ABSTRACT

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

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

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

I attempt to analyze South Afri[illegible]ing to torture, in relation to the international legal framework. [illegible]blished that torture and cruel inhuman and degrading treatm[illegible] in situations where persons are deprived of personal liberty, I examine legislation, policies and practices applicable to specific places of detention, such as correctional centres, police custody, repatriation centers, mental health care facilities and child and youth care centers. I establish that although South Africa has ratified the UNCAT and is a signatory to the OPCAT, our legal system greatly lacks in structure and in mechanisms of enforcement, as far as the absolute prohibition and the prevention of torture and other forms of cruel and degrading treatment or punishment are concerned.

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

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

DECLARATION

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

Marilize Ackermann

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ACKNOWLEDGEMENTS

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LIST OF ABBREVIATIONS

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

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

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CHAPTER ONE: INTRODUCTION

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

- Desmond Tutu, 8 June 1986

1.1 Background to the study

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

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

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

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

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

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

Convention Against Torture and other Cruel, Inhuman and Degrading Treatment[5] or Punishment (UNCAT) on 10 December 1998. The accession to this instrument demonstrates South Africa's acceptance of international standards governing the manner in which torture and other forms of ill-treatment should be approached. However, 12 years after ratification, the State has done little to ensure compliance with its obligations under the UNCAT. The prohibition against torture and other forms of cruel, inhuman and degrading treatment or punishment (CIDT) appears in the South African Constitution, but is not contextualized or developed in any other piece of legislation. Of greater concern, is the absence of the crime of torture in South African criminal law. The South African government was several years late in submitting its initial report on adherence to its duties under the UNCAT to the Committee Against Torture (CAT). Worse still, the government seems to pay little attention to the recommendations made by the CAT, in response to this report. The second report to the CAT was due in December 2009, but since this has not been submitted yet, it would appear as if the issue of torture remains inadequately prioritized.

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

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

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

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

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

1.2 The Research Question

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

1.3 Objectives of the study

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

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

1.4 Significance of the study

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

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1.5 Research Methods

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

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

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

1.6 Literature

A highly comprehensive and informatory commentary on the UNCAT was published in 2008 by the Oxford University Press.[9] This commentary contains an in-depth examination of the international position on torture and other forms of cruel treatment. There are many sources of information on the international legal structure. Some of the first publications on the topic include works by Ingelse,[10] Boulesbaa,[11] as well as Burgers and Danelius,[12] all of which discuss the drafting process of the UNCAT and the mechanisms of prevention created thereby. Very few publications exist on the South African position surrounding torture and CIDT. No academic commentary has been published on torture and CIDT relative to South Africa. There is some literature available on the Constitutional prohibition against torture and CIDT and there are a few practical guides to the UNCAT in the South African context, for example the CSPRI guide[13] and the CSVR booklet.[14] It appears that no academic evaluations of the draft Bill on the Combating of Torture of 2008 exists and general information about the draft Bill is not readily available. Similarly, there are no academic publications dealing with the legal position of victims of torture in South Africa. There are only a few court cases, Constitutional or otherwise, dealing with matters pertaining to torture. Calls for law reform in this area has been made by several non-governmental organizations (NGO) – mostly in the forms of shadow reports to the CAT, however, it no formal proposal for law reform is currently being investigated by the Department of Justice and South African Law Reform Commission.[15]

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

[9] Nowak, M. and McArthur, E. (2008) *The United Nations Convention against Torture: A Commentary,* Oxford University Press, United Kingdom.
[10] Ingelse, C. (2001) *The UN Committee Against Torture: An Assessment*, Kluwer Law International, The Netherlands.
[11] Boulesbaa, A. (1999) *The UN Convention on Torture and the Prospects for Enforcement*, Martinus Nijhoff Publishers, The Netherlands.
[12] Burgers, H.J. & Danelius, H. (1988) *The UN Convention against Torture: A Handbook on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, The Netherlands.
[13] Muntingh, L. (2008) *Guide to the UN Convention against Torture in South Africa*, CSPRI & Community Law Centre.
[14] Muntingh, L. (2008) *Preventing and Combating Torture in South Africa: A framework for action under CAT and OPCAT,* Centre for the Study of Violence and Reconciliation and Civil Society Prison Reform Initiative.
[15] Issues subject to law reform in South Africa are initially investigated by the South African Law Reform Commission, after which suggestions are communicated to Government. See the list of Current Investigations and Progress Report of the South African Law Reform Commission, available at http://www.justice.gov.za/salrc/projects.htm accessed on 16 March 2010.

