives, NGOs or other concerned persons or institutions;
- propose appropriate urgent action.

The SRP will conduct studies into conditions or situations contributing to human rights violations of prisons deprived of their liberty and recommend preventive measures. The SRP must also co-ordinate its activities with other relevant Special Rapporteurs and Working Groups of the African Commission and the United Nations. The SRP shall also submit to the Commission an annual report, which will be published and widely disseminated.

The SRP is not a complaints mechanism such as the JICS, but rather a mechanism to investigate conditions of detention that may violate detainees' rights in Africa. The SRP undertakes country visits during which it examines and investigates conditions of detention and then formulates recommendations to address problem areas. The report on a country visit is presented to the Commission during its two annual meetings.

The SRP may also assist with 'urgent appeals' as well as with communications to the Commission. Information on the procedure to be followed as well as the extent of the SRP's involvement in this regard is, however, sketchy.²⁹²

Even though it is difficult to assess the impact of the SRP, there are indications that much has been achieved in a general sense to bring attention to the plight of detained persons in Africa, but there have also been specific achievements in countries after the SRP has visited.²⁹³

²⁹⁰ For a detailed description of the SPR see Viljoen F (2005) 'Special Rapporteur on Prisons and Conditions of Detention in Africa – Achievements and Possibilities' *Human Rights Quarterly* 27

²⁹¹ Viljoen F (2005) 'Special Rapporteur on Prisons and Conditions of Detention in Africa – Achievements and Possibilities' *Human Rights Quarterly* 27 p. 131.

²⁹² Viljoen F (2005) 'Special Rapporteur on Prisons and Conditions of Detention in Africa – Achievements and Possibilities' *Human Rights Quarterly* 27 p. 144-147.

²⁹³ Viljoen F (2005) 'Special Rapporteur on Prisons and Conditions of Detention in Africa – Achievements and Possibilities' *Human Rights Quarterly* 27, pp. 163 – 167.

The SRP visited South Africa in 2004 and the report is available at the URL in the footnote.²⁹⁴

Contact details:

Website: http://www.achpr.org/english/_info/prison_mand..html
E-mail: achpr@achpr.org
Tel: (220) 4392962 / 4377721
Postal address: P. O. Box 673, Banjul, Gambia

UN Special Rapporteur on Torture

The UN Commission on Human Rights (now the Human Rights Council), in resolution 1985/33, decided to appoint an expert, a special rapporteur, to examine questions relevant to torture. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified CAT.

The mandate comprises three main activities:

- 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 country visits; and
- submitting annual reports, on activities, the mandate and methods of work, to the Human Rights Council and the General Assembly.

Unlike the complaints mechanisms of the human rights treaty monitoring bodies, the Special Rapporteur does not require the exhaustion of domestic remedies to act. When the facts in question come within the scope of more than one mandate established by the Council, the Special Rapporteur may decide to approach other thematic mechanisms and country rapporteurs with a view to sending joint communications or seeking joint missions.

The Special Rapporteur utilises a number of mechanisms to fulfil its mandate.

Urgent appeals: The Special Rapporteur will act upon receiving credible information suggesting that an individual or a group of individuals is at risk of torture at the hands, with the consent, or acquiescence of public officials. Without drawing any conclusions as to the facts of the case, the Special Rapporteur will send a letter to the Minister of Foreign Affairs of the country concerned, urging the Government to ensure the physical and mental integrity of the person(s).

The Special Rapporteur also takes action when persons are feared to be at risk of: corporal punishment; means of restraint contrary to international standards; prolonged incommunicado detention; solitary confinement; "torturous" conditions of detention; the denial of medical treatment and adequate nutrition; imminent deportation to a country where there is a risk of torture; and the threatened use or excessive use of force by law enforcement officials.

²⁹⁴ http://www.achpr.org/english/Mission_reports/South%20Africa/Special%20Rap_Prisons_South%20Africa.pdf

Allegation letters: Allegations of torture received by the Special Rapporteur which do not require immediate action, are sent to governments in the form of "allegation letters". The Special Rapporteur requests the government to clarify the substance of the allegations and to forward information on the status of any investigation (i.e. the findings of any medical examination, the identity of the persons responsible for the torture, the disciplinary and criminal sanctions imposed on them, and the nature and amount of compensation paid to the victims or their families). Allegation letters may be sent in relation to systematic patterns of torture, including:

- specific groups of victims or perpetrators;
- the use of particular methods of torture, and
- detention conditions amounting to ill-treatment.

Legislation that has an impact on the occurrence of torture may also be the subject of an allegation letter:

- criminal sentencing provisions (e.g. permitting corporal punishment);
- criminal procedure legislation (e.g. regarding periods of incommunicado detention, interrogation, etc.), and
- legal provisions granting amnesty, and other measures providing for de facto or de jure impunity in violation of the prohibition of torture.

