



**A CRITICAL REVIEW OF TORTURE LEGISLATION
IN SOUTH AFRICA**

BY

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DECLARATION

“A CRITICAL REVIEW OF TORTURE LEGISLATION IN SOUTH AFRICA”

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I, Ashwin S. Tularam certify that the whole research paper, unless specifically indicated to the contrary in the text, is my own work. It is submitted as the dissertation component in the partial fulfillment of the requirements for the degree of Masters of Medical Law in the School of Law, University of KwaZulu-Natal.

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ABSTRACT

The practice of torture is an affront to human dignity. Freedom from torture is an absolute human right. Laws that violated human rights and entrenched racial divisions characterized the apartheid era in South Africa. However, the transition from a repressive state to a democratic one, gave “birth” to a Constitution characterized by fundamental human rights, social justice and open democratic societal values.

In order to have any real meaning, the human rights enshrined in the Constitution and various National and International instruments, needs to be realized in everyday life.

These rights are valuable in that they provide the tools to empower victims, or rather, survivors of torture and other cruel, inhuman and degrading treatment. A Criminal Justice System that focuses on victims’ rights and empowerment has the ability to transform the current maze that one must navigate to access justice.

In keeping with its obligations as a signatory in 1984 to the UN Convention against Torture, South Africa has 29 years later, in 2013, passed in its parliament the first Legislative Act creating the specific offence of torture. This paper critically appraises the current state of legislative and other provisions in the light of South Africa’s position against torture and analyses its fresh new law with the objective of establishing how effective these measures will be and what future recommendations are required for reinforcing its prevention.



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DEDICATION

To the survivors of torture and human rights abuses in South Africa, and the courageous custodians that take a stand to transform the current maze that these victims must navigate to access justice.

“It is better to risk sparing a guilty person than to condemn an innocent one.”

Voltaire

ABBREVIATIONS

ACHPR – African Commission on Human and Peoples ‘Rights

AI - Amnesty International

APT-Association for the Prevention of Torture

CAT-Committee Against Torture

UNCAT–United Nations Convention against Torture and Cruel, In-human 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

IV-Independent Visitor

JICS- Judicial Inspectorate for Correctional Services

MEC - Member of the Executive Council

NCPS-National Crime Prevention Strategy

NDPP- National Director of Public Prosecutions

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

TRC -Truth and Reconciliation Commission

UDHR -Universal declaration of Human Rights

UPR- Universal Periodic Review

WMA- World Medical Council.

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CHAPTER 1

General Introduction

1.1. Background to the Study

“When I couldn’t take it any more I told them what they wanted to hear, I just wanted to get out of there.”¹

Amnesty International recognizes the act of torture as being one of the worst forms of human rights abuses worldwide. Under international law, countries have a duty to undertake the necessary steps to prevent torture, punish perpetrators, as well as establish effective remedies for the survivors of any acts of torture.² The author submits that any form of human rights violation demonstrates a degradation and erosion of the political process especially when it forms part of an organized pattern of governance. This, according to Amnesty International, eventually emasculates the very fabric of humane relations between government and its citizens.³

Presently most general human rights conventions address the issue of torture and ill-treatment at both global and regional level and unanimously declare its absolute prohibition, even during emergencies or armed conflicts. From a regional perspective, the South African Constitution conforms to international law and applies the status of *Jus Cogens*⁴ (or peremptory norm), which encompasses the same judicial and ethical principles as the prohibition of slavery or gen-

¹ Prageshni Kisten: -Sunday Tribune: “Torture still used by SAPS claims.”-28 April 2013 -page 14.

² Carla Ferstman: “*Reparation for torture?*” Torture, Journal on rehabilitation of torture victims and prevention of torture, Thematic issue-Access to justice and reparations for victims of torture, Volume 16, No 3, 2006, p.184

³ Amnesty International: “*Take a Step to Stamp out Torture,*” 18, October, 2000.

⁴ Steve Biko Memorial lecture delivered by the President of South Africa, Thabo Mbeki on the occasion of the 30th anniversary of the death of Steven Bantu Biko, Cape town, 12 September 2007.

JUS COGENS -is a technical name given to the basic principle of international law, in which States are not allowed to contract out of – see (article 53, 64, and 71 of the 1969 Vienna Convention on the Law of Treaties). The concept of Jus Cogens was founded “upon an acceptance of fundamental and superior values within the system and in some respects are akin to the notion of public order or public policy in the domestic legal orders.” MN Shaw International Law (4th Ed) (1997) 97 Some examples of *Jus Cogens* have been given significance during the discussions by the International Law Commission on the topic, and they include unlawful use of forces, piracy, slave trading and, recently, torture.(HJ Steiner & P Alston International Human Rights in Context: Law, Politics, Morals (2nd Ed) (2000), p.77. {The authors argue that at present very few rules pass the test of Jus Cogens and that torture is one of them}.

ocide. Even though most international conventions forbid governments or their agents from intentionally inflicting severe physical and / or mental pain and suffering on people in their custody or control, acts of torture continue unabated throughout the continent of Africa with renewed apathy that beats imagination.⁵ Beatings, burning, rape, electrical shock, extraction of nails, neck lacing and “water boarding” and systematic repetitive slow dropping of water on a victim’s forehead are methods commonly used.⁶

In spite of the numerous international instruments in place, the reluctance to enforce the prohibition and criminalizing of torture through acts of their officials by some governments, is because the criminalization of torture would amount to “shooting themselves in the foot.”⁷ The reason for this is that State immunity⁸ is not a defense in cases where torture was alleged to have taken place and they could be vicariously liable if found to have sanctioned such acts.

This was illustrated in the case, *Jones v. Saudi Arabia*⁹ whereby survivors of Saudi torture claimed compensation in the United Kingdom, despite Saudi Arabia’s claim of State immunity. Orakhelashvili¹⁰ argues that,

“The prohibition of torture prevails over State immunity because of the normative values of that prohibition, and not because of the rules of State immunity allowing or not allowing this.”

⁵ Amnesty International, Take a Step to Stamp out Torture, 18, October, 2000.

⁶ Ibid.

⁷ Carla Ferstman “Reparation for torture?” Torture, Journal on rehabilitation of torture victims and prevention of torture, Volume 16, No 3, 2006, p. 184.

⁸ The Special Court for Sierra Leone held that ‘*The Principle of State immunity derives from the equality of sovereign States*’ see, Prosecutor v Charles G Taylor, SCSL-2003-01-I-AR72 (E), para. 51.

⁹ *Jones v. Saudi Arabia* [2005] U.K.H.R.R. 57, cited in C. Miéville “*Anxiety and the Sidekick State: British International Law after Iraq*” (2005) Harv. Int’l L.J.- p.441, where the author argues that this decision was “constructed from a complete lattice of international law, European human rights law, British human rights law, and the prohibition of torture as jus cogens,”- and that the case vividly illustrates the slippery boundaries between these various elements, see para. 451. See also -*Siderman de Blake v. Republic of Argentina* Apr 10, 2012 - The first international civil rights case against a sovereign foreign country ever to reach trial in the United States.

¹⁰ A Orakhelashvili “Restrictive interpretation of human rights treaties on the recent jurisprudence of the European Court of Human Rights.” (2003) 14 Eur.j.Int’l.529 ,para 562.

The principle of accountability and responsibility has become a general standard in international law¹¹ and therefore, any act or omission by any State that is in breach of a legal obligation, is held accountable in international law.¹² McQuoid-Mason et al makes a clear distinction,

“Responsibility denotes a duty to perform some function in a satisfactory manner.

Accountability entails giving an account of one’s acts or omissions.”¹³

The author submits that promoting accountability and prosecuting the culprits, especially state officials, not only stops them from repeating these crimes, but also sends a clear message that torture and ill-treatment cannot and would not be tolerated.

Likewise, according to M.A. Sherman:–

“Promoting accountability encourages the search for truth.”¹⁴

States that pursue cases against torturers also perform the vital function of differentiating individual responsibility from group responsibility.¹⁵ Very often groups identified by certain ideologies such as religious, racial, or ethnic beliefs are often castigated for the crimes perpetrated by relatively few radical offenders. Judge Richard Goldstone¹⁶ (the first prosecutor of the International Criminal Tribunal for the former Yugoslavia and a South African), explained this phenomenon in the context of regional human rights abuses appropriately by stating that,

“Too many people in the former Yugoslavia still blame Serbs, Croats, and Muslims for their suffering. The Tribunal’s mandate is to help reverse this destructive legacy.”¹⁷

¹¹ Ian Brownlie, “Principles of Public International Law,” (5th Edition 1998), p. 436.

¹² Dawn J. Miller, “Holding States to their Convention Obligation: The United Nations Convention against Torture and the need for a broad Interpretation of state action, Georgetown Immigration Law Journal, 17, No.2 Wint- 2003, p. 304.

¹³ Ames Dhai and McQuoid-Mason: “Bioethics, Human Rights and Law-Principles and Practice”-p.62-2011 (Juta).

¹⁴ Mark Andrew Sherman, “Some Thoughts on Restoration, Reintegration, and Justice in the Transnational Context,” Fordham international Law Journal (2000), p. 1397.

¹⁵ Amnesty International “Take a Step to Stamp out Torture,” 18, October, 2000

¹⁶ Richard J. Goldstone, “Ethnic Reconciliation Needs the Help of a Truth Commission.” International Herald Tribune, Oct. 24, 1998, p. 6.

¹⁷ ibid

According to Miller,

“Legal proceedings against torturers must focus blame where it belongs by summoning individuals to account for their crimes and absolving communal blame.”¹⁸

The writer submits that this is the mindset of State officials in South Africa, who (two decades into post-apartheid South Africa) still use apartheid as an excuse to perpetrate acts of torture.

1.1.1. Torture as a Human Right’s Violation.

The general aim of torture is to destroy a human being,¹⁹ by destroying his or her dignity and self-esteem.²⁰ It is argued that the purpose of torture is not only confined to the extraction of information and or confession, but is also used to stifle dissent, intimidate opposition, and strengthen the forces of tyranny.²¹ Torture aims to disorientate people to such an extent that their personalities and identities are subjugated.²²

This notion is summarized by Alexander Solzhenitsyn²³ (Nobel laureate in Literature in literature-1970) who stated that,

“When we torture, we are departing downward from humanity.”

The prohibition of torture is enshrined in basic fundamental values of any democratic society.²⁴ Its prohibition in a national constitution, commits the country, and specifically its law enforcement officers to conduct their duties with due diligence essential to the dignity of every human being.²⁵ Constitutional provisions on human rights issues are binding on all the citizens, gov-

¹⁸ Dawn J. Miller “Holding States to their Convention Obligation”: The United Nations Convention against Torture and the need for a broad Interpretation of state action, - Georgetown Immigration Law Journal, 17, No.2, Wint 2003, p. 304.

¹⁹ Reynes H “Torture and its Consequences”, 1995, pp. 72-76.

²⁰ Mikko Kosma, Johannes Cantell “Neoconservative Ideology and the use of Torture in the Global War on Terror.” p. 81.

²¹ *ibid*

²² Reynes H “*Torture and its Consequences.*” 1995, pp. 72-76.

²³ Aleksandr Isayevich Solzhenitsyn was an eminent Russian novelist, historian, and tireless critic of Soviet totalitarianism. en.wikipedia.org/wiki/Aleksandr_Solzhenitsyn (Cached). (Accessed on 20 September 2013).

²⁴ Farrar, Straws and Giroux, Amnesty International, Report on Torture, 1975, (New York), pp. 21-23.

²⁵ *Ibid*

ernment officials, or non-governmental officials, particularly those relating to the protection of fundamental human rights. By applying various enforcement mechanisms in place, any violation must be penalized.

Unlike slavery, which is on the decline worldwide, torture is widespread even amongst governments viewed as fairly civilized and democratic.²⁶ This explains why the African Commission on Human and Peoples' Rights (ACHPR) resolved to adopt the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment, (*The Robben Island Guidelines*),²⁷ on 17-23 October 2003 in Banjul, Gambia, Africa.

This important development in Africa focused at operationalizing article 5 of The African Charter.²⁸

The author submits that "RIG" though ambitious, remains doubtful in its implementation because it is not legally binding.

²⁶ Article 5 of The African Charter on Human Rights and Peoples' Rights, Nairobi, 27 June 1981, entry into force 21 October 1986, [Now referred to as (African Charter)]. Article 5 of The African Charter prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, inhuman or degrading punishment or treatment prohibits torture. In addition, Article 5 paragraph 2 of the American Convention on Human Rights (1969), "*Pact of San Jose*", Organization of American States, OAS Treaty Series, No. 36. Entered into force on 18 July 1978.[Now referred to as (ACHR)]. The four Geneva Conventions of 1949; namely, Geneva Convention for the Amelioration of the Wounded and the Sick of Armed Forces in the Field, 1949, 75 UNTS (1950) 287.

²⁷ History of RIG:

The Robben Island Guidelines (RIG), adopted by the African Commission in 2002, is the first regional instrument for the prohibition and prevention of torture in Africa. The Robben Island Guidelines was developed from a workshop, jointly organised by the African Commission and the APT(Association for the Prevention of Torture) on Robben-Island, South Africa, on 12 -14 February 2002. This workshop brought together African and International experts from different professional backgrounds dealing with the issue of torture. The RIG provides guidance to African States on the implementation of laws preventing torture, as well as providing redress for victims. To ensure the effective implementation of the guidelines, the Africa Commission established a committee – the CPTA (Committee for the prevention of torture) in 2004. Article 5 of The African Charter prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, inhuman or degrading punishment or treatment. General Comment No. 2, Implementation of Article 1 by States Parties.-Thirty-eighth session, 30 April – 18 May 2007, para 3.

²⁸ Article 5 of The African Charter prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, inhuman or degrading punishment or treatment. General Comment No. 2, Implementation of Article 1 by States Parties.-Thirty-eighth session, 30 April – 18 May 2007, para 3.

1.1.2. Definition of Torture

Defining torture is challenging due to the wide range of contexts and the vast array of situations used in the infliction of torture or cruel, inhuman, or degrading treatment (CIDT). The UN General Assembly adopted the definition submitted in 1984 by the Convention Against Torture (UNCAT) in Article 1.