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

1.7 Outline of chapters

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

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

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

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

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

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

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

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

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

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

2.3 Characteristics of the prohibition against torture

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

[36] The African Charter was adopted by the Organization of African Unity (since replaced by the African Union) on 25 June 1981 and entered into force on 21 October 1986.
[37] As such, this paper will employ the jurisprudence of these forums as sources contributing to the development of international law in respect of torture and CIDT.
[38] Preamble to the UNCAT.

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

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

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

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

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

[46] Simbeye, Y. (2004) p.61.

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

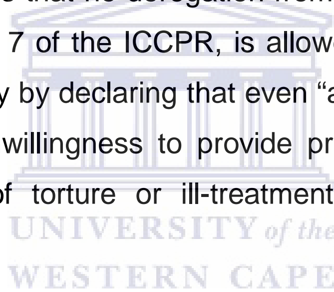
[48] Garnett (1997) "The Defence of State Immunity for Acts of Torture", *Australian Yearbook of International Law*, p.102.

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

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

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

Derogation-clauses are often inserted into treaties to allow States Parties to limit the application of certain specific clauses by noting reservations or declarations. The UNCAT contains a derogation clause which allows a State to declare itself unbound by prescribed methods of dispute resolution, as proposed under article 30. The Convention contains no clause which allows States to limit the application of the duty to prohibit and prevent torture or CIDT.[53] Article 2(2) of the UNCAT expressly confirms the non-derogable nature of the ban against torture by stating that no exceptional circumstances, including a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. Supportive hereof, is section 4(2) of the ICCPR, which states that no derogation from the right not to be subjected to torture, as protected by article 7 of the ICCPR, is allowed. The CAT further developed the meaning of non-derogability by declaring that even “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”[54]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It is important to note that the UNCAT includes other forms of CIDT within its scope of prohibited actions.[55] It therefore follows that the absolute and non-derogable prohibition against torture is extended to CIDT, rendering such actions equally absolutely impermissible.[56]

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

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

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

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

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

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

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

international law to the effect that all nations may claim jurisdiction over a crime committed, irrespective of the nationality of the perpetrator or where the crime was committed.[57] Article 5 of the UNCAT permits State Parties to exercise universal jurisdiction over the crime of torture, requiring of all signatories to take the necessary steps to establish jurisdiction over the offences referred to in article 4 of the Convention. Specific reference is made to offences committed in any territory under the particular State's jurisdiction,[58] to the nationality of the offender[59] and to the nationality of the victim or complainant[60] as grounds for establishing jurisdiction. Furthermore, UNCAT article 5(2) requires of States Parties to take measures to establish jurisdiction over offences in cases where the alleged offender is present in any territory under its jurisdiction, but is not extradited pursuant to article 8. The APT explains the effect of clause 5(2) as requiring of a States Party to either exercise its jurisdiction to prosecute an individual suspected of committing torture, or to extradite an offender to another State to be duly prosecuted.[61] Complementary to this explanation, is the CAT's emphasis on the fact that "the provisions of the UNCAT apply wherever a States Party exercises *de jure* or *de facto* control in accordance with international law."[62] Similar to the duty to criminalize torture imposed by article 4 of the UNCAT, universal jurisdiction is considered to be applicable only to acts of torture and not to other forms of CIDT.[63]

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

2.4.1 Defining torture

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

1(1) For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

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[57] Steiner, HJ., Alston, P. & Goodman, R. (2008) p. 1162.
[58] Section 5(1)(a) of the UNCAT.
[59] Section 5(1)(b) of the UNCAT.
[60] Section 5(1)(c) of the UNCAT.
[61] Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 22.
[62] Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 16.
[63] Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 21.

