SUBMISSIONS ON COMBATING OF TORTURE OF PERSONS BILL [B 21 of 2012]

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These submissions are endorsed by the following organisations:

The Centre for Applied Legal Studies (CALS)

The Institute for Security Studies

Centre for the Study of Violence and Reconciliation

The Association for the Prevention of Torture

NICRO

The Wits Justice Project

The Gender, Health and Justice Research Unit, University of Cape Town

The Child Justice Alliance

The South African No Torture Consortium (SANToC)

Khulumani Support Group

The Trauma Centre for Survivors and Torture

The Institute for Healing of Memories

Sonke Gender Justice

Just Detention International

Introduction

1. These submissions represent the views of a group of organisations. A statement indicating the names of these organisations and a description of their joint campaign – the Campaign to Domesticate the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – are annexed to this document.

2. We welcome the tabling in Parliament of the Combating of Torture of Persons Bill as it represents an important step in preventing and eradicating torture and other ill treatment in South Africa, demonstrating the state's commitment to fulfil its obligations under international human rights law and the Constitution.

3. These submissions address, primarily, whether the contents of the Bill comply fully with the obligations imposed on the state in terms of international law. Accordingly, its contents will be examined against the requirements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). These submissions also include recommendations on what the Bill should include and / or exclude as well as suggestions on how the text could be amended.

4. It is the view of the organisations party to this submission that the Bill should aspire to establish a legislative framework that is as comprehensive as possible to facilitate South Africa's compliance with duties under UNCAT.

Structure of submission

5. The UNCAT places four broad duties on states parties:
   a. The duty to criminalize torture and combat impunity;
   b. The duty to prevent torture and other ill treatment;
   c. The duty to provide redress and rehabilitation to victims of torture and other ill treatment; and
   d. The duty to report to the Committee against Torture (CAT).

6. The contents of the Bill and the requirements of the UNCAT will be discussed under these four headings.

7. The Prevention and Combating of Torture Bill (1) establishes a specific crime of torture, (2) establishes jurisdiction over certain acts of torture that occurred outside of South

Africa, and (3) emphasizes a general responsibility on the part of the State to promote awareness about torture. As such, the Bill addresses *some* of the duties South Africa undertook when it ratified the UNCAT. In particular, the Bill seems to be targeted towards fulfilling the duty to criminalise torture and to combat impunity. Therefore in this comment, we will first address whether the provision criminalising torture and the provision related to jurisdiction are sufficient under the UNCAT. We will next make some suggestions for amendments to the provision emphasising a general responsibility on the part of the State to promote awareness about torture. Finally, we will discuss additional provisions that could be added to this Bill, or other legislation, in order to ensure that South Africa more fully meets its obligations under the UNCAT.

The duty to combat impunity

8. In combating impunity, it is of central importance that there is an effective and comprehensive legal framework in place criminalising torture and enabling effective prosecutions. To this end the criminalisation of torture in domestic law needs to specifically take account of:
   a) the need to define the crime of torture as a specific offence committed by or at the instigation of or with the consent or acquiescence of a public official;
   b) any special intent to extract a confession or other information, to punish arbitrarily, to intimidate, to coerce or to discriminate;
   c) the need to legislate against complicity in torture and attempts to commit torture as equally punishable as committing acts of torture;
   d) the need to exclude the legal applicability of any justification for acts of torture;
   e) the need to ensure that no statutory limitations are applied to the crime of torture;
   f) the need to procedurally exclude all evidence obtained by the use of torture in criminal and all other proceedings, except in proceedings against the perpetrator of torture himself;
   g) the need to legislate for and to enforce the prompt and impartial investigation of any substantiated allegations of torture;[1] and
   h) the need to recognise coercing another person to commit torture as an offence in domestic law.[2]

[1] A/52/44 para 241.
[2] Nowak and McArthur (2008) p. 237.

Definition and penalties

9. Article 1 of UNCAT defines torture as: For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

10. Article 1 of the UNCAT defines the crime of torture and article 4 obliges states to criminalise torture in domestic law and specify appropriate punishments that take into account the gravity of the crime. The two articles are closely linked, affirming the duty of State Parties to fight impunity as one of the root causes of widespread torture across the world.[3]

11. CAT has noted on several occasions and specifically in General Comment 2 that states should adopt in domestic law a definition of torture that is compatible with the definition in article 1. Importantly, article 1.2 permits national legislation that defines torture more broadly than it does, but does not afford the same privilege for narrower definitions.[4] While a verbatim adoption is preferable, the definition in domestic law should contain the main elements of the definition in article 1.[5] It is against this standard that a number of comments need to be made.