UNCAT defines torture as follows:

"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 any other person acting in an official capacity. It does not include pain or suffering arising only from inherent or incidental lawful sanctions."²⁹

Based on this definition,³⁰ three conditions and one exception qualify as torture:

- a) It must result in severe mental and/or physical suffering;

The act of torture is not restricted to physical suffering resulting from beatings or electrical shocks. Mental or emotional stress applied to a person threatening to harm a person's family may also constitute torture. Therefore, the argument that it must result in "severe" suf-

²⁹ UNCAT- (2007) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention against Torture) is an international human rights instrument, under the review of the United Nations. The aim was to prevent torture and cruel, inhuman degrading treatment or punishment around the world. The Convention requires States to take effective measures to prevent torture within their borders, and forbids states to transport people to any country where there is reason to believe they will be tortured. Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment, or Punishment, General Comment No. 2, Implementation of Article 1 by States Parties. Thirty-eighth session, 30 April – 18 May 2007, para. 3

³⁰ The Declaration of Tokyo on Guidelines for Physicians concerning torture and other cruel, inhuman or degrading Treatment or punishment in relation to detention and imprisonment(1995) The Declaration of Tokyo is not law but many of its principles are to be found in the constitution,1996, The Correctional Services Act, 1998 (ACT 111 of 1998)

fering is a misconception and not an absolute standard. The act of defining torture will depend on the evidence and the context in which the acts occurred.

b) It must be inflicted intentionally:

Article 1³¹ 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 1.³²

c) It must be committed by, or with the consent or acquiescence of a public official:-

An act of torture must be committed directly by a public official, for example, by assaulting a criminal suspect. It may also be committed by a non-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 prevent the infliction of severe mental and/or physical suffering on another person by non-state actors.

d) 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 UNCAT. For example, punishments such as the death penalty and corporal punishment can inflict severe physical and mental suffering.

The Constitution of Botswana allows corporal punishment to be inflicted as a form of punishment even though Botswana ratified UNCAT in 2000.³³ The legal situation in South Africa

³¹ Article 1 of UNCAT

³² Ibid

³³ Upon ratification, Botswana entered the following reservation: "The Government of the Rep. of Botswana considered itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman

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 grey area of what is lawful or unlawful for example, whether the use of force in quelling a prison riot exceeded the minimum threshold.³⁴

Torture is defined In the WMA Declaration of Tokyo as:

“The deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the order of any authority, to force another person to yield information, to make a confession, or for any other reason.”³⁵

1.2. A Critical Review of the Distinction between Cruel, Inhuman and Degrading Treatment (CIDT) and Torture.

Article 1 of UNCAT³⁶ provides the current definition of torture under international law and this should be the basis for adoption in domestic law. However, the Convention does not provide a definition of cruel, inhuman, and degrading treatment or punishment (CIDT). Scholars have also spent many hours questioning the relationship between torture on the one hand and cruel, inhuman, or degrading treatment or punishment (CIDT) on the other. There have also been a number of South African decisions on this issue, such as *Whittaker and Morant v Roos and Bateman*,³⁷ *Stanfield v Minister of Correctional Services*³⁸ and *Strydom v Minister of Correction-*

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>.The UN Special Rapporteur on Torture has specifically asked for corporal punishment as a form of punishment to be abolished in all jurisdictions. <http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm>.(Accessed 26 August 2013).

³⁴ See- The McCallum Decision-*CCPR/C/100/D/1818/2008*. Accessed on 27 August 2013.

³⁵ See *Ireland v UK* 1976, 2 EHRR 25, Rodley N.S. (2002) *The Definition of Torture under International Law, Current Legal Problems*. Oxford Univ. Press, pp. 467-493.

Also see *Prosecutor v Dragoljub et al* -Judgment of 12 June 2002 at -

<<http://www.un.org/icty/kunarac/appeal/judgement/index.htm>> (Accessed on 27 August 2013.)

³⁶ Convention against Torture and Cruel, inhuman or Degrading Treatment or Punishment (1984) was entered into force on 22 June 1987. (4) {Now referred to as UNCAT} Article 1.

³⁷ *Whittaker and Morant v Roos and Bateman* 1912 AD 92, Para.122-123

³⁸ *Stanfield v Minister of Correctional Services* 2003 (4) SA 282 (C) - Para. 124.

al Services.³⁹ Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment is the court's decision. There are many international case laws on this issue as well.⁴⁰

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 cruel, inhuman or degrading treatment or punishment are prohibited under UNCAT⁴¹, and that protection against cruel, inhuman or degrading treatment or punishment is guaranteed in Section 12 (e) of the South African Constitution. Therefore, State parties are obligated to prevent both torture and cruel, inhuman, or degrading treatment or punishment.

The Constitution in section 35(5)⁴² 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.”^{43 44}

The use of a statement obtained under torture to secure the conviction of a criminal suspect was the central issue in *Mthembu v State*,⁴⁵ heard by the Supreme Court of Appeal (SCA) in 2008.

³⁹ *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (WO..

⁴⁰ See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002.

⁴¹ UNCAT- Article 1 and 16.

⁴² The Constitution SEC 35- of the Republic of South Africa-Revised 11 edition.(March 2012).

⁴³ Currie and De Waal (eds) *Bill of Rights Handbook* 5th ed. (Juta- Cape Town 2005)- Chapter 2 of The Bill of Rights s 35(5)

⁴⁴ De Vos W "Illegally or unconstitutionally obtained evidence: a South African perspective" 2011 TSAR 268-282

⁴⁵ *Mthembu v The State*(64/2007) (2008) ZASCA 51 (10 April 2008)

UN Human Rights Committee (HRC) in, *Bradley McCallum v South Africa* ⁴⁶ demonstrated the institutional and systemic failure by the South African government to deal with the prevention and eradication of torture in compliance with Article 12 and 13 of UNCAT after 1998. (These cases will be discussed more appropriately in chapter 4.4.)

1.3. Research Question

Although, South Africa did not have the crime of torture defined in the statutes in the past, common law crimes such as assault and attempted murder was used to prosecute perpetrators. More than 15 years after South Africa ratified the Convention (UNCAT), legislation-criminalizing torture was finally signed on the 29 July 2013 by President Jacob Zuma (Prevention of Combating and Torture of Persons Act, Act 13 of 2013). The Act aims to criminalize torture and caters for most of the obligations required by UNCAT. The Act is examined in detail in chapter 4.

The following questions will be addressed in this dissertation viz:-

1. What is the status of torture as a crime in South Africa, and whether legal instruments such as RIG, UNCAT and OPCAT, etc. are deterrents to the practice of torture?
2. How effective will the implementation of the new “*Prevention of Combating and Torture of Persons Act*” (Act 13 of 2013), be in abiding by the International conventions against Torture? (The ambiguous wording⁴⁷ of the Act will be discussed in chapter 4).

1.4. Research methods

Research for this dissertation was desktop based and relied on the available international and local literature and legislation: this involved reading relevant publications, journals, and human rights reports. Articles were sourced from textbooks and the Internet. Relevant information on the above topic was obtained from the websites of the following organizations viz:-

⁴⁶ Bradley McCallum v South Africa No. 1818/2008, U.N. Doc. CCPR/C/100/D/1818/2008 (2010)

⁴⁷ Dr S.R. Naidoo—Honorary Research Fellow, School Of Law, UKZN. He Commented on the “erroneous “wording of the Act 13 of 2013 at the time of its first publication.

Office of the United Nations High Commissioner for Human Rights; Centre for Human Rights (Univ. of Pretoria); African Commission on Human and People's Rights; Human Rights Watch; Centre for the Study of Violence and Reconciliation; Association for the Prevention of Torture; Amnesty International and many other websites that could provide information relating to this topic.

1.5. Key Hypothesis of the study

The underlying hypothesis of the study relate to the following key elements:

- I. Even though the act of torture is prohibited under customary international and regional law, it is still practiced with impunity and remains widespread in the African continent⁴⁸ including South Africa.⁴⁹
- II. Various human rights instrument such as UNCAT, OPCAT, and RIG etc. have the potential to eradicate torture and other cruel practices totally by effective application and implementation mechanisms.
- III. Torture prevention can be reinforced by educating government officials and making them aware that torture is a criminal offence under their domestic legislation and will not be condoned.
- IV. Lastly, the South African legislation on torture prevention should be reviewed on a regular basis to evaluate its effectiveness in combating torture in this country.

1.6. Outline of the chapters

The research paper will be organized into five Chapters.

- a) Chapter 1 provided the introduction and setting of the dissertation, its rationale, objective, justification, and limitations of the study and methodology.

⁴⁸ Amnesty International USA, Amnesty International Report Highlights Ongoing Jailing, Torture and Murders of Suspected Political Opponents of President Kabila in Congo, Press Release October 24, 2007

⁴⁹ See Sunday Tribune-“ torture still used by SAPS CLAIMS”-P14-28- APRIL 2013.

Also--Mthembu v The State (64/2007) (2008) ZASCA 51 (10 April 2008)

- b) Chapter 2 will reflect on the types of torturers, the reasons for the justification of torture by perpetrators, and their aims.
- c) Chapter 3 will be devoted to giving an overview of the international legislation, instruments, and systems in place prohibiting torture. Reference to relevant case laws, and Committee reports will also be discussed.
- d) Chapter 4 consists of a review of current South African national laws, instruments, and systems in the prohibition of torture. Its aim is to articulate the practice of torture by contextualizing the problem in South Africa in recent times. We will draw on some case studies, relevant legislation, the Constitution, and comment on the new Torture Act - (Act 13 of 2013).
- e) Chapter 5 will focus on the conclusion and recommendations.

1.7. Limitations of the study

The limitations in this study related to the following:

- 1) A freshly created piece of legislation in South Africa,⁵⁰ in accordance with requirements of international law, that has yet to be tested on the grounds of its potential effectiveness in halting the abuse of human rights.
- 2) Only the available literature, reviews and judicial judgments of the past were available for study by the author.
- 3) This desktop research study does not involve empirical investigations or fieldwork involving interviews with police officers, prison officials, and State prosecutors etc. that may cast an insight in terms of what their opinion is, on the potential effectiveness of the new legislation in preventing and combatting torture in South Africa.

⁵⁰ Act 13 of 2013

CHAPTER 2

A Critical Review of the Definition, Aims and Status of the Perpetrators of Torture.

2.1. Introduction

Peter Benenson- (founder of Amnesty International), stated:

“Torture is banned, but in two-thirds of the world's countries it is still being committed in secret. Too many governments still allow wrongful imprisonment, murder, or disappearance to be carried out by their officials with impunity.”⁵¹

It is submitted by the author, that in order to understand why torture prevails, we need to delve into the actual persona of the perpetrators.

2.2. Definition of a Perpetrator

Article 1 of UNCAT⁵² defines the perpetrator as a “*public official or any person acting in an official capacity*”. Often, the purposive element of torture stems from an organized political entity exercising its political muscle.⁵³

Kelman’s description emphasizes this appropriately,

“It may also be someone with no official status acting in collusion with, and to advance the purposes of, public officialdom, often to shroud the responsibility of members of that officialdom”.⁵⁴

⁵¹ Quotations by- Peter Benenson (31 July 1921 – 25 February 2005) who was a British lawyer and the founder of human rights group Amnesty International (AI). In 2001.

⁵² Convention against Torture and Cruel, inhuman or Degrading Treatment or Punishment (1984). Entered into force on 22 June 1987. (4) { Now referred to as UNCAT }

⁵³ It is significant that the General Assembly resolution containing the Declaration against Torture adopted it as a ‘guideline for all States and other entities exercising effective power’: UNGA res. 3452 (XXX), 9 Dec.1975.

⁵⁴ Herbert C. Kelman, The policy context of torture: A Social Psychological Analysis, International Review of the Red Cross, Volume 87 Number 857 March 2005, pp. 125-127.

As mentioned earlier, torture is usually committed in the dark and secret reaches of state power. That is why the CAT definition describes *“the perpetrator not only as the official who directly inflicts the torture, but also the official who instigates, consents to or acquiesces in it”*.⁵⁵

2.3. Categories of Torturers

Torturers have been classified, based on the accounts from people who participated in the practice.

Creslinsten and Schmidt⁵⁶ recognized three characteristic types of torturers viz.:-

- Sadists,
- Zealots
- Professionals as torturers.

2.3.1 Sadists

Sadists achieve pleasure by causing their victims pain for personal gratification or revenge.⁵⁷ The sadist achieve gratification from torture regardless of his/her successes’ at fulfilling the “state’s objective of uncovering information.”⁵⁸ An example of this was the recent military trial of a specialist in torture tactics, Charles A. Graner⁵⁹ for alleged prisoner abuse at Abu Ghraib in Iraq.⁶⁰ The prosecutors, “portrayed the soldier accused, as a sadistic thug,” who punched de-

⁵⁵ Article 1, CAT.

⁵⁶ Creslinsten, Ronald D; Schmid Alex “The Military, Torture and Human Rights: Experiences from Argentina, Brazil, Chile and Uruguay.” p. 73-107.

⁵⁷ Leonard Watchekon et al “The Journal of Conflict Resolution”, Vol., 43, No. 5 (Oct 199), p. 600.

⁵⁸ Ibid, p .602

⁵⁹ Preferred Charges against SPC. Charles A.Graner, (14 May 2004) available from-
<<http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html>> (Accessed on 28 September 2013) (charges included conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees and committing indecent acts).

⁶⁰ Ibid

tainees for sport. He posed smiling next to the bloody face of a detainee and bragged about forcing an Iraqi woman to let him photograph her naked.⁶¹

2.3.2 Zealots

Zealots carry out orders, devoid of any remorse for their victims by their actions. Their primary aim is to obtain information for the state at any cost.⁶² Once the necessary information is obtained from the victim after torturing them, they discontinue with its application because there is no longer an incentive to motivate its continued application.⁶³

Watchekon, in *The Journal of Conflict Resolution* noted that,

“If there are problems in obtaining the information, the zealot will continue to torture, having separated himself from the victim’s feelings,”⁶⁴

2.3.3 Professionals as Torturers

This category is “schooled” in the art of torture. Even though Professionals prefer not to torture, they will resort to torture only as a last resort in obtaining the necessary information sought. The conundrum faced by this type of torturers is that they cannot attain the coldness of the zealot and are likely to be distraught by the nature of their deeds.⁶⁵ The professionals deliberate various alternatives prior to torture and initially evaluate the level of trauma needed against the benefit of obtaining it.⁶⁶

2.4. States and Governments as Torturers

States are required by law to take necessary steps to ensure that citizens are not subjected to torture or other cruel, inhuman. or degrading treatment or punishment. This entails keeping

⁶¹ Kate Zernike, “Central Figure in Iraq Abuse Goes on Trial”, *New York Times*, 11 January 2005, available From <http://www.nytimes.com/2005/01/11/national/11abuse.html?th> (accessed on 30 October 2013)

⁶² John Conroy, *Bystanders, Unspeakable Acts, Ordinary People*, University of California Press, 2000, paper, <http://www.thirdworldtraveler.co/Torture/Unspeakable-Acts.html>, (last visited 30 October 2013).

⁶³ Leonard Watchekon et al, *The Journal of Conflict Resolution*, Vol., 43, No. 5 (Oct, 1999), p. 600.

⁶⁴ Leonard Watchekon et al, *The Journal of Conflict Resolution*, Vol., 43, No. 5 (Oct, 1999), p..601-602.

⁶⁵ Ibid

⁶⁶ ibid

vigilance on public officials, law enforcement officers, states and government security agents responsible for detainees in protective custody in police stations, prisons, juvenile detention centers, immigrant-holding centers, and closed psychiatric hospitals. Also included are those who participate in protest actions against government policies or embark on civil unrest to press for certain demands.