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

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

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

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

[66] Refer to chapter 1.

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

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

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

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

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

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

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

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

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

2.4.1.1 Conduct

Legally, conduct can either take the form of a positive action or the form of an omission. An omission is defined as the failure or neglect to perform when there exists a legal duty to act positively.[74] Authors agree that an omission to act falls within the scope of the definition of torture under article 1 of the UNCAT.[75] This inherently implies that the UNCAT places a legal duty on States Parties to prohibit and prevent torture. It is therefore possible for an act of torture to result from an omission, provided that the conduct in the particular instance meets the remaining criteria of the definition as per article 1.[76] Once a person is placed in custody, the State acquires the obligation to protect the physical well-being of such a person.[77] Whereas the concept of torture is often regarded as the more severe form of treatment requiring a very specific kind of intent, the approach to the question of what constitutes CIDT is more flexible and inclusive.[78] An omission, as a form of conduct resulting in CIDT, is generally associated with negligence as a form of intent. Therefore, when it comes to harm caused by an omission, the elements of conduct and intent are closely linked, as illustrated in paragraph 2.4.1.3 below.

2.4.1.2 Infliction of severe mental or physical pain or suffering

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

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

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

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

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

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

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

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

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

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2.4.1.3 Intent and purpose of conduct

[80] Committee Against Torture, Report from Government of Brazil CAT/C/39/2, 28 July 2008. See also *Prosecutor v Limaj et al.*, ICTY, IT-03-66, 30 November 2005, paragraph 237 and *Prosecutor v Miroslav Kvocka et al.*, ICTY, IT 98-30/1, 2 November 2001, paragraph 143; *Prosecutor v Brdjanin,* ICTY, IT-99-36, 1 September 2004, paragraph 484.
[81] *Prosecutor v Jean Paul Akayesu,* paragraph 597.
[82] Committee Against Torture, Conclusions and recommendations, United States of America, CAT/C/USA/CO/2, 25 July 2006, paragraph 13; CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992 paragraph 5 insists that section 7 of the ICCPR values the mental health aspect of torture, as much as the physical infliction of pain.
[83] *Denmark et al v Greece*, European Commission No. 3321-3/67; 3344/67, Yearbook XII, 5 November 1969, p.461 (The *Greek*-case).
[84] *International Pen and Others v Nigeria* (1998) African Commission on Human and Peoples' Rights, Communication No. 137/94, 139/94, 154/96 and 161/97, paragraph 79.
[85] The International Council for the Rehabilitation of Torture Victims (2004) *A global appeal on behalf of victims of torture*, available at http://www.irct.org/Default.aspx?ID=3558&M=News&NewsID=152 accessed on 10 November 2009.
[86] The *Greek*-case, p. 186; *Akkoc v Turkey,* European Court of Human Rights, Application No. 22947/93; 22948/93, Judgment 10 October 2000, paragraph 25, 116 & 117; *Campbell and Cosans v UK,* Case No. 7511/76, 7743/76, Judgment 25 February 1982, paragraph 26 states that the mere threat of torture may in some situations, constitute CIDT.

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

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

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

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

[87] Nowak, M. & McArthur, E. (2008) p. 74.
[88] Nowak, M. & McArthur, E. (2008) p. 74.
[89] Nowak, M. & McArthur, E. (2008) p. 558.
[90] View shared by Ingelse, C. (2001) p. 209 and Nowak, M. & McArthur, E. (2008) p. 73.
[91] Nowak, M. (2005) *Civil and Political Rights, Including the question of torture and detention*, Report of the Special Rapporteur on the question of Torture, UN Economic and Social Council, E/CN.4/2006/6.