Country visits provide the Special Rapporteur with a firsthand account of the situation concerning torture, including institutional and legislative factors that contribute to such practices. Visits are undertaken only at the invitation of a government. However, the Special Rapporteur may solicit an invitation, based on factors such as the number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation. Before a visit takes place, the government is asked to provide the following guarantees to the Special Rapporteur and accompanying United Nations staff: freedom of movement throughout the country; freedom of inquiry, especially in terms of access to all prisons, detention centres and places of interrogation; free contact with central and local authorities of all branches of government; free contact with representatives of NGOs, other private institutions and the media; confidential and unsupervised contacts, where the Special Rapporteur's mandate so requires, with witnesses and other private individuals, including persons deprived of their liberty; full access to all documentary material relevant to the mandate; and assurances that no persons, be they officials or private individuals, who have been in contact with the Special Rapporteur will suffer threats, harassment or punishment or be subjected to judicial proceedings.

During the visit the Special Rapporteur meets with government authorities, NGOs, representatives of the legal profession, alleged victims and relatives of victims. The conclusions and recommendations contained in the Special Rapporteur's mission report are intended to assist governments in identifying factors which may contribute to torture, and provide practical solutions to implement international standards.

The Special Rapporteur has also identified a number of issues of particular interest to it, such as psychiatric institutions, corporal punishment and the investigation of torture. The Special Rapporteur has also produced 'General Recommendations of the Special Rapporteur on Torture' which provides general guidelines on the prevention of torture.

The website of the Special Rapporteur also has the necessary forms applicable to urgent appeals and letters of allegations.

Contact details:

Website: <http://www2.ohchr.org/english/issues/torture/rapporteur/>

Email: see website

Postal address: Special Rapporteur on Torture
c/o Office of the High Commissioner for Human Rights
United Nations Office at Geneva
CH-1211 Geneva 10
Switzerland

UN Working Group on Arbitrary Detention

In 1990 the UN Commission on Human Rights (now the Human Rights Council), due to concern about the increase in arbitrary detentions since 1985, requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a thorough study of the matter and submit recommendations to it for the reduction of such practices. Two years earlier the UN General Assembly had adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In 1991, in pursuance of the recommendations made in the above-mentioned report of the Sub-Commission, the Commission on Human Rights set up the Working Group on Arbitrary Detention. The Commission on Human Rights has entrusted the Working Group with the following mandate:

- to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned;
- to seek and receive information from Government and intergovernmental and non-governmental organisations, and receive information from the individuals concerned, their families or their representatives;
- to present a comprehensive report to the Commission at its annual session.

If a case falls into any of the following three categories, it is considered to be arbitrary:

- when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, such as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him;
- when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the UDHR and, insofar as States Parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR;
- when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.

In the light of the information collected under this adversary procedure, the Working Group adopts one of the following measures in a private session:

- if the person has been released, the Group, however, reserves the right to render an opinion, on a case-by-case basis, as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned;
- if the Group considers that the case is not one of the arbitrary deprivation of liberty, it shall render an opinion to this effect;
- if the Group considers that further information is required from the government or the source, it may keep the case pending until that information is received;
- if the Group considers that it is unable to obtain sufficient information on the case, it may file the case provisionally or definitively;
- if the Group decides that the arbitrary nature of the deprivation of liberty is established, it shall render an opinion to that effect and make recommendations to the government.

The Working Group uses three core mechanisms to address arbitrary detention:

Individual complaints: The Working Group acts on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned governments to clarify and/or bring to their attention these cases. The Working Group also considers individual complaints. It is the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints. This means that its actions are based on the right of petition of individuals anywhere in the world.

Country visits: The Working Group conducts country visits (also called field-missions) upon the invitation of the government, in order to understand better the situation prevailing in that country, as well as the underlying reasons for instances of arbitrary deprivation of liberty. The Working Group submits a report of the visit to the Human Rights Council, presenting its findings, conclusions and recommendations.

Annual report: Each year the Working Group reports to the Council on its activities. In the annual report, the Working Group will express its observations on the different institutions, (legal) insufficiencies, policies, and judicial practices which, in its opinion, are the cause of the arbitrary deprivation of liberty.

The Working Group visited South Africa in 2005 and its report is available at the URL in the footnote.²⁹⁵

Contact details:

Website: <http://www2.ohchr.org/english/issues/detention/index.htm>

Email: see website

Postal address: Working Group on Arbitrary Detention

c/o. Office of the UN High Commissioner for Human Rights
United Nations Office at Geneva

CH-1211, Geneva 10
Switzerland

²⁹⁵ <http://daccessdds.un.org/doc/UNDOC/GEN/G05/168/98/PDF/G0516898.pdf?OpenElement>

The Universal Periodic Review under the HRC²⁹⁶

The Universal Periodic Review (UPR) is a mechanism of the Human Rights Council (HRC) and was created by the General Assembly as part of the UN reform process. The UPR process involves the review of all UN member states by the HRC once every four years. This means that 48 states are reviewed per year, divided into three sessions of two weeks. The subject of the review is the states' human rights practices and the respect for their human rights obligations.