However, according to Amnesty International:

“It is extremely appalling to know that states are the major perpetrators of acts of torture. Reports of torture and ill-treatment by state officials are reported daily in most parts of the World,”⁶⁷

Amnesty International,⁶⁸ recently reported allegations of abuse, including the use of electric shocks, against inmates in a privately run prison in South Africa (October 2013). Serious questions about the authorities’ real commitment to tackle torture and other ill-treatment were raised.⁶⁹ Mary Rayner of Amnesty International commented that,

“Unfortunately, these recent allegations of abuse against inmates in South Africa’s Mangaung prison⁷⁰ are consistent with a long-standing pattern across the country, including disturbing levels of impunity for human rights abuses within South Africa’s prisons,”⁷¹

Even though, the South African authorities have reportedly launched an official investigation into the allegations,

⁶⁷ Amnesty International USA “Action for Human Rights. Hope for Humanity.” July 2011.

⁶⁸ Amnesty International USA “Reports on prison abuse in South Africa must lead to urgent investigation”-28 October 2013--<http://www.amnesty.org/en/news/reports-prison-abuse-south-africa-must-lead-urgent-initiative...>(Accessed on 02 November 2013).

⁶⁹ *ibid*

⁷⁰ Inmates at Mangaung’s high-security prison, in Free State province, have alleged that staff from G4S, a UK private security firm which until recently ran the facility, subjected them to electric shocks and beatings, amongst other abuses. On 9 October 2013, the South African authorities took control of the prison because of a range of problems within the facility.

⁷¹ Mary Rayner, South African researcher at Amnesty International- ‘Reports on prison abuse in South Africa must lead to urgent investigation’- 28 October, 2013-<http://www.amnesty.org/en/news/reports-prison-abuse-south-africa-must-lead-urgent-investigation>.(Accessed on 30 January ,2014)

“The question now is whether they will actually bring those responsible to justice and provide full reparations to victims, as opposed to what has happened too many times in the past.”⁷²

These new allegations highlight the urgent need for progress in establishing an effective investigative mechanism with 24-hour access without notice to all prisons and other places of detention. Such a body would strengthen the impact of the existing Judicial Inspectorate for Correctional Services.”⁷³

In July this year the President of South Africa, Jacob Zuma, signed into law the Prevention of Combating and Torture of Persons Act. Act 13 of 2013. Amnesty International welcomed that development and urged the government to “seize this moment and implement its international and domestic obligations to prevent, investigate and bring to justice perpetrators of torture.”⁷⁴

2.4.1 Torture as National Policy.

A state may adopt and implement a “policy of torture” to dominate and terrorize its citizens. Often, the all-embracing purpose of state torture is to maintain the status quo or to destroy internal or external political, ideological, or military threats, real or imagined, against it. The incidence of violence or perceived threat of violence against the State underlies the justification for a policy of torture.⁷⁵

According to Cohen (2005),

⁷² *ibid*

⁷³ *ibid*

⁷⁴ Amnesty International USA “Reports on prison abuse in South Africa must lead to urgent investigation, 28 October, 2013-<http://www.amnesty.org/en/news/reports-prison-abuse-south-africa-must-lead-urgent-investigation>.(Accessed on 31 January, 2014).

⁷⁵ Wolfgang S. Heinz The military, torture and human rights: Experiences from Argentina, Brazil, Chile and Uruguay, in Ronald D. Crelinsten and Alex P. Schmid (eds.), *The Politics of Pain: Torturers and their Masters*, COMT, University of Leiden, Leiden, The Netherlands, 1993, pp. 73-108.

“State torture is form of governance whereby an infrastructure complete with trained torturers, torture chambers, and detention centers are purposefully created specifically for the practice of torture”.⁷⁶

In instances where the state legitimizes an act of torture and thereby denies the intent to UN-CAT, it is asserted that the act should still be considered torture. For instance, Israel has authorized the use of “shaking”⁷⁷ during the interrogation of suspected terrorists. The practice of “shaking” of suspects does not constitute torture in Israeli national law. However, to many victims that have experienced “shaking,” this act is torture.⁷⁸ Cohen states that It is important to clarify this position because it prevents the individual state from defining techniques as an acceptable form of punishment, even though they have been categorized by international political organizations as constituting torture.⁷⁹

Government authorities may also support policies and practices that foster torture and human rights violation through law enforcement officers and security forces. For instance, In Brazil, State Security Secretary Milton Cerqueira frequently summoned police to inflict physical torture to criminals in public statements.⁸⁰ In the same country in 2002, authorities widely praised the police after an incident in which twelve suspects were tortured and killed. However, evidence revealed later that the victims had been “wrongly executed.”⁸¹

Similarly, in Nigeria the government’s response to crime control had led to numerous human rights violations by the security officials entrusted with the responsibility for crime control.⁸²

⁷⁶ Irwin M. Cohen, Raymond R. Corrado, State Torture in the Contemporary World International Journal of Comparative Sociology 2005, p. 105.

⁷⁷ Amos N. Guiora et al, “Shaking’ has been defined by the HCJ as “the forceful shaking of the suspect’s upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly.” HCJ5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2), ¶ 24, available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.(Accessed on 31 January 2014)

⁷⁸ Ibid

⁷⁹ ibid

⁸⁰ Amnesty International, Fear for Safety/Medical Concern 2, AI Index AMR 19/03/98 (1998)

⁸¹ The Global Justice Center, Human Rights in Brazil -2002.

⁸² Kole Shettima and Innocent Chukwuma, Crime and Human Rights in Nigeria 2 (Crime Project Working Paper 2002 available at <http://www.ichrp.org>. (Accessed on 30-October 2013)

The author submits that in 2010, our then South African Commissioner of Police, Mr. Bheki Cele, at a time of rampant crime, gave orders to police officers "to shoot to kill."⁸³ This led to trigger happy police officers opening fire on civilians that were deemed to be suspects.⁸⁴ Incidences of the torturing and murder of individuals by the so-called Cato Manor Organized crime unit⁸⁵ in 2010 are examples of this. The high degree of police violence in some KwaZulu-Natal cases reported to the Independent Police Investigative Directorate (IPID) was disturbing. IPID executive director Francois Beukman emphasised this by stating that,

"Once the full extent of the alleged atrocities committed by the policemen come out, as South Africans we should do everything [to ensure] that such atrocities are never [again] committed in our name."⁸⁶

2.5 Aims and Objectives of Torture

History has revealed that up until the last two centuries, torture was used as a form of criminal punishment. Various methods and forms were employed as a deterrent to crime, insubordination, treason and military victory, etc.

David Luban⁸⁷ identified five major aims of torture, viz.:-

⁸³ "Use deadly force", Cele tells cops- Johannesburg - National police commissioner Bheki Cele has again told members of the South African Police Service (Saps) to "use deadly force" against criminals. "If somebody uses a camera to shoot you, smile. But when they use anything else to shoot you, use deadly force before they can do anything - and don't miss," he said at the launch of the police's festive season campaign in Sandton on Monday 2009-12-07 14:29-News 24.

⁸⁴ Jenny Irish-Quobosheane, the public's representative in the police department, told journalists in Parliament the ministry had noticed an increased number of shootings of civilians by police officers in the past three years. 2009-11-13 13:02

⁸⁵ Published on 6 Sep 2012 by e-news channel KwaZulu-Natal, September 6 -- Members of the Organised Crime Unit based in Cato Manor are accused of murdering 28 people and planting guns on the bodies to cover up their crimes. In this special report, eNCA reporter Karyn Maughan examines why supporters of the unit say these men are loyal and dedicated police officers and why their accusers say they are nothing but cold-blooded killers.

⁸⁶ Remarks by Executive Director for the Independent Police Investigative Directorate (IPID) Mr. Francois Beukman on a visit to families of victims of police criminality ... into matters involving the Cato Manor Organised Crime Unit. July 11, 2012.

⁸⁷ David Luban -Virginia Law Review, Vol. 91, No. 6. (Oct., 2005), p. 142.

2.5.1 Victor's Pleasure.

Military victory is one of the motivating factors in embarking on torture of the defeated enemy. An example of this is narrated by Luban⁸⁸,

“I recently saw some spectacular Mayan murals depicting defeated enemies from a rival city-state having their fingernails torn out before being executed in a ritual reenactment of the battle.”

Underneath whatever significance that attaches to torturing the vanquished, the victor tortures captives for the simplest of motives for example, to re-live the victory, to demonstrate the absoluteness of his/her mastery, to rub the loser's face in it, and to humiliate the loser by making him/her scream and beg.⁸⁹ Luban argued that the torture survivor instead of being dignified is in retrospect isolated, demoralized, and humiliated.⁹⁰

2.5.2. As a Means to Instill Fear.

It is submitted that the purpose of torture is often used for terrorizing people into submission. History highlights incidences by dictators like Hitler, Pinochet, Idi Amin, and Saddam Hussein who tortured their political prisoners so that their enemies, knowing that they might face a fate far worse than death, would be afraid to oppose them. Terror is a “force-amplifier” that enables a relatively small number of officers or officials of the state to subdue a far larger population.

2.5.3. As a Form of Punishment.

Many international instruments condemn punishments that are crueler than is necessary to deter crime.⁹¹ Beccaria makes it clear that torture, used as a form of punishment, would turn society into a “herd of slaves”.

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ David Luban Virginia Law Review, Vol 91, No. 6 (Oct.2005)p.142

Such punishments, he argues,

“Would also be contrary to justice and to the nature of the social contract itself, presumably because turning society into a herd of slaves undermines the liberal understanding of the ends of society.”⁹²

2.5.4. As a Means of Extracting Confessions.

The French language has different words to describe them: *le supplice*, (torture as punishment), and *la question*, (torture to extract confessions).⁹³

As *Luban* observes, pre-modern legal rules required either multiple eyewitnesses or confessions for criminal convictions. Initially, these were important rights of the accused but they had the perverse effect of legitimizing judicial torture in order to make convictions possible.⁹⁴ However, once it was accepted that the criminal justice system could base guilty verdicts on various types of evidence that rationally establish facts rather than insisting on the ritual of confession, then the need for torture to secure convictions vanished.⁹⁵

2.5.5. Intelligence Gathering

Intelligence gathering, is applied as a torture technique on uncooperative detainees refusing to confess to their crimes.⁹⁶ This may appear to be indistinguishable from conventional torture methods to extract confessions because both practices are associated with interrogation.

⁹² Cesare Beccaria was born on March 15, 1738 in Milan, Italy. To this day, is still considered the father of classical criminal theory. His book titled “Of Crimes and Punishment” have shaped the modern day system of criminology. His ideas are seen today in the American Constitution and the Bill of Rights. Cesar Beccria's views was highly respected by John Adams , Thomas Jefferson, and also by all Americans. He is acknowledged for instituting the criminal justice system. Source David Luban, *Virginia Law Review*, Vol 91, no.6.

⁹³ibid

⁹⁴ David Luban *Virginia Law Review*, Vol. 91, No. 6. (Oct., 2005), p. 142

⁹⁵Alan Donagan “The Right Not to Incriminate Oneself”, *Social Philosophy & Policy* (1984), p. 137.

⁹⁶ Rosemary Foot “Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era- *International Relations*,”- 2006-- Sage Publications, p. 135. 1.

Rosemary Foot states:

“The crucial difference lies in the fact that the confession is backward-looking because it aims to document and ratify the past for purposes of retribution, while intelligence gathering is forward looking because its main reason is to gain information to avert future evils like terrorist attacks.”⁹⁷

According to Conroy,⁹⁸ the liberal rationale for torture as intelligence gathering in gravely dangerous situations transforms and rationalizes the motivation for torture and that it becomes possible to think of torture as a last resort for those who are sincerely reluctant to torture.⁹⁹

2.6. Conclusion

The question often asked is why, so few culprits have been held accountable for torture and other cruel, inhuman, and degrading treatment inflicted on detainees in the so-called “war on terror”. Daily reports of human rights violations and abuses created the impression that this problem is systemic.¹⁰⁰

Many of these recent abuses reportedly took place in Guantanamo Bay, Abu- Ghraib Bagram Air Force Base in Afghanistan, and undisclosed CIA detention centers whereby agents of America (USA) “rendered” suspects on a CIA plane.¹⁰¹ The term “rendition” is the apprehension and

⁹⁷ *ibid*

⁹⁸ “*Unspeakable Acts, Ordinary People*” by author John Conroy- is a riveting book that exposes the potential in each of us for acting unspeakably. John Conroy sits down with torturers from several nations and comes to understand their motivation -His compelling narrative has the tension of a novel. He takes us into a Chicago police station, two villages in the West Bank, and a secret British interrogation center in Northern Ireland, and in the process, we are exposed to the experience of the victim, the rationalizations of the torturer, and the seeming indifference of the bystander. The torture occurs in democracies that ostensibly value justice, due process, and human rights, and yet the perpetrators and their superiors escape without punishment, thereby revealing much about the dynamics of torture.

⁹⁹ *ibid*

¹⁰⁰ Herbert C. Kelman “The policy context of torture: A Social Psychological Analysis”, *International Review of the Red Cross*, Volume 87 Number 857 March 2005, pp. 125-127

¹⁰¹ Di Ruxandra Cesereanu “An Overview of Political Torture in The Twentieth Century The Microcosm of Torture Instruments”- September 2006, at www.metabasis.it, Accessed on 28 September, 2013

extrajudicial transfer of a person from one country to another for the purposes of inflicting torture. Under the President George W. Bush Administration, this term became synonymous with the heinous US practice of abducting and transferring terrorism suspects to countries known to employ torture for the purpose of interrogation.¹⁰²

Although documents linking these practices to policies established by the Pentagon and Justice Department have been uncovered,¹⁰³ thus far they have not been held accountable or “brought to book.”¹⁰⁴ Despite public outcry, the US Government has refused to appoint an independent commission to investigate these abuses. The irony is that many governmental institutions previously implicated in these practices are now themselves, entrusted with the responsibility of investigating these abuses in other countries, for example the US Government.

Before the International Criminal Court (ICC) was established, there were numerous political obstacles in bringing people to justice for committing horrendous crimes. Now, a number of specific criminal tribunals have started to raise the stakes. As the title of an article from the French paper, *Le Monde* suggests, even Presidents are under scrutiny on issues of crimes against humanity.¹⁰⁵ A good example involves the case of the prosecution of former Chilean dictator, Augusto Pinochet, accused of ordering killings, abductions and torture of over 1000 Chileans during his 17 years of rule. The House of Lords subsequently ruled that Pinochet did not have immunity from prosecution on charges of gross human rights violation in the UK. In January 2001, he was extradited to Chile and prosecuted for crimes against humanity.¹⁰⁶

¹⁰² Michael John Garcia (Legislative Attorney American Law Division). "Renditions: Constraints Imposed by Laws on Torture", 8 September 2009; link from the United States Counter-Terrorism Training and Resources for Law Enforcement web site Jump up ^ <http://www.politifact.com/truth-o-meter/promises/obameter/promise/176/end-the-use-of-extreme-rendition/> .(Accessed on 10 November, 2013)

¹⁰³ George Hunsinger "Torture, Why it Matters, Why the Torture Abuse Scandal Matters"-, 24 October 24, 2005.