2.4.1.4 Official capacity

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

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

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

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

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[92] Burgers, H.J. & Danelius, H. (1988) p. 119.
[93] Boulesbaa, A. (1999) p.24 refers to discussions by the Working Group on the Torture Convention.
[94] Nowak, M. & McArthur, E. (2008) p. 77 – 78.
[95] Boulesbaa, A. (1999) p. 27 refers to the discussions by the Working Group on the Torture Convention, prior to the adoption thereof.

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

2.5 The distinction between torture and CIDT

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

16. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 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.

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

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

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

[96] *Gafgen v Germany* (2009) The European Court of Human Rights, Case No. 22978/05, paragraph 19 (the *Gafgen*-case).
[97] Nowak, M. & McArthur, E. (2008) p. 558.
[98] Nowak, M. (2005) paragraph 35.

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

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

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

Some guidelines for the distinction of the concepts are offered in case law. However, points of distinction can overlap and are interpreted differently by various forums. For example, the Inter-American Commission- and Court require a higher intensity of pain for torture than for CIDT, but also looks at the purpose of the conduct complained of.[102] The Human Rights Committee[103] differs in its application of the distinction in so far as it found in one case that an action amounted to both torture and CIDT,[104] but refrained from distinguishing between torture and CIDT in another.[105] The subjectivity related to the determination of severity supports an argument in favour of distinguishing acts of torture from CIDT solely on the grounds of purpose and intent. As one expert recalls: -

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[99] Nowak, M. (2005) paragraphs 38 & 40.
[100] The International Criminal Tribunal of the Former Yugoslavia was created by the Security Council under Chapter VII of the United Nations Charter. It is a court prosecuting war crimes committed during the 1990's in the Balkans. It is situated in The Hague. See www.icty.org.
[101] *Naletilic and Martlinovic*, ICTY, Case No. IT-98-34, 31 March 2003, paragraph 246.
[102] *Ceaser v Trinidad and Tobago*, Inter-American Court of Human Rights, Case No. 12/147, Judgment of 11 March 2005, Series C No.123, paragraph 50, 68, 87, as discussed in the *Gafgen*-case.
[103] The Human Rights Committee is a United Nations treaty body which monitors the implementation of the ICCPR. For more information see http://www2.ohchr.org/english/bodies/hrc/index.htm accessed on 15 February 2010.
[104] *Alberto Grille Motta v Uruguay*, Communication No. 11/1977, UN Doc CCPR/C/OP/1 at 54 (1984) paragraph 14.
[105] *Wilson v the Philippines,* Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003) paragraph 7.4 & 7.5.

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

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

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

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

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

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[106] Evans, M. & the Association for the Prevention of Torture (2001) *Getting to grips with torture*, The Definition of Torture: Proceedings of an expert seminar Geneva 2001, Panel Discussion 1, "Threshold of Severity or Purpose?" p. 17 – 19.
[107] The *Gafgen*-case, paragraph 18.

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

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

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2.6 Objectives of the UNCAT

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

2.6.1 The Prevention of Torture and CIDT

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

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[108] Evans, M. (2001) p. 42, see footnote number 58.
[109] *Guridi v Spain*, Committee Against Torture, Application No. 212/2002, (2005), paragraph 6.8
[110] Atlas on torture (2009) *Right of torture victim to adequate remedy and reparation*, available at http://www.univie.ac.at/bimtor/rightofvictimsoftorturetoaremedyandreparation accessed on 29 March 2010.