The UPR is a three-stage process. The first stage involves the state being reviewed in a three-hour Working Group. The outcome of this Working Group is a document containing recommendations by states and voluntary commitments by the state under review. The second phase is the adoption of this document within two weeks of the Working Group session but not earlier than 48 hours after the state was reviewed. The third phase is the adoption of that document during a plenary session of the Human Rights Council.

The performance of a state in respect of rights obligations emanating from the following are considered during the UPR:

- The Charter of the United Nations
- The Universal Declaration of Human Rights
- Human Rights instruments to which the state is party (human rights treaties ratified by the state concerned)
- Voluntary pledges and commitments made by the State
- Applicable international humanitarian law

The UPR process makes provision for NGO participation by either submitting a report on the State Party in advance, or by taking the floor during the session. The procedures for this should be consulted.²⁹⁷

South Africa was reviewed by the UPR in 2008 and the relevant documentation is accessible at the URL given in the footnote.²⁹⁸

Contact details:

Website: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

Further information may be sought at the following addresses:

For States: UPRStates@ohchr.org

For Stakeholders: UPRsubmissions@ohchr.org

civilsocietyunit@ohchr.org (NGOs)

jklok@ohchr.org (NHRIs)

²⁹⁶ UPR-info.org <http://www.upr-info.org/>

²⁹⁷ A user-friendly description is available at <http://www.upr-info.org/-NGOs-.html>

²⁹⁸ <http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CZASession1.aspx>

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

In 2005 the Commission on Human Rights (now the Human Rights Council) decided to appoint a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In 2007 the Council decided to extend the mandate of the Special Rapporteur for a period of three years and requested the Special Rapporteur:

- To make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including the provision of advisory services or technical assistance;
- To gather, request, receive and exchange information and communications from and with all relevant sources, including governments, the individuals concerned, their families, representatives and organisations, including through country visits, with the consent of the state concerned, on alleged violations of human rights and fundamental freedoms while countering terrorism, with special attention to areas not covered by existing mandate-holders;
- To integrate a gender perspective throughout the work of his/her mandate;
- To identify, exchange and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms;
- To work in close coordination with other relevant bodies and mechanisms of the United Nations, and in particular with other special procedures of the Human Rights Council, in order to strengthen the work for the promotion and protection of human rights and fundamental freedoms while avoiding unnecessary duplication of efforts;
- To develop a regular dialogue and discuss possible areas of cooperation with governments, UN bodies and all relevant actors while fully respecting the respective mandates of these bodies and with a view to avoiding duplication of effort;
- To report regularly to the Human Rights Council and to the General Assembly.

The Special Rapporteur visited South Africa in 2007 and the report is available at the URL in the footnote.²⁹⁹

Contact details:

Website: <http://www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm>

²⁹⁹ <http://daccessdds.un.org/doc/UNDOC/GEN/G07/148/69/PDF/G0714869.pdf?OpenElement>

Appendix 1 CAT

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, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,
Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 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 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

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

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. 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 I, 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.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

- (a) Six members shall constitute a quorum;
- (b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United

Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party

concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (d) The Committee shall hold closed meetings when examining communications under this article;
- (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
 - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned. 5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

- (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
- (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

Appendix 2 List of UN treaties signed and/or ratified by South Africa

Instrument	Date open for signature	Date SA signed	Date SA Ratified
Convention on the Prevention and Punishment of the Crime of Genocide	1948	-	10 Dec 1998
International Convention on the Elimination of All Forms of Racial Discrimination	1966	3 Oct 1994	10 Dec 1998
International Covenant on Economic, Social and Cultural Rights	1966	3 Oct 1994	
International Covenant on Civil and Political Rights	1966	3 Oct 1994	10 Dec 1998
Optional Protocol to the International Covenant on Civil and Political Rights	1966	-	28 Feb 2002
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989	-	28 Feb 2003
Convention on the Elimination of All Forms of Discrimination against Women	1979	29 Jan 1993	15 Dec 1995
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	1999	-	18 Oct 2005
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984	29 Jan 1993	10 Dec 1998
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2002	20 Sept 2006	
Convention on the Rights of the Child	1989	29 Jan 1993	16 June 1995
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	2000	8 Feb 2002	
Amendment to article 43 (2) of the Convention on the Rights of the Child	1995	-	5 Aug 1997
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	2000	-	30 June 2003
Convention on the Rights of Persons with Disabilities	2006	30 March 2007	30 Nov 2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities	2006	30 March 2007	30 Nov 2007