¹⁰⁴ Tom Head "American Torture. An Overview of American Torture in the War on Terror" , Vol. 280, January 3, 2005, p. 3

¹⁰⁵ Shah Anup "International Criminal Court: The Pinochet Case." *Global Issues*. 18 Sep. 2001. Web. 08 Feb. . . <<http://www.globalissues.org/article/493/icc-the-pinochet-case>>.(Accessed on 10 October 2013)

¹⁰⁶ Marc Cooper, Chile and the End of Pinochet, *The Nation Magazine*, Feb 26, 2001.

The writer observes that this should serve as a lesson to States that are willing to follow the path of destruction instead of construction. The indictment of General Augusto Pinochet should serve as a warning to prospective tyrants or dictators.¹⁰⁷

¹⁰⁷ Robertson G (2006) "Crimes against Humanity"- Penguin Books, London, p. 264 { Pinochet sanctioned torture similar to the various practices currently perpetrated by US in the so-called war on terror. It must be noted that Pinochet was eventually brought to book after thirty years}.

CHAPTER 3

A Critical Review of the International Systems, Legislation and Instruments on the Prohibition of Torture.

3.1. Introduction

In the past, torture was considered as *a* justifiable and necessary means of obtaining information in judicial processes by many states. During the period of the Spanish Inquisition it was used to extract information and to punish criminals.

Foucault in the *“Execution of Damien’s in 1757”*¹⁰⁸ stated that:

“The unreliability of information obtained through torture, as well as increasing revulsion for its inhumanity, led to its official abandonment over time.”¹⁰⁹

Despite official denial by states, it is unfortunate that torture is still widely used to acquire information and punish people. As mentioned, the “war on terror” and especially the conduct of the USA had revealed the willingness, enthusiasm of democratic countries to resort to torture and ill-treatment.

This Chapter deals with the International human rights instruments and mechanisms to combat torture. It will look at the Convention against Torture (CAT), the Optional Protocol to CAT, the International Covenant on Civil and Political Rights, and International Humanitarian law among others. It is beyond the scope of this Chapter to discuss all the United Nations General Assem-

¹⁰⁸ 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 was to be quartered by four horses. (Foucault M (1977) *“Discipline and Punish – The Birth of the Prison”*, Penguin Books , London, pp. 3-6.

¹⁰⁹ See Articles 2(1) (b), 11-15 of the (1969) Vienna Convention on the Law of Treaties. ‘Treaties create legal obligations the observance of which does not dissolve the treaty obligation’ see I. Brownlie- *Principles of Public International Law* (5th Ed) (1998) 12

bly Resolutions on torture. However, the Universal Declaration of Human Rights,¹¹⁰ which specifically prohibits torture,¹¹¹ has acquired the status of customary international law¹¹² and covers and embraces all previous resolutions.

3.2. Main instruments

3.2.1 The United Nations Convention against Torture (UNCAT)

The United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is one of the main international treaties committed specifically to the fight against torture.¹¹³ Many African countries have ratified UNCAT,¹¹⁴ because they have realized that torture is a serious issue on the continent and therefore, ought to eliminate it. This compels States to enforce legislative, administrative, judicial, and other procedures to prevent acts of torture.¹¹⁵

This convention (UNCAT) specifies guidelines that States Parties have to undertake to ensure that torture is eradicated. They are:

- The absolute nature of the right to freedom from torture is emphasized and that no exceptional circumstances whatsoever, irrespective of war or a threat of war, internal

¹¹⁰ Article 5 of UNCAT

¹¹¹ See Articles 2(1) (b), 11-15 of the (1969) Vienna Convention on the Law of Treaties. 'Treaties create legal obligations the observance of which does not dissolve the treaty obligation' see I. Brownlie Principles of Public International Law (5th Ed) (1998) 12

¹¹² Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

¹¹³ Article 5 of UNCAT

¹¹⁴ Only eight African countries had not ratified CAT at the time of this publication: Angola, Central African Republic, Eritrea, Liberia, Mauritania, Rwanda, Tanzania and Zimbabwe, <http://www.unhchr.ch/pdf/report.pdf>. (Accessed on 10 November 2013.)

¹¹⁵ Article 2(1) of UNCAT

political instability, or any other public emergency, may be summoned as a justification of torture.¹¹⁶

- Absolutely no order, whether from a superior officer or public authority may be invoked as a justification of torture.¹¹⁷
- This treaty requires States Parties not to expel, return, or extradite a person summoned to a country where there is a substantial danger that they may be tortured.¹¹⁸
- It requires States Parties to criminalize all acts of torture and to have jurisdiction to try torture whenever and wherever it is committed.¹¹⁹
- Another important aspect of this treaty is the fact that it makes torture an extraditable offence and requires States to cooperate and offer assistance in respect of criminal proceedings in the case(s) of torture.¹²⁰
- It requires States Parties to educate all personnel responsible for the custody, interrogation, or treatment of any person deprived of their liberty that torture is prohibited.¹²¹
- States Parties are also obliged to review interrogation rules, methods, and practices and to ensure that public authorities immediately investigate allegations of torture.¹²²
- Individuals who allege that they have been tortured have a right to complain and have their cases promptly investigated. They are entitled to fair and adequate compensation if they were indeed subjected to torture.¹²³
- The treaty also prohibits courts from relying on any statement that has been extracted from the accused via torturous means.¹²⁴

¹¹⁶ Article 2(3) of UNCAT

¹¹⁷ Article 2(3)) of UNCAT

¹¹⁸ Article 3 of UNCAT

¹¹⁹ Article 4,5,and 7 of UNCAT

¹²⁰ Article 8 and 9 of UNCAT

¹²¹ Article 10 of UNCAT

¹²² Article 11 and 12 of UNCAT

¹²³ Article 13 and 14 of UNCAT

¹²⁴ Article 15 of UNCAT

3.2.2 The Optional Protocol to CAT (OPCAT)

OPCAT is a treaty that was created specifically for the prevention of torture in detention facilities.¹²⁵ The primary objective of OPCAT is to establish a system of regular visits by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman, or degrading treatment or punishment.¹²⁶

3.2.3 Subcommittee on Prevention of Torture (SPT)

The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“SPT”) is the most recent body of the United Nations human rights system. It was created by OPCAT and has a preventive mandate focused on an innovative, sustained, and proactive approach to the prevention of torture and ill treatment.

The SPT comprises of 25 independent and impartial experts sourced from different backgrounds and from various regions of the world. Members are elected by States that are parties to OPCAT for a four-year mandate and can be re-elected.¹²⁷

What does the SPT do?

a) Mandate –The SPT has an operational role which involves visiting places of detention. It has an advisory function, providing assistance and advice to both States parties and National Preventive Mechanisms (“NPM”). In addition, the SPT cooperates with the relevant United Nations organs and mechanisms as well as with international, regional, and national institutions or organizations. The SPT presents a public annual report on its activities UNCAT at the United Nations Office in Geneva.¹²⁸

¹²⁵ Adopted by the UN General Assembly by General Assembly Resolution 57/199 on 18 December 2002 .

¹²⁶ Article 1of UNCAT

¹²⁷ *Source:www.Internationaldisabilityalliance.org/en/subcommittee-prevention-torture-spt.*(Accessed on 10 November 2013)

¹²⁸ *ibid*

b) Visits –Under the OPCAT, the SPT has unrestricted access to all places of detention, their installations and facilities and to all relevant information. The SPT visits police stations, prisons (military and civilian), detention centers (e.g. pre-trial detention centers, immigration detention centers, juvenile justice establishments, etc.), mental health and social care institutions and any other places where people are or may be deprived of their liberty.¹²⁹

These visits are conducted by at least two members of the SPT. Members are accompanied, if required, by experts of demonstrated professional experience and knowledge in the field.¹³⁰

c) Assistance and advice –The SPT's mandate includes assisting and advising States in the establishment of NPMs. To this end, the SPT has set out Guidelines on NPMs to add further clarity on the establishment and operation of NPMs. The SPT also assists NPMs in reinforcing their power, independence and capacities and strengthening safeguards against ill-treatment of persons deprived of their liberty. Other duties of the SPT include making itself available for continuous dialogue and collaboration with the NPMs, in order to ensure ongoing monitoring of all places of detention.

How does the SPT do its work?

During these visits, the SPT examines living conditions in places of detention and legislative and institutional frameworks relating to the prevention of torture and ill-treatment. At the end of these visits, it communicates its recommendations and observations to the State by means of a confidential report, and if necessary, to the NPMs.

The principles of confidentiality, impartiality, non-selectivity, and co-corporation are the main guiding forces of the SPT. The main purpose is to engage with States parties via constructive dialogue and collaboration rather than condemnation. However, if the State party refuses to co-operate or fails to take steps to improve the situation in light of the SPT's proposals, the SPT

¹²⁹ Article 4(1) of UNCAT

¹³⁰ Note 128 above.

may demand the Committee Against Torture (UNCAT) to make a public statement or to publish the SPT report.¹³¹

Challenges facing the SPT

The Subcommittee is likely to face many challenges because of some African States have solitary confinement detention facilities for “security reasons”.¹³² It is unlikely that the SPT will ever know of their existence and location although they are permitted to visit “any place, within their jurisdiction.”¹³³ There is also the possibility of States suppressing relevant information concerning persons detained for security reasons, which would discourage the working of the Subcommittee.¹³⁴

Under the European system on human rights, the mechanism of visiting places of detention has been an effective way of preventing torture and African States should be inspired to ratify the OPCAT as soon as possible in order to introduce this mechanism.¹³⁵

3.2.4 International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR),¹³⁶ to which many African countries are participants of, also outlaws torture. Few African countries signed this treaty before it was enforced,¹³⁷ but many others followed at a later stage,¹³⁸ The ICCPR expressly provides in article 7 that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment

¹³¹ Available from: <http://www.ochr.org>. (Accessed on 10 November 2013)

¹³² Source: <http://www.irinnews.org/report/95403/libya-detained-migrants-face-harsh-conditions-legal-limbo>. (Accessed on 10 November 2013)

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Source www.internationaldisabilityalliance.org/en/subcommittee-prevention-torture-spt. (Accessed on 10 October 2013)

¹³⁶ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with article 49.

¹³⁷ See <<http://www.ohchr.org/english/countries/ratifications/4.htm>>, which indicates that some African countries like Liberia, Guinea and Tunisia signed this treaty as early as 1967 long before the treaty came into force.

¹³⁸ On 17 February 2005, Mauritania became the 154th State Party to the ICCPR. See [p://www.ohchr.org/english/bodies/hrc/](http://www.ohchr.org/english/bodies/hrc/) (Accessed on 10 October 2013)

or punishment.¹³⁹ It is worth noting that the UN Human Rights Committee (HRC),¹⁴⁰ in its General Comment 20 of 10 March 1992, had interpreted article 7 in broad terms to assist African countries party to this treaty to take steps to eradicate torture.

This interpretation is vital because it specifies that article 7 has to be read together with other relevant articles of the treaty with the sole aim to protect both the dignity and the physical and mental integrity of the survivor.¹⁴¹ The HRC further explains that the prohibition in article 7 is complemented by the positive requirements of Article 10¹⁴², which stipulates that :

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹⁴³

This clarification is important because people deprived of their liberty are more vulnerable to torture, and that the obligation to treat them humanely strengthens their protection.¹⁴⁴

3.2.5 Optional Protocol to ICCPR

The Optional Protocol to the ICCPR¹⁴⁵ to which many African States are members, gives the HRC jurisdiction to accommodate communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant, provided the State recognizes the competence of the HRC to receive and consider communications.¹⁴⁶

¹³⁹ Article 7 of ICCPR also provides that no one shall be subjected without his free consent to medical or scientific experimentation.

¹⁴⁰ The HRC was established under article 28 of the ICCPR with the mandate to monitor the implementation of that treaty.

¹⁴¹ The HRC expressly puts it that the aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual, Para 2 of General Comment 20.

¹⁴² Article 10 of ICCPR, para 1.

¹⁴³ Article 10, paragraph 1, of the ICCPR.

¹⁴⁴ Most cases and reports of torture indicate that those in detention are more vulnerable. The HRC also indirectly observes this in Para 11. The HRC also requires States to read article 7 in conjunction with article 2(3) (see Para 14)

¹⁴⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

¹⁴⁶ Preamble to Optional Protocol and article 1

The right to freedom from torture being one of the rights protected under the Covenant has led to many negative reports being filed against various African States on violations. The HRC has in many cases, ordered the respective States to compensate the victims and to curtail torture.¹⁴⁷ However, in some cases it had found no violations.¹⁴⁸ This is because instigators of the complaints are required to provide substantive evidence to the HRC that they have indeed been victims of torture. This was evident in the case, *Primo Jose Essono Miha v Equatorial Guinea* where the HRC found that,

“Medical evidence is of immense value to substantiate an allegation of torture.”¹⁴⁹

In *Primo Jose Essono Mika Miha v Equatorial Guinea*, the HRC argued that the State should always be conscious of the fact that torture, especially psychological torture, had long lasting effects on the victims and to dismiss a complaint based on lack of evidence (without taking into consideration the after effects on the victim), would need the intervention of psychiatrists, social workers, and trauma counselors.¹⁵⁰

¹⁴⁷ In *Marcel Mutezi v Democratic Republic of Congo*, Communication No.962/2001,CCPR/C/81/D/962, the DRC was held to have violated article 7 of CCPR (see Para 5.3); *Albert Womah Mukong v Cameroon*, Communication No.458/1991,CCPR/C/51/D/458/1991, the HRC held that detaining the author incommunicado in inhuman conditions amounted to cruel, inhuman and degrading treatment, and Cameroon was in breach of article 7 of CCPR (see Para 9.4);

in *Primo Jose` Essono Mika Miha v Equatorial Guinea*, Communication No.414/1990,CCPR/C/51/D/414/1990, the State was held to have violated article 7 when the author was tortured for several days and also denied food (see para 6.4); and

in *Isidore KananaTshiongo and Minanga v Zaire*, Communication-No.366/1989,CCPR/C/49/D/366/1989, where the author remained strapped to the concrete floor of his cell for close to four hours and thereafter was subjected to acts of torture, Zaire was found to have violated article 7 (see para 5.3). (Accessed on 10 NOVEMBER 2013)

¹⁴⁸ *Bernard Lubuto v Zambia*, Communication No.390/1990,CCPR/C/55/D/390/1990, the HRC dismissed the allegations of torture on grounds that the author had not adduced sufficient evidence (para 4.3).(Accessed on 10 November 2013)

¹⁴⁹ In *Primo Jose Essono Mika Miha v Equatorial Guinea*, the HRC relied heavily on the medical evidence to hold the State to have breached Article 7.