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

The CAT confirms the application of the duty to prevent both to torture and to other forms of CIDT, as envisaged by article 16.[112] In an attempt to aid the practical interpretation of this obligation, States Parties are advised to always interpret treaties in good faith and in accordance with the ordinary meaning of its terms and to give affect to its goals and objectives.[113] The ordinary meaning of the duty imposed by article 2(1) is to effect law reform on all levels so as to prohibit and prevent torture in the widest sense. Therefore, where not yet provided for in national law, States Parties should ensure the rights and freedoms protected by the UNCAT, in favour of all individuals within their respective jurisdictions.[114] Ultimately, commitment to the UNCAT means acquiescence to full incorporation of the prohibition against torture and the obligation to prevent torture and CIDT within all relevant contexts of a State Party's legal system.[115] As a preventive measure, in addition to proper prosecution and adequate punishment in its penal codes,[116] the State should provide for effective methods of recourse under civil law.[117] The CAT has, for instance, applauded Canada's inclusion of the proper definition of torture in its criminal code, as well as the exclusion of exceptional circumstances as a defense.[118] Furthermore, the CAT recommends the abolition of capital and corporal punishment, as a manifestation of the prohibition of torture.[119] States Parties should ensure that it is not possible to override the prohibition of torture and safeguards for its

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[111] Nowak, M. & McArthur, E. (2008) p. 113.
[112] Committee Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007 paragraph 3.
[113] Article 3(1) of the Vienna Convention on the Law of Treaties 1969.
[114] United Nations Economic and Social Council, Question on Human Rights, Adaptation of Municipal Law to International Conventions, E/CN.4/116 (9 June 1948), p.2 paragraph 1(a).
[115] See generally Committee Against Torture, Recommendations made in response to South Africa's initial report to the CAT CAT/C/ZAF/CO/1, 7 December 2006 and Committee Against Torture General Comment 2, paragraph 4.
[116] CCPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992, paragraph 8.
[117] United Nations Economic and Social Council, *Question on Human Rights, Adaptation of Municipal Law to International Conventions*, E/CN.4/116 (9 June 1948), p. 2 paragraph 1(b).
[118] Committee Against Torture, Conclusions and Recommendations, Canada, CAT/C/CO/34/CAN, 7 July 2005, paragraph 3.
[119] Capital punishment in itself is not seen as torture however, the CAT recommends its abolition. Corporal punishment on the other hand, is almost always considered to be torture or ill-treatment. See Association for the Prevention of Torture (2008) *Torture in International Law: A guide to jurisprudence*, Center for Justice and International Law, Geneva, Switzerland, p. 34 & 37.

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

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

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

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

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

[120] Amnesty International (2005) *12-Point programme for the prevention of Torture and other Cruel, Inhuman and Degrading Treatment or Punishment by Agents of the State*, AI Index No. ACT40/001/2005, paragraph 5, available at http://www.amnesty.org/en/library/info/ACT40/001/2005 accessed on 2 October 2009.
[121] Boulesbaa, A. (1999) p. 70 – 73; Ingelse, C. (2001) p. 261 – 263.
[122] Association for the Prevention of Torture & Wendland, L. (2002) *A Handbook on State Obligations under the UNCAT*, Association for the Prevention of Torture, Geneva, p. 30 & 31.
[123] Committee Against Torture, Concluding observations, New Zealand, CAT/C/NZL/CO/5, 14 May 2009.

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

No provision is made for the independent monitoring of conditions in repatriation facilities in South Africa. As a result, the legal system pertaining to the treatment of refugees and asylum seekers in detention remains unsupported by official reports and statistics. Non-governmental bodies such as the SAHRC,[385] the Consortium for Refugees and Migrants in South Africa (CORMSA),[386] and LHR[387] have in the past attempted to monitor conditions in these facilities by entering into agreement with the relevant authorities.[388] Documented problems at South African repatriation centers include routine violence, corruption, bribery, insufficient food, overcrowding, lack of reading and writing materials, denial of visits by family and friends, failure to provide access to medical care, indefinite detention without judicial review and the refusal to grant access to monitoring bodies.[389] The legal framework on repatriation centers does not provide for an individual complaints mechanism.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[392] United Nations High Commissioner of Refugees (1999) *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, Nos. 10 i,ii, iii, iv, v, vi, ix, x.
[393] Section 34(1)(e) Immigration Act & section 23 of the Refugees Act.

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

3.7.4 Mental Health Care Facilities

Admission to Mental Health Care facilities is often involuntary or compulsory, as a result of a court order. To prevent abuse of the system, the Mental Health Care Act[395] sets out stringent requirements for admission of assisted or involuntary patients.