12. The Bill currently uses a confusing and cumbersome way to define torture and to create a criminal offence. We suggest that the words “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” be added to the definition of torture in Section 3 since there is no real reason to separate them in the way the Bill does.

[3] Nowak, M. and McArthur, E. (2008) *The United Nations Convention against Torture - A Commentary*, Oxford: Oxford University Press, p. 229.
[4] Article 1(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.
[5]CAT/C/CR/29/5 (Estonia) para 6(a).CAT/C/CR/30/6 (Belgium) para 6.

13. The definition in the Bill omits an important aspect of the definition of torture: where torture is committed "with the consent or acquiescence of a public official…or other person acting in that capacity." This clause covers a range of importance scenarios, such as private security guards perpetrating torture and officials being aware or warned that torture is being perpetrated, but ignoring or refusing to act against it. The definition in the Bill should therefore be amended so as to include this phrase from the UNCAT. In addition, the penalties provision should also be amended to include "consent" and "acquiescence."

14. The Bill also omits the phrase "for such purposes as" present in the article 1 definition, thus restricting the purposes/intentions to a closed list, being obtaining information, punishment, intimidation, coercion or for discriminatory purposes. The phrase "for such purposes as" is thus critically important to allow for a dynamic interpretation of the definition, recognising that neither the methods of torture nor its purposes can ever be a finite affair.

15. Section 4 of the Bill is written in a way that criminalises the 'public official' who 'incites, instigates, commands or procures…etc,'(Art 4(1)(c)) rather than criminalizing the public official and the person who acts with the acquiescence of a public official.

16. It is submitted that clause 4(1) of the Bill should be amended to refer to 'any person' as oppose to 'any public official'. If this is accepted then clause 4(2) become unnecessary as clause 4(1) will then encompass all possible actors.

17. We recommend that section 3 of the Bill read as follows:
For the purpose of this Act, "torture" means any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a public official on a person **for such purposes as** obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the **consent or acquiescence** of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

18. We recommend that section 4 reads as follows:

(1) Any person who-

(a) Commits torture;

(b) attempts to commit torture; or

(c) **consents, acquiesces to**, incites, instigates, commands or procures any person to commit torture,

is guilty of the offence of torture and is liable on conviction to imprisonment, including imprisonment for life.

Sentencing

19. The text of section five of the Bill is ambiguous in places and thus does not give the sentencing court a clear indication as to *how* such factors are to be taken into account. We recommend that instead of a list of aggravating factors, the section emphasise the severity of the offence of torture. Article 4.1 of the UNCAT notes that the punishment for torture should reflect the grave nature of the crime. The Robben Island Guidelines (Article 12) uses similar wording: 'Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence'.

20. The seriousness of the crime of torture is recognised in several international instruments and is recognized as "an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."[6] Moreover, the crime of torture carries the status of a peremptory norm.[7] This means that the prohibition of torture "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules",[8] and States accept the norm to be absolutely binding, without exception. States must not derogate[9] from the prohibition, whether by

[6] Article 2 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

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

[7] *Prosecutor v Furundzija* op citpara 153.

[8] *Prosecutor v Furundzija* op citpara 153.

[9] When states become Parties to international human rights treaties, they are allowed to 'suspend' some of the rights under those treaties in certain situations or circumstances until the situation or circumstance that gave rise to the 'suspension' has come to an end. This is called derogation. For example, a state may ban people from travelling to some parts of the country during an outbreak of an epidemic. This may be interpreted by some

subsequent treaty or customary law: "The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[10]

21. Because of the absolute prohibition of torture, no State is permitted to excuse itself from the application of the peremptory norm. Because the ban is absolute, the norm applies regardless of the status of the victim and the circumstances (for example, during states of war, siege or emergency). The revulsion with which the torturer is held is demonstrated by strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind",[11] and torture itself as an act of barbarity which "no civilized society condones",[12] "one of the most evil practices known to man"[13] and "an unqualified evil".[14]

22. Following from the status of torture as a peremptory norm, any State has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution".[15]

23. Seen against this background, it is submitted that any form of a non-custodial sentence for the crime of torture would be wholly inappropriate. An appropriate term of imprisonment should reflect the gravity of the crime of torture and hold strong deterrent value, communicating unambiguously that torture is an abhorrent practice and will not be tolerated. While CAT does not prescribe a minimum sentence to be imposed, individual members of the Committee have expressly supported custodial sentences of between six and 20 years.[16]

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people to mean that their right to freedom of movement has been infringed. International and national human rights law permit such derogations.

[10]*Prosecutor v Furundzija* op citpara 153.

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

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

[13]Ibid at para 101.

[14]Ibid at para 160.