¹⁵⁰ *ibid*

It is unfortunate that some of the African countries do not appear before the HRC to defend the allegations filed against them,¹⁵¹ because this brings into doubt their pledge to the protection and promotion of the rights in the treaty.

3.2.6. International Humanitarian Law. (Geneva Convention)

The international treaties governing armed conflicts establish international humanitarian law or the law of war.¹⁵² The prohibition of torture under International Humanitarian Law is an important facet of the broader protection these treaties provide for all victims of war. The four Geneva Conventions have since been ratified by 188 States.¹⁵³

They establish rules for the conduct of international armed conflict and, especially, for the treatment of persons who do not, or who no longer, take part in hostilities, including the wounded, the captured and civilians. All four conventions prohibit the infliction of torture and other forms of ill-treatment.¹⁵⁴

Two Protocols of 1977, additional to the Geneva Conventions, expand the protection and scope of these conventions. Protocol I (ratified to date by 153 States) covers international conflicts. Protocol II (ratified to date by 145 States) covers non-international conflicts¹⁵⁵. More important to the purpose here, however, is what is known as “**Common Article 3**”, found in all four conventions. Common Article 3 applies to armed conflicts “not of an international character”, and It is taken to define core obligations that must be respected in all armed conflicts.¹⁵⁶ (Emphasis placed in bold text).

¹⁵¹ *Nina Mutabe and another v Zaire*, Communication No.124/182,CCPR/C/22/D/124/1982, Zaire never submitted any clarifications despite the constant reminders by the HRC

¹⁵² Geneva Convention of 1949.

¹⁵³ *ibid*

¹⁵⁴ N. Rodley “The Treatment of Prisoners under International Law”, 2nd ed. (Oxford, Clarendon Press, 199:58)

¹⁵⁵ Second preamble paragraph of Protocol II (1977), additional to the Geneva Conventions of 1949.

¹⁵⁶ *ibid*

A further link between International Humanitarian Law and Human Rights Law is found in the preamble to Protocol II which itself regulates non-international armed conflicts such as fully-fledged civil wars.

3.3. Other instruments

3.3.1 Convention on the Elimination of all Forms of Racial Discrimination

The International Convention on the Elimination of all Forms of Racial Discrimination¹⁵⁷ also indirectly prohibits torture. Government agents, individuals, or groups of individual are compelled to respect this right.¹⁵⁸ Unlike article 1 of CAT,¹⁵⁹ this provision places obligations on individuals, irrespective of them acting in their official or private capacity to respect this right. All African countries but Angola are party to this treaty.¹⁶⁰

3.3.2 Convention on Apartheid

The International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁶¹ defines policies and practices of Apartheid. This includes preventing human rights violations by members of a particular racial group or groups against another racial group for the purposes of domination with the view of suppressing or oppressing them.¹⁶² Most African countries, including Kenya and South Africa (to whom the treaty was originally aimed) are party to this treaty.¹⁶³

¹⁵⁷ It was adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

¹⁵⁸ Article 5(b) of CAT.

¹⁵⁹ Article 1 of CAT only prohibits torture by people in official capacities. See definition of torture in Chapter(1.1.1).

¹⁶⁰ <<http://www.ohchr.org/english/countries/ratification/13.htm>> accessed 25 September 2013.

¹⁶¹ Adopted and opened for signature and ratification by General Assembly Resolution 3068(XXVIII) of 30 November 1973 and entered into force on 18 July 1978.

¹⁶² Article II (ii).-Convention on Apartheid.

¹⁶³ Second preamble paragraph of Protocol II (1977), additional to the Geneva Conventions of 1949.

3.3.3. Convention on Migrant Workers and Members of Their Families

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families provides 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”.¹⁶⁴

To protect the rights of the migrant workers and their families, the treaty established the Committee on the Protection of the Rights of the Migrant Workers and Members of Their Families.¹⁶⁵ This Committee has jurisdiction to examine and comment on periodical reports relating to the implementation of the provisions of the treaty.¹⁶⁶ The treaty establishes an inter-state communications procedure¹⁶⁷ and has to date been ratified by 13 African countries.¹⁶⁸

3.3.4. The African Commission on Human and Peoples’ Rights; and The African Court on Human and Peoples’ Rights.

In contrast to both the European and the Inter-American systems, Africa does not have a convention on torture and its prevention. The question of torture is dealt with primarily in the African Charter of Human and Peoples’ Rights, which was adopted by the Organization of African Unity on 27 June 1981 and which entered into force on 21 October 1986. Article 5 of the African Charter states:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.”¹⁶⁹

¹⁶⁴ Article 10-Convention on Migrant Workers and Members of their Families.

¹⁶⁵ Ibid-Article 72.

¹⁶⁶ Ibid- Article 74

¹⁶⁷ Ibid- Article 76

¹⁶⁸ These countries are: Algeria, Burkina Faso, Cape Verde, Egypt, Ghana, Guinea, Lesotho, Libya , Arab Jamahiriya, Mali, Morocco, Senegal, Seychelles, and Uganda.

¹⁶⁹ Report of the special rapporteur on prisons and conditions of detention in Africa: Presented by the Hon. Commissioner S.K. Kaggwa at the 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights: Yamoussoukro, cote d’Ivoire 9-22 October 2012.

In its periodic sessions, the Commission has passed several country resolutions on matters concerning human rights in Africa, some of which have dealt with torture, among other violations. In some of its country resolutions, the Commission raised concerns about the degradation of human rights situations, including the practice of torture.¹⁷⁰ The Commission has since established new mechanisms viz.:

- the Special Rapporteur on Prisons,
- the Special Rapporteur on Arbitrary and Summary Executions and
- The Special Rapporteur on Women, whose mandate is to report during the open sessions of the Commission.¹⁷¹

These mechanisms have created opportunities for victims and non-governmental organizations to send information directly to special rapporteurs.¹⁷²

3.3.5. The International Criminal Court (*Treaty of Rome*)

The Treaty of Rome was adopted on 17 July 1998, and established the International Criminal Court to try individuals responsible for genocide, crimes against humanity and war crimes. This court has jurisdiction over cases alleging torture, either as part of the crime of genocide or as a crime against humanity, but only if the torture is committed,

“As part of a widespread or systematic attack or as a war crime under the Geneva Conventions of 1949”.¹⁷³

The Statute of the International Criminal Court, the Treaty of Rome, came into force three months after it had been ratified by 60 countries.¹⁷⁴ As of April 1999, nine months after the

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² M. Evans and R. Murray “The Special Rapporteurs in the African System” in M Evans and R Murray .p280

¹⁷³ Rome Statute of the International Criminal Court, 17 July 1998 -State parties (122) - State signatories (31)

The United Nations has been considering the establishment of a permanent international criminal court since its creation. After years of negotiations, a Diplomatic Conference was held from 15 June to 17 July 1998 in Rome, which finalised and adopted the Statute for the International Criminal Court (ICC). The Statute was finally adopted by a vote where 120 were in favour, 7 against and 21 abstained.

¹⁷⁴ Ibid

signing of the Treaty of Rome, 81 countries had already ratified the treaty.¹⁷⁵ The new Court is located in Hague, Netherlands.

This Court has jurisdiction only in cases in which States are unable or unwilling to prosecute individuals responsible for the crimes described in the Treaty of Rome.

3.4. Conclusion

In the discussion above, we have dealt with the various measures that the international community has adopted in its struggle against torture and have shown that some African countries have actively participated in this campaign. This was done not only by ratifying a number of instruments but also by making use of the mechanisms established by those instruments.¹⁷⁶

It can be argued that all mechanisms complement each other in order to achieve the promotion and protection of human rights. However, there is still a gap between the ratification of the treaties by the African States and the implementation of the treaty provisions in many countries.¹⁷⁷ This is reflected by the fact that human rights abuses, especially the violation of the right to freedom from torture, are a daily occurrence in many African Countries.¹⁷⁸

The mere fact that the violation of the right to freedom from torture seems to be occurring on a larger scale in Africa is unfortunate when viewed in the light of the other human rights systems, in particular the European system where it has reduced drastically. It is submitted by the author that adopting the above measures will provide guidelines on the subject of torture and provide education to citizens on their civil rights.

¹⁷⁵ Ibid

¹⁷⁶ Lucas Muntingh "Preventing torture in South Africa" - The framework for action under CAT and OPCAT-2008

¹⁷⁷ Ibid

¹⁷⁸ Jamie Mansfield "Suffering and Moral Responsibility." 1999, Oxford University Press -p. 4

CHAPTER 4

A Critical Review of the Current National Laws, Instruments and Systems in the Prohibition of Torture in South Africa.

4.1. Introduction.

Archbishop Desmond Tutu, the renowned human rights activist and Nobel laureate, in a presentation before the Truth and Reconciliation Commission in South Africa made the following comment about the past :

“Those who forget the past are doomed to repeat it”, are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester...We also need to know about the past so that we can renew our resolve and commitments that never again will such violations take place. We need to know the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future.”¹⁷⁹

The question is why do we need to reflect on torture in post-apartheid South Africa? Is torture not something that we have stamped out in the past? It is submitted by the author that regrettably torture, cruel, inhuman and degrading treatment or punishment still happens in South Africa on a daily bases according to media reports.¹⁸⁰ This reality did not end on 27 April 1994.¹⁸¹

¹⁷⁹ Priscilla B. Hayne Unspeakable Truth Confronting State and Atrocity, *The South Africa Law Journal* Vol. 118 Part 3, p. 615.

¹⁸⁰ See Sunday Tribune “Torture still used by SAPS Claims”-P14-28 April, 2013.

¹⁸¹ First Democratic Elections in South Africa . The New Constitution came into effect on 27 April 1994,

Official statistics are not kept on the incidence of torture, but from departmental annual reports, research and media reports it is evident that torture remains a problem.¹⁸² It is submitted by the author that no country, regardless of the strength and maturity of its democracy can afford to become complacent about the issue of torture.

In 1998, South Africa ratified the UN Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT)¹⁸³ and in 2006 signed the Optional Protocol to CAT (OPCAT).¹⁸⁴ Ratification involves the legal obligation for the ratifying state to apply the Convention or Protocol.¹⁸⁵ Both these actions have placed considerable obligations on South Africa to take drastic steps to prevent and combat torture and other cruel, inhuman, or degrading treatment or punishment.

In recent years the debate on torture in Europe, North America and the Middle East has focused on the “war on terror”, giving it a particular political context.¹⁸⁶ However, the situation in South Africa is different; here the debate focuses on the treatment of prisoners, detainees in police custody, undocumented foreigners, children in secure care facilities, and patients in psychiatric hospital.¹⁸⁷

In post-apartheid South Africa (1994), it has become evident that transformation was far more demanding than writing new laws and that many attitudes, practices and habits from the previous regime have survived, especially in places where people are deprived of their liberty¹⁸⁸.

¹⁸² Note 180 above

¹⁸³ Amnesty International “Take a step to stamp out torture”, 18 October 2000.

¹⁸⁴ *ibid*

¹⁸⁵ Article 18 of the Vienna Convention on the Law of Treaties, 1969.

¹⁸⁶ Warden, M, (2005). “Torture spoken here”. In Roth.K.Worden, M & Bernstein, A.D (eds). *Torture-A human Rights Perspective*. The New Press & Human Rights Watch. New York. P.98

¹⁸⁷ Lucas Muniingh, “The implications of torture for South Africa”, www.uj.ac.za/sociology. (Accessed on 10 October 2013).

¹⁸⁸ *ibid*

Furthermore, according to Robertson:

“it is important to note that torture does not happen in a vacuum – it ascends to other abuses.”¹⁸⁹

It has been observed that when there is no effective outside monitoring, abuses of various kinds, including torture, are more than likely to occur.¹⁹⁰ In our discussion on the South African situation we will reflect on the Constitutional and legal issues. We will also analyze the current bill and comment on its shortcomings.

4.2. The Present Status of Torture in South Africa.

South Africa had embraced the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and ratified it on 10 December 1998.¹⁹¹ This indicated to the international community that South Africa in fact endorsed the international ban on torture and would abide by the tenets of the Convention. However, it is submitted that there has been very little progress towards South Africa’s compliance with its commitments. It is needless to argue and deny that acts of torture are a daily occurrence in South Africa.¹⁹² This has been well documented by many researchers and surveillance structures.¹⁹³

Statistics from the 2010/11 Department of Correctional Services Annual Report reflect that 51 prisoners died in that year due to unnatural causes.¹⁹⁴ The Judicial Inspectorate for Correctional Services also recorded 2276 complaints from prisoners alleging that prison warders had assaulted them in the same period.¹⁹⁵

¹⁸⁹ Robertson G(2006) “Crimes against Humanity-The struggle for global justice” , Penguin, London, p 265

¹⁹⁰ Note 188 above.

¹⁹¹ Amnesty International, “Take a step to stamp out torture’ 18 October 2000

¹⁹² Bruce D, Newham and Masuku T (2007) “In Service of the People’s Democracy – an assessment of the South African Police Service”, CSV, Johannesburg

¹⁹³ *ibid*

¹⁹⁴ Department of Correctional Services (2011) Annual Report 2010/11, Pretoria p.48.

¹⁹⁵ Office of the Inspecting Judge (20011) Annual Report of the Judicial Inspectorate 2010/11, Cape Town, p. 32. See for example the following cases from the ICD Annual Report 2004/5 listed according to the relevant police station: Moroka (p. 59), Zonkiszwe (p. 59), Linden (p. 60), Smithfield (p. 61), Odendaalsrus (p. 61), Klerksdorp (p.63), and Benoni (p. 66).

The 2004/5 Independent Complaints Directorate (ICD) Annual Report similarly had reflected on a number of cases where torture and assault of police suspects were alleged to have taken place.¹⁹⁶ The 2005/6 Annual Report of the ICD provided more detail: 1787 cases against police officers had been investigated for torture in police custody and in prisons, often leading to fatalities'.¹⁹⁷ Based on this report, it could be ascertained that government support for the prevention and combating of torture could be best described as apathetic, even thirty years after Steve Biko was tortured to death in detention by apartheid police.¹⁹⁸

More than 15 years after South Africa ratified UNCAT; torture has finally been criminalized in domestic law,¹⁹⁹ and will be thoroughly discussed later in this chapter.

4.3 The Right to Dignity according to the South African Constitution

History has proven that people deprived of liberty are often found to be more vulnerable and are therefore, at a greater risk of being tortured and ill-treated.

The Constitution,²⁰⁰ in section 35(5), spells out in detail the rights of arrested and detained persons,²⁰¹ viz.:

“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.”²⁰²

¹⁹⁶ Ibid –note 195 above

¹⁹⁷ Independent Complaints Directorate (2007) Annual Report 2005/6, Pretoria, pp. 63-64. The following specific offence categories are being referred to: assault common, assault (gbh), attempted murder, beaten with handcuffs, beaten with fists, dog attack, emotion/verbal/psychological abuse, indecent assault, intimidation, kicked, kidnapping, physical abuse, pointing of firearm, rape and torture.