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

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

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On an international level, the UN Resolution on Protection of Persons with Mental Illness does not use the term torture, but rather refers to the abuse of patients.[397] The Mental Health Care Act does not contain an express prohibition against torture, but observes every health care user's right to human dignity and privacy[398] and recognizes the right not to be subjected to abuse, exploitation or degrading treatment.[399] Importantly, section 70(1)(c) of the Mental Health Care Act views the mistreatment of a health care user as a crime, punishable by a fine or imprisonment.[400] If an act of abuse is witnessed, it must be reported immediately to the Review Board and to the SAPS.[401]

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

[395] Mental Health Care Act No. 17 of 2001.

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

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

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

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

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

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

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

3.7.5 Child and Youth Care Centers

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

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The CAA provides the platform for the development of a set of norms and standards according to which child care facilities ought to be operated. The Regulations to the CAA place the specific responsibility on foster parents, as well as on management clusters of foster care schemes, to refrain from imposing physical, violent punishment or humiliation and degrading forms of discipline on children.[404] In respect of child- and youth care centres, certain behaviour management actions are expressly prohibited, including *inter alia* the humiliation and ridiculing of a child,[405] the imposition of physical punishment[406] and the practice of isolating or locking a child up as a form of punishment.[407] The CAA contains a framework of national norms and standards according to which children in the care of another should be treated. Amongst these is the specifically included duty to ensure a safe environment for children, which is supported by a prohibition against inhumane and degrading treatment or punishment.[408] In addition, the CAA provides for

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[402] The Child Care Act No 74 of 1983.
[403] The Children's Amendment Act No 41 of 2007, set to enter into force on 1 April 2010.
[404] CAA Regulations 65(1)(h) & 69(2)(b)(iv).
[405] CAA Regulation 76(2)(c).
[406] CAA Regulation 76(2)(d).
[407] CAA Regulation 76(4)(b).
[408] CAA Regulations Part VI, relative to section 216 of the Act pertaining to drop-in centres.

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

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

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

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

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

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[409] Section 193 of the CAA.
[410] Regulation 74 of the CAA.
[411] Section 110 of the CAA requires of any person who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official. Section 110 is accompanied by Regulation 33.
[412] Sections 89, 178 and 226 respectively require the personnel of partial care centres, alternative care centres and drop-in centres to report incidents of abuse. Section 178 is supported by Regulation 64.
[413] Section 211(1) & (2) of the CAA.

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

3.8 Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 4: THE DRAFT COMBATING OF TORTURE BILL, 2008

4.1 The Bill in context

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

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

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4.2 Background to the Bill

The Combating of Torture Bill in its current form is the third version of draft legislation attempting to address torture within South African law. Both previous versions of the Bill were published in 2006.[421] The Bill has not been tabled in parliament, but previous

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[416] Section 231(4) of the Constitution states that an international agreement will only become binding in the Republic once it is enacted into law by national legislation.
[417] Circle of Rights (2000) *Economic, Social and Cultural Rights Activism: A Training Resource*, Section 7 Module 22, p. 418 & 419, International Human Rights Internship Program, USA.
[418] *AZAPO and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC).
[419] Section 39 of the Constitutions states that "(1) When interpreting the Bill of Rights, a court, tribunal or forum: …(b) must consider international law."
[420] Burchell, J. (2005) *Principles of Criminal Law*, 3rd Edition, Butterworths, p. 96.
[421] Muntingh, L (2008) *Comments on the Combating of Torture Bill* (2008) CSVR & CSPRI Roundtable discussion on the Combating of Torture Bill, 2008, p.1.