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

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

Jurisdiction

24. Article 5(1) of UNCAT obliges the state to take measures to establish jurisdiction where an offence is committed in any territory under the jurisdiction of the state, or on board a ship of aircraft registered to the state (Art 5(1)(a)); where the offence is committed anywhere in the world when the alleged offender is a national of the State (Art. 5(1)(b)) or when the victim is a national of the State, if the State party considers it appropriate (Art. 5(1)(c). In addition, the State should establish jurisdiction over persons alleged to have committed torture found in 'in any territory under its jurisdiction or on board a ship or aircraft registered in that state' (Art 5(1)(a), provided that the State does not extradite the person (Art. 5(2)).

25. By contrast, section 6 of the Bill says that a court will have jurisdiction if *after* the commission of the offence, the person is present in the territory of the republic.[17] This provision puts into effect Art 5(2) of UNCAT, but it does not take account of acts that were committed on state territory, such as ships, etc.

26. The word 'lawfully' should be removed from section 5/6(c) of the Bill to include persons found in South Africa who are in the country without the permission of South Africa.

Evidence obtained as a result of torture

27. The Bill does not contain a provision dealing with evidence obtained as a result of torture, unlike the UNCAT which deals with this in article 15.

28. Section 35(5) of the Constitution states that "evidence obtained in a manner that violates any right in the Bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." Although this section would cover instances of torture, its interpretation has been developed by a number of cases. In particular, the Supreme Court of Appeal in *S v Mthembu*[18] found that evidence obtained as a result of the torture of a witness (as opposed to the accused) was no bar to the subjection of such evidence to the test in section 35(5) of the Constitution. This element of South African law, indisputably necessary in the adjudication of the admissibility of evidence obtained as a result of torture, would be

[17] One version of the Bill also includes the words .."or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the republic and that person is not extradited pursuant to Article 8 of the Convention' (Article 6(1)(c) of the Bill).
[18] 2008 (2) SACR 407 (SCA).

better reflected in a detailed provision describing this development. We therefore suggest that the follow provisions be added to the Bill:

i. *Evidence obtained as a result of torture or the threat of torture or other ill treatment shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made or evidence obtained under torture.*

ii. *It shall be irrelevant whether the evidence was obtained directly as a result of torture: the inadmissibility of the evidence shall follow directly as a result of the fact that torture was used in the attempt to obtain the evidence.*

29. The recommended provisions (above) differ from article 15 of the UNCAT in two important ways. The first is the fact that the word "evidence" is used instead of "statements." This is for the obvious reason that torture might just as easily be used to obtain real or "physical" evidence. The second is the inclusion of the stipulation that the torture need not have directly resulted in the gathering of evidence. The reason for this is that it removes a problematic aspect of the causal link, i.e. it can be found that torture occurred, but not that the evidence was obtained by or as a result of it.[19] The stipulation removes the consideration of the particular effects that the torture had on a particular accused (or whether the torture ultimately led to the victim providing evidence) from the enquiry and focuses, instead, on ascertaining, simply, whether in seeking evidence, police used torture. The danger of not having the stipulation is that the inquiry will, at times, ultimately centre on whether the actions by the public official and its effect on the victim had 'dissipated' by the time a statement was made.[20] This eventuality is not consistent with the spirit of the UNCAT and international law in general, which emphasise the absolute prohibition of torture.

Exemption from Common Law

30. The adoption of an exclusionary rule is not enough to prevent impunity. It still needs to be proven that torture took place, and a detainee usually faces acute difficulties in this regard. Accordingly, finding an approach to the burden of proof that will filter spurious claims while avoiding imposing impossible burdens on a detainee is therefore critical to ensuring the fairness of the procedure.[21] The UN Human Rights Committee has

[19]See Swart and Fowkes "The Regulation of Detention in the "Age of Terror" – Lessons from the Apartheid Experience."(2009) S. African L. J. 780, 799.
[20]*S v Christie* 1982(1) SA 464 (A) serves as a good example of this.
[21]See for example: Report of the Special Rapporteur on Torture at UN Doc.A/56/156, July 2001, at para 39(j); Report of the Special Rapporteur on his mission to Sri Lanka, UN Doc A/HRC/7/3/Add.6, 26 February 2008, at

consistently maintained that in cases where the state has access to information, the burden of proof cannot rest on the complainants, 'especially considering that the author [of the complaint] and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information'.[22] The European Court of Human Rights has said that 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused.'[23]

31. Under the common law, the person (or relative of victim) who alleges torture, must prove that it occurred. In cases of torture, this is extraordinarily difficult for the complainant to do, for, frequently, the inquiry boils down to the say-so of the complainant against that of the public official. Accordingly, the Bill should exempt the complainant from the ordinary rules of evidence, particularly the evidentiary burden of proof, which, in turn, should be borne by the state.