¹⁹⁸ Steve Biko Memorial Lecture delivered by the President of South Africa, Thabo Mbeki on the occasion of the 30TH anniversary of the death of Steven Bantu Biko, Cape Town, 12 September 2007.

¹⁹⁹ Act 13 Of 2013

²⁰⁰ The Constitution of the Republic of South Africa-Revised 11 edition. Sec 35.

²⁰¹ SAHRC (2006) Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996), SAHRC, Johannesburg, p.136.

²⁰² The Constitution of the Republic of South Africa –Section 35(5)-Revised 11 edit. March 2012

Based on this it would be assumed that state officials would adhere to and abide by the laws, however this is not so. Dignity, as a constitutional importance, has been addressed at length in a number of Constitutional Court cases.²⁰³ Chaskalson has emphasized this 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’.²⁰⁴

Furthermore, the right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman, or degrading way. Currie and De Vaal have stated that,²⁰⁵

“Even though dignity is a founding value of the Constitution, it is a difficult concept to grasp in precise terms”.²⁰⁶

This is further explained by Muntingh,²⁰⁷ who argues that,

“..since South Africa is a fairly young constitutional democracy, the value of dignity is often poorly understood and has difficulty in taking root,(especially) when many people continue to suffer the indignities of socioeconomic deprivation.”²⁰⁸

It is submitted by the author that the right to dignity is an absolute one; it has universal application and is not negotiable. Therefore achieving the right to dignity forth in tangible terms is of course more challenging than debating it in legal and scholarly texts. In this respect, the Constitutional Court has shown great understanding to the challenges facing the government,²⁰⁹ and

²⁰³ *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)

²⁰⁴ 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.

²⁰⁵ Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 276

²⁰⁶ Ibid

²⁰⁷ Lucas Muntingh “The implications of Torture for South Africa” , October 2012. p14.

²⁰⁸ Ibid

²⁰⁹ *Government of RSA and Others v Grootboom and Others* 2001 (1) S.A 46 (CC).

has been steadfast in ensuring that the rights of people deprived of their liberty are not neglected or ignored.²¹⁰

4.4. Contextualizing the Problem of Torture in South Africa, Government Apathy and the Reasons for the Delay in Torture being Criminalized in Post-apartheid South Africa.

The writer submits that though the act of torture is frowned upon, as discussed in detail above, he feels the need to give the reader an insight into the reasons for the reluctance of the State to criminalize torture in the past.

Muntingh²¹¹ argues that due to the high violent crime rate in South Africa, the government became increasingly intolerant of prisoners and suspects rights and attempted (and was partly successful) to reframe or dilute these rights, or distance itself from prisoners and suspects rights enshrined in the Constitution.²¹² In effect, the rights afforded to suspects and sentenced prisoners became a “contested terrain”.²¹³ Set against this context, the underlying reasons for the lack of government action in preventing and eradicating torture become more apparent. In reviewing the past, incidences in 1994 and thereafter of violent crime had “soiled the fruits” of the new democracy.²¹⁴

The public was terrified and demanded immediate action from the government. President Mandela gave cognizance to the problem by portraying a “war-like” situation of criminals versus law-abiding citizens.²¹⁵

²¹⁰ *Minister of Home Affairs v Nico and Others* 2005 (3) S.A. 280 (CC).

²¹¹ Lucas Muntingh, “The implications of torture for South Africa –Civil society Prison Reform”, Community Law Centre UNIV. OF Western Cape, 09 May 2013

²¹² *Ibid*

²¹³ *Ibid*

²¹⁴ Sarkin, J. (2000) “Fighting crime while promoting human rights in the police, the courts and the prisons in South Africa”, *Law Democracy and Development*, Vol. 4 No. 2, pp.151-15

²¹⁵ “The situation cannot be tolerated in which our country continues to be engulfed by the crime wave which included murder, crimes against women and children, drug trafficking, armed robbery, fraud and theft. We must

Calls for the return of the death penalty reverberated with vigour by the public in spite of it being declared unconstitutional in 1994.

Political rhetoric, advocating a “tough-on-crime approach,” found popular support. In his 1999 State of the Nation address, President Mbeki was positive that more effective law enforcement would ultimately reap dividends.²¹⁶ In a speech in Parliament Mbeki likened criminals to “barbarians in our midst.”²¹⁷ The then new Minister of Justice in the first Mbeki Cabinet, Penuel Maduna²¹⁸ was also explicit in his response:

“As our country embarks on the second democratic term, we have to reflect on the shortcomings of the previous term and resolve to improve significantly on performance. Many problems continue to plague our justice system and at times evoking public sentiments that the new democratic order is more sympathetic to human rights concerns of criminals and less sensitive to the plight of victims of crime and the general sense of insecurity that continues to besiege our country.”²¹⁹

Further to this rhetoric, then Minister of Safety and Security, Steve Tshwete²²⁰ stated that:

“The criminals have obviously declared war against the South African public. ... We are ready, more than ever before, not just to send a message to the criminals out there about our intentions, but more importantly to make them feel that “die tyd vir speletjies is nou verby”. We are now poised to rise with power and vigor proportional to the enormity and vastness of the aim to be achieved.”²²¹

take the war to the criminals and no longer allow the situation in which we are mere sitting ducks of those in our society who, for whatever reason, are bent to engage in criminal and anti-social activities. Instructions have therefore already gone out to the Minister of Safety and Security, the National Commissioner of the Police Service and the security organs as a whole to take all necessary measures to bring down the levels of crime.”

(Opening of Parliament address by President N. R. Mandela, 17 Feb 1995, Cape Town) Also Cavadino, M. and Dignan, J. (eds) (2006) *Penal Systems – a comparative approach*, London: Sage Publications, p. 95.

²¹⁶ Address of the President of the Republic of South Africa, Thabo Mbeki, At the Opening of Parliament: National Assembly, Cape Town, 25 June 1999.

²¹⁷ Ibid

²¹⁸ Minister of Justice, Penuel Maduna, June 1995-cited in Rauch, J. (2001) p.10

²¹⁹ Ibid

²²⁰ Minister of Safety and Security, Steve Tshwete (Minister June 1999). Cited in Rauch, J. (2001), p.10

²²¹ Ibid

Muntingh writes that throughout the 1990s and even in later years, political rhetoric framed crime and human rights in a peculiar manner by attempting to drive a wedge between the Constitution (applicable to the just and innocent) and offenders (who should have limited Protection under the Constitution).²²² This posed a dilemma for human rights activists, especially those concerned with prisoners' rights. Initially the government's response concentrated on improving law enforcement by announcing the National Crime Prevention Strategy (NCPS) of 1996, although the NCPS still balanced this with social crime prevention. After a review of the NCPS in 1998, the focus on law enforcement became more transparent.²²³

Thereafter, South African legal issues reflected the outlook of the South African judiciary on their scrutiny of cases of torture. Of significance are the following relevant cases, which will be briefly reviewed:- *Mthembu v The State*, and *Bradley McCallum v South Africa (The McCallum Decision)*

Case 1 :

***Mthembu v The State*²²⁴**

Article 15 of CAT provides that any statement obtained through torture cannot be adduced as evidence in any proceedings in court. The Constitution in section 35(5)²²⁵ 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.”^{226 227}

²²² Lucas Muntingh, “The implications of torture for South Africa –Civil society Prison Reform”, Community Law Centre UNIV. OF Western Cape, 09 May 2013.

²²³ Van Aswegen, W.F. “The South African National Crime Prevention Strategy, Overview and contextual Analysis,” Dated 2000.

²²⁴ *Mthembu v The State*(64/2007) (2008) ZASCA 51 (10 April 2008)

²²⁵ The Constitution of the Republic of South Africa- Revised 11 edition. Sec 35 (5).

²²⁶ Currie and De Waal (eds) Bill of Rights Handbook 5th ed. (Juta Cape Town 2005)- Chapter 2 of The Bill of Rights s 35(5)

²²⁷ De Vos W "Illegally or unconstitutionally obtained evidence: a South African perspective" 2011 TSAR 268-282

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 2008.²²⁸ The torture however, was not directed against the appellant but against the state's chief witness, Mr. Ramseroop, who implicated the appellant in several crimes through narrative.²²⁹

During the trial Ramseroop disclosed that he had been assaulted and tortured by police before leading to the key evidence incriminating the appellant. The central question was whether the evidence disclosed and pointed out by Ramseroop under torture could be used against the appellant to secure his conviction.²³⁰

The appellant, a former a police officer, was convicted in the Verulam Regional C 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 - totaling 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 subsequent to this decision. A brief history of the dealings between the two parties in question is iterated below:²³¹

In late January 1998, the appellant accompanied by another person, one Mhlongo, left a vehicle with Ramseroop and upon departing, left a large metal box with Ramseroop with the instruction to dispose of it. Ramseroop, however, instead of disposing of the metal box, 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 told the police about the Toyota Corolla and at the request of the police, pointed out to them where it was

²²⁸ Note 211 above

²²⁹ Ibid

²³⁰ Ally D. "The need for clarity on whether 'suspects' may rely on section 35(5) of the Constitution of the Republic of South Africa, 1996: a comparative analysis" 2010 CILSA 239-259

²³¹ Court excerpts taken from : *Mthembu v The State* (64/2007) (2008) ZASCA 51 (10 April 2008)

parked on his property. After establishing that the vehicle was stolen, the police took Ramseroop into custody.

While he was in custody on 19 February, he was severely assaulted by police at Tongaat.²³² The assaults included torture with electric shock treatment.²³³ The complainant'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 and only stopped after he took the police to his home to show them where he had hidden the metal box.²³⁴

It was 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), was therefore deemed to have been obtained as a result of the torture inflicted on Ramseroop.

In the judgment, Cachalia J,²³⁵ refers to the pre-constitutional era where "courts generally admitted all evidence, irrespective of how it was obtained",²³⁶ 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 obtained, compared to real (physical) evidence.²³⁷ In short, "the fruit of the poisonous tree was not excluded."²³⁸ In the constitutional era, this posi-

²³² Ibid note-218 above.

²³³ Ibid

²³⁴ Ibid

²³⁵ Justices Azhar Cachalia- Supreme Court of Appeal: (1999-present)

²³⁶ Van der Merwe SE "Unconstitutionally Obtained Evidence" in Schwikkard PJ and Van der Merwe SE (eds) Principles of Evidence 2nd ed (Juta Cape Town 2002)

²³⁷ Ibid

²³⁸ Meintjies-Van der Walt L.- "*S v Melani and Two Others* (CC9/93 29 March 1995 ECD): "Public policy and the 'fruits of the poisonous tree' – Admissibility of evidence of a pointing-out obtained in breach of the Constitution" 1996 SACJ 83-89

tion had changed,²³⁹ 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.”²⁴⁰

Evidence improperly obtained from a person other than the accused added a new dimension to the debate and this case was, according to Cachalia J, the first to deal with this issue. Relying on what was called a “plain reading” of section 35(5) of the Constitution,²⁴¹ it was found that it would not only apply to evidence obtained from the accused, but from any person.

To strengthen its point, the Court then turned to the right to be free from torture in section 12 of the Constitution and supported this with the definition of torture in Article 1 of UNCAT, noting that South Africa ratified UNCAT in 1998. Relying further on case law from Ireland and the House of Lords, it was concluded, that to accept into the courts record and admit as evidence for purposes of conviction the discovery of the Hilux and the metal box would, “*involve the State in moral defilement.*”²⁴²

The court felt that, though Ramseroop’s 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 under torture.²⁴³

The court found the link between the torture and evidence tendered was compelling and undeniable. The impression created by this case after the SCA Judgment, was that the finding of guilt on the part of the appellant in the Regional Court (and left unchanged in the High Court) was based upon the evidence obtained under the torture.

²³⁹ Zeffertt D. and Paizes : “A The South African Law of Evidence” 2nd ed (LexisNexis Butterworths 2009)

²⁴⁰ Schwikkard P "Pointing out and inadmissible confessions" 1991 SACJ 318-328

²⁴¹ Note 206 above

²⁴² Referring to *S v January and Prokureur-General, Natal v Khumalo* 1994 2 SACR 801(A)

²⁴³ Van der Merwe SE "Unconstitutionally Obtained Evidence" in Schwikkard PJ and Van der Merwe SE (eds) Principles of Evidence 2nd ed (Juta Cape Town 2002)

The Constitutional Court decreed that the torture had profoundly blemished the evidence that was tendered, and could not accept this into submission.²⁴⁴

The case was most unfortunate because the appellant, who was clearly guilty, escaped justice and the consequences of his crime. The police officers perpetrating torture had themselves committed crime and treated the law with contempt and were held to account for their actions.

CASE 2

The McCallum Decision.²⁴⁵

The manner in which government dealt with the prevention and eradication of torture after 1998 was glaringly illustrated in the recent McCallum decision by the UN Human Rights Committee (HRC).²⁴⁶ In 2006, when UNCAT was assessing South Africa's initial report, it was informed of a particular incident at St Albans prison (Port Elizabeth, Eastern Cape) where in July 2005 a mass assault on prisoners by officials took place.²⁴⁷ The assault reportedly happened in retaliation for the fatal stabbing of a warder.²⁴⁸ The South African government, when questioned by UNCAT evaded the allegations and stated that the matter was subject to a civil claim and thus sub judice.

The mass assault in question was exceptionally cruel, inhuman and ruthlessly deprived the prisoners of their dignity.²⁴⁹ In the aftermath, the prisoners were denied access to medical treatment as well as legal representation.

²⁴⁴Van der Merwe SE "Unconstitutionally Obtained Evidence" in Schwikkard PJ and Van der Merwe SE (eds) *Principles of Evidence* 2nd ed (Juta Cape Town 2009)

²⁴⁵ *McCallum v South Africa-CCPR/C/100/D/1818/2008* Communication No. 1818/2008.

²⁴⁶ *Ibid*

²⁴⁷ *Ibid*

²⁴⁸ Note 249 above.

²⁴⁹ CAT/C/SR. 739 para 57.

The latter was only resolved after a successful High Court application by a prisoner, Mr. McCallum, assisted by legal counsel.²⁵⁰ Together they directed an individual complaint to the UN Human Rights Committee (HRC). On 2 November 2010, the HRC decision found that his right to be free from torture²⁵¹ had been violated.

This decision by the HRC²⁵² demonstrated the “shambolic nature” of the government’s internal communicating systems and that the failure to cooperate with the HRC was a deliberate one and therefore “reeked of malfeasance.”²⁵³ Furthermore, the HRC found that the Department’s actions displayed an indifferent attitude towards the general issue of torture since South Africa ratified UNCAT in 1998. It also found that there was very little evidence that the Department of Correctional Services (DCS) has taken any noticeable steps to prevent and reduce assaults on prisoners by officials, in spite of the White Paper on Corrections,²⁵⁴ and South Africa’s repeated references to prisoners’ constitutional rights.