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

4.3 Primary provisions of the Bill

4.3.1 The definition of torture

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

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

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

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

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

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

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

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

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

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

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

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

4.3.2 The absolute prohibition

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

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4.3.3 Criminalization of torture

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

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[426] Reference is made to the conclusions drawn in Chapter 3.
[427] Commission Against Torture General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, par 9.
[428] Clause 2(b) of the Combating of Torture Bill, 2008.
[429] Clause 2(1)(c)(iii) of the Combating of Torture Bill, 2008.
[430] Muntingh, L., 28 October 2008 , *Comments on the Combating of Torture Bill,* CSVR & CSPRI Roundtable discussion on the Combating of Torture Bill held in Cape Town.

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

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

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

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

431 Muntingh, L., 28 October 2008, *Comments on the Combating of Torture Bill,* CSVR & CSPRI Roundtable discussion on the Combating of Torture Bill held in Cape Town.
432 Clause 9 of the Combating of Torture Bill, 2008.
433 The Criminal Law (Sentencing) Amendment Act No. 38 of 2007.

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

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

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4.3.4 *Non-refoulement*

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

[434] Muntingh, L. (2009) *UN Committee against torture releases list of issues for South Africa*, CSPRI Newsletter No 31, p.2.
[435] Definition of extradition as per Cassel (1995) *Popular English Dictionary*, London.

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

4.3.5 Preventive Mechanisms

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

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

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

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

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

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

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

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

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

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

4.3.6 The Right to Redress

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

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

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4.3.7 Exclusionary Rule

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

4.4 Conclusion

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

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

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

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

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

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

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

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

CHAPTER 5: RECOMMENDATIONS FOR LAW REFORM

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

- Desmond Tutu

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

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

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

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

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

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

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

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

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

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

5.2 Recommendations

5.2.1 Incorporation of the UNCAT into national law

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

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

5.2.2 Ratification of the OPCAT

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

5.2.3 Establishment of National Preventive Mechanisms

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

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

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

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

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

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

5.3 Law reform: Practical implementation

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

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

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

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

[448] Boulesbaa, A. (1999) p. 68.

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

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

Some recent examples of legislation which require government to prepare specific implementation plans are the Child Justice Act[451] and the Sexual Offences Act[452] which both create a legislative obligation regarding implementation and establishment of national policy frameworks. Such policy frameworks are aimed at ensuring a coordinated and uniform approach by all government departments and state organs, to the matters dealt with under the respective acts. In both instances, the national policy frameworks are subject to regular review.[453]

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

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[451] Child Justice Act No. 75 of 2008.
[452] Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
[453] Section 93(2) of the Child Justice Act prescribes review of the policy framework within 3 years after initial publication and at least once every 5 years thereafter. Section 62(2) of the Criminal Law Amendment Act subjects the policy framework to review within 5 years after initial publication and once every 5 years thereafter.
[454] In New Zealand, employees in correctional facilities are expected to demonstrate knowledge of a variety of legislation, policy and procedures. This includes familiarity with the 'Use of Force' policy and use of control and restraint responses in prisons. See Committee Against Torture, Concluding observations CAT/C/NZL/5, 17 August 2007, p.24.
[455] An example of how to make the protection of human rights accessible is the initiation of a number of training programmes on the practical execution of policy decisions by the Philippines, such as the "Access to Justice for the Poor" Project, the Mobile Court or "Justice on Wheels" programme of the Supreme Court and the recent directive by the National Police Commission to activate human rights desks in all police stations nationwide. See Committee Against Torture, Concluding Observations, CAT/C/PHL/CO/2, 29 May 2009, paragraph 6.
[456] Association for the Prevention of Torture (2005) *Position Paper: The role of national human rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment,* Geneva.
[457] Conclusions and recommendations of the Committee against Torture, Sweden, CAT/C/CR/28/6, 6 June 2002.

5.4 Conclusion

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

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

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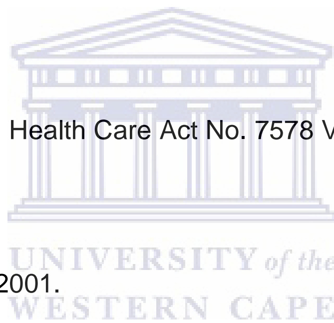

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