²⁵⁰ The following is an extract from the decision by the United Nations Human Rights Committee (HRC) in the McCallum matter describing the events at St Albans prison: On 17 July 2005, the author [McCallum], together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author’s shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them. At some point, Warder P. approached the author and while insulting him, he inserted a baton into the author’s anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate’s belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, faeces and blood and some inmates fell over each other. (CCPR/C/100/D/1818/2008)

²⁵¹ Article 7 of the International Covenant on Civil and Political Rights (ICCPR),

²⁵² United Nations Human Rights Committee.-Communications No. 1818/2008,U.N.Doc. CCPR/C/100/D/1818/2008. Accessed on 12 November 2013.

²⁵³ Ibid

²⁵⁴ The Portfolio Committee on Correctional Services. “Draft White Paper on Corrections In South Africa”. 4 February, 2004

The HRC established that instead of holding perpetrators of torture accountable and prosecuting them, (even if it was on assault and attempted murder charges) the officials of the Department of Correctional Services instead opted to shield them from prosecution by creating many obstacles for victims seeking redress.²⁵⁵

Further investigations revealed that the DCS senior management was aware of the incident in 2006 and disclosed this to UNCAT, but however, failed to address the issues at hand. Whether this was due to a lack of willingness or incapability to investigate the allegation is unknown.²⁵⁶

The McCallum case demonstrated the institutional and systemic failures to deal with allegations of torture in a manner that is compliant with Articles 12 and 13 of UNCAT. The McCallum decision is significant for a number of reasons, mainly because it developed into a small crisis that exposed numerous failures of the safeguards to protect prisoners. In the past the absence of legislation criminalizing torture combined with the Department of Correctional Services' poor response to allegations of torture and ill treatment have left prisoners vulnerable to violations in this respect.

4.4.1 Conclusion

The validity of the findings of the above two cases is clearly reflected in the Constitution.

Section 35(5)²⁵⁷ directs:

“ South African courts not to be influenced by the pressures of public opinion, but to assure all South Africans citizens that regardless of the fact that they may be accused of having committed the most heinous crimes,(even if there is evidence) – that the goals of crime control do not justify unconstitutional police conduct.”

²⁵⁵ Note 257 above.

²⁵⁶ Ibid

²⁵⁷ The Constitution of the Republic of South Africa –Section 35(5)-Revised 11 edit. March 2012.

It should be emphasized that the goal of preserving the integrity of the criminal justice system is of paramount importance in section 35(5) challenges.²⁵⁸

Cachalia J. argues that, while the "current public mood" of society may be a relevant consideration in the admissibility assessment, it should not replace the fundamental duty of South African courts to "*uphold and protect the Constitution and the human rights entrenched in it,*"²⁵⁹ and to administer justice to "*all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law*".²⁶⁰

4.5 Prevention of Combating and Torture of Persons Act.-Act 13 of 2013

4.5.1 Introduction

The Prevention of Combating of Torture of Persons Bill,²⁶¹ was tabled in Parliament in June 2012 and passed by The National Assembly on November 2012. The new Bill was finally signed on the 25 July 2013.²⁶² This heralded a new era for South Africa in the criminalization of torture and other human rights abuses. *Or does it?*

Of importance is the wording of the Act (Act 13 of 2013) in the Government Gazette of The Republic of South Africa.no. 36716 volume 577 reads as: " Act No. 13 of 2013: Prevention of Combating and Torture of Persons Act, 2013. This is grammatically incorrect and ambiguous.²⁶³ The author submits, that this bill had to be thoroughly scrutinized by legal experts over a period of

²⁵⁸ *S v Mthembu* 2008 ZASCA 51 para 33, where Cachalia JA, writing for a unanimous Supreme Court of Appeal, confirmed this contention in the following terms: "... the purpose of the exclusionary rule is to uphold the integrity of the administration of justice".

²⁵⁹ Ibid

²⁶⁰ The oath taken by judges when they take office, contained in item 6 of Schedule 2 of the Constitution

²⁶¹ Act no.13 of 2013

²⁶² S.A. news. Gov.za 25-07-2013

²⁶³ Dr. S.R. Naidoo—Honorary Research Fellow, School of Law, UKZN, Discussions on the new Act 13 of 2013 between author and Dr.S.R. Naidoo just after the release of the document publically.

15 years since ratification before it was finally passed, and that there is no excuse for the rather careless phrasing of such an important Act. It is the opinion of the author that the Act was not intentionally phrased to complement or supplement the application of torture in a rather ambiguous sense, but rather a bad administrative and editing error that cannot be condoned in a piece of formal legislation. It needs to be referred back to the ministry responsible for correction and re-publication in the Government Gazette.

The Act should, in actuality read as : Act No. 13 of 2013: Prevention **and** Combating of Torture of Persons Act, 2013. On analyzing the wording of the Act i.e.” Prevention of Combating and Torture of Persons Act, literally means in lay terms the actual *prevention of combating* of torture of persons. This “error” is not only confined to the first page of the Government Gazette²⁶⁴, but rather is seen on the headers of all the pages.

In this chapter, we shall examine the actual Act²⁶⁵ and comment on its shortcomings and offer solutions for implementation..

4.5.2 Scope of the ACT ²⁶⁶

The new Act²⁶⁷ validates South Africa’s obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and finally recognises the offence of torture and seeks to prevent and combat the torture of persons within or across the borders of South Africa. The proposed legislation also aims to promote the universal respect for human rights and specifically states that torture is not to be tolerated even in a state of war. The Act more importantly places a responsibility on the State to create awareness around the prohibition against torture.

²⁶⁴ Government Gazette no.36716, vol. 577 29 July 2013,

²⁶⁵Act no. 13 of 2013

²⁶⁶ Ibid

²⁶⁷ ibid

4.5.3. Comments on the Act.²⁶⁸

For the purposes of this paper, we shall refer to the Act as: “The Torture Act” or “The Act” **rather** than “The Prevention of Combating and Torture of Persons Act 13 of 2013”. (Emphasis placed in bold)

Though the Act was regrettably delayed for many years, it is gratifying that the Act has rectified many of the shortcomings addressed in various inputs on the draft version of the Bill, and although short and crisp, now serves to formalize the offence of torture, and fulfills South Africa’s obligations in terms of UNCAT.

The Torture Act came into operation on 29 July 2013. It appears in English and Setswana in the Government Gazette No. 36716. It is a new Act and does not repeal any other legislation. However, it amends the Criminal Procedure Act 51 of 1977 (the CPA) by the inclusion of the new offences of Act 13 of 2013 and also amends the Prevention of Organised Crime ACT 121 of 1998 (POCA) by the (further) inclusion of the new offences in Schedule 1 of POCA.²⁶⁹ The Torture Act establishes a specific crime of torture, institutes jurisdiction over certain acts of torture that occurred outside of South Africa, and emphasizes a general responsibility on the part of the State to promote awareness about torture to citizens of South Africa.

The Torture Act was enacted to give effect to South Africa’s obligations in terms of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by South Africa on 10 December 1998.²⁷⁰ The following word definitions, which appear in section 1 of the Torture Act are of importance. They are:-

²⁶⁸ Act 13 of 2013

²⁶⁹ Servamus-Community based Safety & Security Magazine vol.106 /issue 10. Article by Brigadier Dirk Lambrets— Regsrubriek 321.p.68

²⁷⁰ Brigadier Dirk Lambrets –Pollex comments on the Act 13 of 2013.p. 68 October 2013.

The definition of an accused person in Section 1, read together with Sections 3 (Act constituting Torture) and Section 4 (penalties) makes it clear that:

“A public official²⁷¹ who commands, instigates or incites any person to commit torture, are themselves guilty of the offence.”²⁷²

In simple language a “public official” is an employee, employed by the State or an Organ of the State, which according to our Constitution,²⁷³ means any department of State or administration in the national, provincial, or local sphere of government.

To this end, it could be argued that political leaders, government ministers and Ministers of Police²⁷⁴ who utter inflammatory statements to incite police officers to use excessive and unrestrained force like “shoot to kill” in securing arrests and convictions could also be guilty of torture. (As mentioned in Chapter1, State immunity is not a defense in cases where torture has been alleged to take place and that public officials will be vicariously liable, if they are found to have taken part in, or sanctioned such acts.)²⁷⁵ In addition where inquiries show (eg. McCallum case) deliberate attempts to shield or create obstacles to investigations, the public officials responsible could themselves be held accountable.²⁷⁶

Section 3 of “The Torture Act,” referred to the definition of ‘Torture’ as follows:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a “victim” for such purposes as to,

²⁷¹ **Note:** The term, ‘public official’ as referred to in the wording definition, could be an SAPS or Correctional Services member, a provincial or municipal traffic officer, or a member of a municipal police service.

²⁷² Discussion with Dr S.R.Naidoo on 31 January 2014.

²⁷³ Section 239 of The Constitution of South Africa. -11 ed.

²⁷⁴ “Use deadly force”, Cele tells cops- Johannesburg - National police commissioner Bheki Cele has again told members of the South African Police Service (Saps) to "use deadly force" against criminals. "If somebody uses a camera to shoot you, smile. But when they use anything else to shoot you, use deadly force before they can do anything - and don't miss," he said at the launch of the police's festive season campaign in Sandton on Monday 2009-12-07 14:29-News 24.

²⁷⁵ Ibid

²⁷⁶ United Nations Human Rights Committee.-Communications No. 1818/2008,U.N.Doc.CCPR/C/100/D/1818/2008. (Accessed on 12 November 2013)

- i) Obtain information or a confession from him/her or any other person:
- ii) Punish him/her for an act /s he/she or any other person committed or is planning to commit; or
- iii) Intimidate or coerce him/her or any other person to do or to refrain from doing anything; or
- iv) For any other reason based on discrimination of any kind. “

“Victim” means “any person” who has or allegedly been subjected to an act of torture. The phrase “any person” includes a suspect, a witness and /or a complainant in respect of a criminal investigation. In this regard, the court decision in *S v Mthembu*,²⁷⁷ in which the police tortured a witness while in custody. The Supreme Court of Appeal verdict reaffirms that evidence obtained under torture was not admissible and unconstitutional, even though the person tortured was not the accused himself. ²⁷⁸

Section 4 of The Torture Act states:

“Any person who participates in torture, or who conspires with a public official to aid procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.”

This places emphasis on, and provides an “all in one” provision and clarifies the above situation.²⁷⁹ Section 4 further clarifies this position by stating :

“No law, including customary international law, is a defense nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.”

²⁷⁷ *S v Mthembu* 2008(2)SACR 407 (SCA)- As discussed by in chapter 4.4 page55 —case 1 . This case is repeated here because it is constituted to be a land mark case and is done intentionally to clarify the phrase “any person” in the new Act 13 of 2013.

²⁷⁸ Dr S.R.Naidoo,-comments on “The Act” . 05 February 2014

²⁷⁹ Referring to *S v Mthembu* above.

It is indeed commendable that the Torture Act places emphasis on the exclusion of any circumstances, however exceptional, as justification for torture. This would include any internal or external state of war, emergency, instability, threat to security, or terror – this appears to be totally inclusive of all or any situation that may arise. This simply means that under no circumstances whatsoever would torture be condoned. The reader’s attention is directed again to recent international perceptions relating to the “war on terror” and the method of obtaining information from suspects.

Section 4 criminalizes torture and states that the perpetrator, who is restricted to be a public official, will be liable upon conviction to a sentence of imprisonment. There is, however, no minimum prison sentence indicated or reference to the Criminal Law Amendment Act Schedules.²⁸⁰

Section 6- Extra – Territorial jurisdiction²⁸¹

Section 6 of the South African Courts in this legislation applies specifically to persons who are South African citizens or ordinary residents in South African territorial area, and where the incident of torture occurred to them outside of the countries jurisdiction.

The recent landmark case²⁸² where a Zimbabwe human rights group wishes to have the Zimbabwean government tried in a South African Court is not pursued in terms of the new South African legislation, but rather based on international law founded on South Africa’s ratification of the Rome Statute.^{283 284}

²⁸⁰ Lucas Muntingh-Comments on the Act 13 of 2013 (October 2013)

²⁸¹ Supra

²⁸² Anita Powel “South Africa pushed to near Zimbabwe Torture Case---Voice of America (Washington DC) 07 November 2013. <http://allafrica.com/stories/201311020020.html>

²⁸³ Rome Statute of the International Criminal Court, 17 July 1998 -State parties (122) - State signatories (31)

²⁸⁴ Discussion with Dr. S.R. Naidoo –Honorary Research Fellow, School of Law, UKZN. 31 January 2014

Section 9- General Responsibility to promote awareness.

The State has a duty to promote awareness of the prohibition against torture, aimed at the prevention and combating of torture.²⁸⁵ The general responsibility to “promote awareness” provides that the President designate one or more Cabinet members for this purpose.

Dr S.R. Naidoo²⁸⁶ argues that:

“The Act would have been better served if the Ministers of Safety and Security and Correctional Services were designated specifically for this purpose, although a general responsibility for all ministries and public officials towards education and awareness would still exist. The specified ministries are expected to be transparent by providing periodic reports and statistics on the progress of their programmes and interventions. Furthermore, training programmes should be directly funded by the National Treasury.”²⁸⁷

Although the Act makes reference to “training public officials”, it is important that the police, in particular, are equipped with the skills to recognise cases of torture and deal with it in terms of the Act. Parliament should therefore exercise its authority and ensure that police officials are indeed trained in accordance with the Act. Parliament should further request all relevant training statistics and number of cases processed under the Act.

Section 9²⁸⁸ is very general in its provision and does not address the aspects of torture prevention as required under the UNCAT. There is therefore a need for South Africa to develop and implement a comprehensive torture prevention mechanism for all places where persons are deprived of their liberty. This can be achieved by the establishment of a National Preventive Mechanism (NPM) similar to the SPT (see chapter 3), which is essentially a system of regular unannounced visit to places where persons are deprived of their liberty, but at a national level.

²⁸⁵ Section 9(1) –Act 13 of 2013.

²⁸⁶ Note 286 above.

²⁸⁷ Ibid

²⁸⁸ Section 9 (1) of Act 13 of 2013

In terms of Parliament's legislative and oversight function, the specified ministries should exercise its powers and liaise with other relevant parliamentary committees in order to ensure that a NPM is established. This would be a significant step towards the prevention and combating of torture in South Africa.

4.5.4. Conclusion

The new Act, although with a few shortcomings (as discussed above) is a welcome piece of legislation, and finally criminalises torture.

However, It is argued by Brig. Dirk Lambrechts,²⁸⁹ that to further strengthen The Torture Act, provisions for "*competent verdicts*" as referred to in Chapter 24, section (256 to 270) of the Criminal Procedure Act (CPA) must be applied. This according to him, is not reflected sufficiently in the new Act. He recommends that, concerning "*competent verdicts*," the State prosecution places reliance on section 270 of the CPA²⁹⁰. He also suggested that it would be advisable to consider all possible alternative charges from attempted murder to common assault in cases of this nature.²⁹¹

The term "*competent verdict*"²⁹² basically means being charged with a lesser offence: In all offences, if the evidence does not prove the actual offence but indicates in the evidence tendered a lesser offence, then the accused may be found guilty of the lesser offence even though this lesser offence was not originally entered into the charge sheet or indictment.

For example, if the evidence in a case of torture does not prove the actual commission of the torture, but does prove that the accused was an accessory after the fact (for example helping to

²⁸⁹ Servamus-Community based Safety & Security Magazine vol.106 /issue 10. Article by Brigadier Dirk Lambrechts— Regsbrubriek 321.p.68 October 2013.

²⁹⁰ Section 270 of the CPA, Chapter 24.

²⁹¹ Ibid.

²⁹² Submitted by Lerato Moloantwa,-a candidate attorney at Eversheds. eversheds.co.za November 2009. (Accessed on 26 January 2014)

hide the body of the tortured victim), then the accused can be found guilty of the crime of being accessory after the fact.

In cases where it cannot be proven medically that the victim was indeed tortured, the accused may be found guilty of, inter alia assault with intention to do grievous bodily harm, common assault, sexual assault in its various forms as defined in the Criminal Law.

It is prudent to note that the prosecutor does not have to list the competent verdicts in the charge sheet. If an accused is unrepresented, the magistrate is obliged to warn the accused that there are competent verdicts possible. The accused may be found guilty of the competent verdict/s even though not formally charged with them. Persons accused of torture must be aware that there are other lesser offences with which they can be charged and convicted, if the original offence with which they are charged cannot be proven, but the evidence is sufficient to prove the competent verdict.²⁹³

Finally, The Torture Act, though delayed, incorrect in its wording and lacking in specifications of penalties relating to redress to victims, is comprehensive in its current form and a welcome new addition to the judicial and prosecution armamentarium. However, although having a comprehensive piece of legislation is commendable, what is of real significance is the forcefulness of its implementation in preventing and combating torture.

²⁹³ Ibid note 276

CHAPTER 5

Conclusion

This paper briefly reviewed the practice and reasons for torture being perpetrated and studied the nature of perpetrators themselves, as well as the relevant instruments, codes and conventions and finally gave a critical review of the recently-created legislation prohibiting torture in South Africa. The author would like to emphasize that the only major limitation to this study was the restriction in the number of words allowed. To do a fully exhaustive review of the efficacy of all relevant laws and codes would require much more allowance of time, words and space.

The author would like to submit that the timing of this study was indeed timeous, having been conducted at the interface between ratification and final signing of the Prevention and Combating of Torture of Persons Act 13 of 2013 by the President on 29 July 2013.²⁹⁴ That the creation of this legislation has eventually been achieved for South Africa is indeed commendable, and this country has finally fulfilled international law in this respect.²⁹⁵

Whereas we can applaud at finally having an Act²⁹⁶ that criminalizes torture, we should also heed the quote from the popular philosopher Julian Baggini: ²⁹⁷

"I maintain the importance of an absolute prohibition against torture, while acknowledging that even absolute prohibitions can sometimes be broken. If that is a contradiction, it is a contradiction that ethics has to embrace, or else it becomes like glass: hard, clear, but fatally inflexible."

²⁹⁴ S.A.News.Gov.za 25-07-2013

²⁹⁵ Human Rights Watch/Africa -2013

²⁹⁶ Act 13 of 2013

²⁹⁷ Julian Baggini is a journalist and philosopher who studies the complexities of personal identity. He is the editor-in-chief of the Philosophers' Magazine

Baggini's point is that despite the best law in place for prevention, it is a probability that torture will still continue to occur, and this is something that we need to accept as reality. It is what we do about it that makes the civilised difference.²⁹⁸

The fact that we now have a country specific legislation, indicates to the rest of the world that South Africa is committed to abolish the scourge of human rights abuse. This achievement is praiseworthy and laudable itself, against the backdrop of South Africa's own tumultuous policing and human rights history. Now, the challenge is **implementation**. (Emphasis in bold)

Having the law in place is, (in the writer's opinion) simply the intention fulfilled. It is patently clear that torture continues to be practiced in South Africa. It is the practical implementation of the legislation that will best show its contribution to the prohibition and prevention of torture and abuses of human rights involving cruelty, degrading treatment, punishment, and indignity, as well as obtaining justice for victims and just punishment for perpetrators.

This writer asserts that it will not be sufficient to just have effective legislation that outlaws torture and deals with torture and its consequences after the fact. We do not need any further codes or conventions. What we need is active mechanisms to prevent torture from actually happening. This may require comprehensive education and training of law-enforcement and correctional services officials in facilities where torture may be expected to occur, continual public awareness and involvement, empowered autonomous human rights advocacy groups, effective monitoring mechanisms and surveillance systems, facilitating and encouraging inspections of facilities by national and international authorities, and making public the violations that occur.

The international war against terrorism has delivered a fresh concern about a possible sanction of coercive acts and abuses that may be likened to torture against political prisoners, where

²⁹⁸ Comments by DR S.R.Naidoo –Honorary Research Fellow, School of Law, UKZN. (30 January 2014)

there may be major concerns about public safety.²⁹⁹ This becomes an ethical issue where community security is involved, especially with weapons of mass destruction.³⁰⁰ It is easy to sway mass public opinion in this context, and the challenge is to maintain sober frames of mind in this circumstance.³⁰¹

Every sovereign state requires an independent, neutral and objective official commission on human rights, with powers to probe and deal with any and all allegations of human rights abuses in their jurisdictions. All states need to do an in-depth review of their own laws and as well their leaders' attitudes towards the actions of their security forces and behavior of their penal authorities towards those in custody, incarcerated or arrested. Wild and inflammatory statements by those in leadership³⁰² need to be curbed by autonomous and impartial human rights monitoring agencies and advocates.

The need for specific "Codes of Conduct"³⁰³ for prison and law-enforcement authorities themselves, like we have for nurses,³⁰⁴ doctors and psychiatrists,³⁰⁵ etc. to assist these professionals from involving themselves in and reporting any evidence of torture . There has been in South

²⁹⁹ Postner, Richard (September 2,2002), "The Best Offence," The New Republic – (Yale University Press, 271 pp)

³⁰⁰ Why Terrorism Works "Understanding the Threat, Responding to the Challenge "by Alan M. Dershowitz (Yale University Press, 271 pp.,

³⁰¹ "Torture is not wrong. It just doesn't work, says former interrogator" -The Telegraph, October 28,2011.

³⁰² "Use deadly force", Cele tells cops- Johannesburg - National police commissioner Bheki Cele has again told members of the South African Police Service (Saps) to "use deadly force" against criminals."If somebody uses a camera to shoot you, smile. But when they use anything else to shoot you, use deadly force before they can do anything - and don't miss," he said at the launch of the police's festive season campaign in Sandton on Monday 2009-12-07 14:29-News 24.

³⁰³ Burgers JH and Danelius (1998) The UN Convention –A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Martheinus Nijhof Publishers, Dordrecht,pp.142.

³⁰⁴ International Council of Nurses: "Torture, Death Penalty and Participation by Nurses in Executions"" (1998)

³⁰⁵ WMA Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment Adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975 revised by the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006.

Africa a splendid example of conscientious action against abuses, and Dr. Wendy Orr³⁰⁶ is a prominent example of this.

A robust educational campaign towards training (and re-training) of police and prison officers and authorities on the importance, meaning and reasons for the new legislation, and the critical importance of their compliance to rid our facilities of the practice of torture or human rights violations of any sort. They will need to have clear definitions on what constitutes torture and cruel, inhuman, and degrading treatment and punishment, and to have a rigorous teaching on general human rights consciousness in practice.

The implementation of the provisions of the Act 13 of 2013 needs to be clear:

Torture and other inhuman, cruel, and degrading treatment will not be tolerated in South Africa and perpetrators of these heinous and serious human rights infringements will be prosecuted and punished without exception irrespective of how small the act is.³⁰⁷

A further recommendation would be widespread publicity and dissemination of information on the new legislation in the media to inform the public towards greater awareness and involvement in advocacy towards prevention.

There should be further international discussions and consensus on the ethical issues of the management of political detainees where there are very serious concerns about the safety of the general public, particularly where threats of civil disturbance and mass destruction from terrorist activities are present.

³⁰⁶ Dr Wendy Orr qualified as a medical doctor at the University of Cape Town, South Africa in 1983. In 1985, while working in the medical examiner's office in Port Elizabeth she became the first and only doctor in government employment to reveal police torture and abuse of political detainees. www.interlog.com/~saww/2006Wendy

³⁰⁷International Covenant on Civil and Political Rights Article 7 of the 1966 International Covenant on Civil and Political Rights provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, adopted by the UN General Assembly, Res. 2200 A (XXI), 16 December 1966, Article 7.

To quote Mahatma Gandhi:

"The smallest deed is grander than the grandest noblest intention." MK Gandhi

Gandhi makes it clear that what we actually do is more important to the outcome than just the law itself.

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ANNEXURES

Appendix 1

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.

The Convention was adopted and opened for signature, ratification, and accession by the 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,

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 consti-

tutes 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 shall, 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 dependents 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 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 practiced 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 af-

ford 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, 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

Act No. 13 Of 2013: Prevention of Combating and Torture of Persons Act, 2013

This is the current version and applies as from 29 July 2013, i.e. the date of commencement of The Prevention of Combating of Torture of Persons Act 13 of 2013 – to date]

PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT 13 OF 2013

(Gazette No. 36716, Notice No. 545, dated 29 July 2013. Commencement date: 29 July 2013)

(English text signed by the President)

(Assented to 24 July 2013)

ACT

To give effect to the Republic's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic; and to provide for matters connected therewith.

PREAMBLE

Since section 12(1)(d) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way;

And mindful that the Republic of South Africa :-

- * has a shameful history of gross human rights abuses, including the torture of many of its citizens and inhabitants;
- * has, since 1994, become an integral and accepted member of the community of nations;
- * is committed to the preventing and combating of torture of persons, among others, by bringing persons who carry out acts of torture to justice as required by international law;

* is committed to carrying out its obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

And since each State Party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, Parliament of the Republic of South Africa therefore enacts as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions
 2. Objects and interpretation of Act
 3. Acts constituting torture
 4. Offences and penalties
 5. Factors to be considered in sentencing
 6. Extra-territorial jurisdiction
 7. Liability
 8. Expulsion, return or extradition
 9. General responsibility to promote awareness
 10. Regulations
 11. Amendment of laws
 12. Short title
- Schedule

1. Definitions

In this Act, unless the context indicates otherwise—

- “accused person” means any person who has committed or allegedly committed an act of torture;
- “Constitution” means the Constitution of the Republic of South Africa, 1996;

- “Convention” means the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by the Republic on 10 December 1998;
- “court” means a court contemplated in section 166 of the Constitution;
- “public official” means any person holding public office and exercising or purporting to exercise a public power or a public function in terms of any legislation;
- “torture” has the meaning assigned to it in section 3; and
- “victim” means any person who has or has allegedly been subjected to an act of torture.

2. Objects and interpretation of Act

(1) The objects of this Act are to—

(a) Give effect to the Republic’s obligations concerning torture in terms of the Convention, in particular—

(i) The recognition that the equal and inalienable rights of all persons are the foundation of freedom, dignity, justice, and peace in the world;

(ii) The promotion of universal respect for human rights and the protection of human dignity;

(iii) That no one shall be subjected to acts of torture;

(b) Provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties;

(c) Provide for measures aimed at the prevention and combating of torture; and

(d) Provide for the training of persons, who may be involved in the custody, interrogation, or treatment of a person subjected to any form of arrest, detention, or imprisonment, on the prohibition and the combating of torture.

(2) When interpreting this Act, the court must promote the values of Chapter 2 of the Constitution and the achievement of the objects referred to in subsection (1).

3. Acts constituting torture

For the purposes of this Act, “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(a) For such purposes as to—

(i) Obtain information or a confession from him or her or any other person;

(ii) Punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) Intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

(b) 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, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

4. Offences and penalties

(1) Any person who—

(a) commits torture;

(b) attempts to commit torture; or

(c) incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

(2) Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

(3) Despite any other law to the contrary, including customary international law, the fact that an accused person—

(a) is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or

(b) was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither a defense to a charge of committing an offence referred to in this section, nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.

(4) No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.

(5) No one shall be punished for disobeying an order to commit torture.

5. Factors to be considered in sentencing

Any court that imposes a sentence in respect of any offence under this Act must, when considering the presence of aggravating circumstances and without excluding other relevant factors, take the following factors into account:

- (a) Any discrimination against the victim;
- (b) the state of the victim's mental or physical health;
- (c) whether the victim had any mental or physical disability;
- (d) whether the victim was under the age of 18 years;
- (e) whether the victim was also the victim of a sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (f) the use of any kind of weapon to harm, threaten or intimidate the victim;
- (g) the infliction of serious mental or physical harm to the victim;
- (h) the conditions in which the victim was detained;
- (i) the role of the convicted person in the offence;
- (j) previous convictions relating to the offence of torture or related offences; and
- (k) the physical and psychological effects the torture had on the victim.

6. Extra-territorial jurisdiction

(1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 4(1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person—

- (a) is a citizen of the Republic?
- (b) is ordinarily resident in the Republic;

(c) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention; or

(d) has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.

(2) If an accused person is alleged to have committed an offence contemplated in section 4(1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions contemplated in section 179(1) (a) of the Constitution, who must also designate the court in which the prosecution must be conducted.

7. Liability

Nothing contained in this Act affects any liability, which a person may incur under the common law, or any other law.

8. Expulsion, return or extradition

(1) No person shall be expelled, returned, or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

9. General responsibility to promote awareness

(1) The State has a duty to promote awareness of the prohibition against torture, aimed at the prevention and combating of torture.

(2) Without derogating from the general nature of the duty referred to subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to—

- (a) conduct education and information campaigns of the prohibition against torture aimed at the prevention and combating of torture;
- (b) ensure that all public officials who may be involved in the custody, interrogation, or treatment of a person subjected to any form of arrest, detention, or imprisonment, are educated and informed of the prohibition against torture;
- (c) provide assistance and advice to any person who wants to lodge a complaint of torture; and
- (d) train public officials on the prohibition, prevention and combating of torture.

10. Regulations

(1) The Cabinet member responsible for the administration of justice may make regulations regarding any matter referred to in section 9(2), which are reasonably necessary or expedient to regulate in order to achieve the objects of this Act.

(2) Any regulation contemplated in subsection (1) must be tabled in Parliament before it is promulgated.

11. Amendment of laws

The laws specified in the Schedule are hereby amended to the extent indicated in the third column thereof.

12. Short title

This Act is called the Prevention of Combating and Torture of Persons Act, 2013.

SCHEDULE

Laws amended

(Section 9)

Number and year of law	Short title	Extent of amendment
Act No. 51 of 1977	Criminal Procedure Act of 1977	1. The amendment of Schedule 1 and Parts II and III of Schedule 2, by the inclusion of the offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013
Act No. 121 of 1998	Prevention of Organised Crime Act of 1998	2. The amendment of Schedule 1 by the inclusion of the offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013.