32. It is important, first, that the Bill require that the state discharge the onus of proving that torture did not occur. Secondly, the Bill should "require the state to discharge the onus on the basis of evidence other than the testimony of the officials directly responsible for the detainee's incarceration and interrogation."[24] The latter requirement is important for, as Swart and Fowkes explain:

"a detainee's experience is such that even true accounts would be likely to display some inconsistencies. As such, it is only if an accused's story contains gross contradictions, such that there is no reasonable doubt that it could be true, that a court can reject a torture allegation after considering the testimony alone. In all other cases, something besides testimony will be needed."[25]

33. It is recommended therefore, that the Bill include a two-stage enquiry: If a person alleges that he or she has been tortured, the testimony is assessed as to whether it is reasonably possibly true (spurious claims will be filtered in this way). If a prima facie case is

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para 94(f), where the SP noted that 'The burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained under any kind of duress'; and Report of the Special Rapporteur on Torture – Follow-up made after visits to visits to Azerbaijan, Brazil, Cameroon, China (People's Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal,
Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo, UN Doc A/HRC/13/39/Add.6, 26 February 2010, at page 16.

[22] *Bouroual v. Algeria*, UN HRC Decision of 30 March 2006, CCPR/C/86/D/992/2001, 24 April 2006 at para. 9.4, available on http://www.unhchr.ch/tbs/doc.nsf/0/0aef3b15e0b6c761c125719a00486e57?Opendocument.

[23] *Selmouni v France,* application No. 25803/94, 28 July 1999, at para 87.

[24] See Swart and Fowkes "The Regulation of Detention in the "Age of Terror" – Lessons from the Apartheid Experience."(2009) S. African L. J. 780, 799.

[25] Id.

established, the state must use independent evidence to show that torture did not occur. The second provision may assist in "preserving the incentive to collect and present the evidence from oversight mechanisms."[26]

34. A provision in the bill incorporating the above suggestions, could read as follows:[27]

(i) States shall ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody. A detainee's allegation of torture should only be rejected, in the absence of rebutting evidence from the state, if there is no reasonable possibility that it is true.

(ii) Where there is a reasonable possibility that a detainee's allegations are true, the state shall be required to rebut those allegations beyond a reasonable doubt. In accordance with the requirements to provide oversight mechanisms and to permit the independent monitoring of those in custody, a state shall be required to rebut the allegations on the basis of evidence other than testimony of those immediately responsible for the detention of the detainee. The testimony of those immediately responsible for the detention of the detainee shall be insufficient to rebut the allegations unless corroborated by evidence from other sources.

(iii) For the purposes of this section, those immediately responsible for the detention of the detainee shall include, although shall not be limited to, those officials charged with carrying out any interrogation or questioning of the detainee.

Non-refoulement

35. The Bill does not contain a provision stipulating non-refoulement "where there are substantial grounds for believing that [the person to be deported/extradited]" would be in danger of being subjected to torture" as the UNCAT requires in article 3.

36. Section 11(b)(ii) of the Extradition Act 67 of 1962 states:

"The Minister may…order that a person shall not be surrendered…by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned."

[26]Id.
[27]Taken directly from Swart and Fowkes (above).

37. In *Mohamed and Another v President of the Republic*,[28] the Constitutional Court interpreted this provision to include non-surrender if the subject of an extradition request is at risk of being executed or of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Put differently, the decision means that if any official, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial (or for any other purpose) knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution.[29]

38. The Court also made the important point that the obligation of the Government to secure the requisite assurance could not depend on whether the removal is by extradition or deportation.[30] Accordingly, the finding of the Court in *Mohamed* is applicable to deportations, which are governed by the Immigration Act 13 of 2002 and, in part, by the Refugees Act 130 of 1998. Neither of these pieces of legislation makes provision for the non-refoulement of persons illegally present in the Republic.

39. The Bill should reflect the law on non-refoulement as articulated by the Constitutional Court in Mohamed, and, more recently (27 July 2012) the case of *Minister of Home Affairs and Others v Tsebe and Others.*[31] Accordingly, the following provisions should be included:

    (i) "The state shall not expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

    (ii) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[28] *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).
[29] Section 7(2) of the Constitution states:
"The state must respect, protect, promote and fulfill the rights in the Bill of Rights."
[30] *Mahomed* at para 42.
[31] Constitutional Court, judgment handed down on 27 July 2012.

The duty to provide redress

Access to redress

40. The Bill contains two clauses relating to the rights of victims of torture. Firstly, clause 7 authorises victims of torture to sue the perpetrator(s) of acts of torture for damages under the relevant provisions of "common law or any other law". Secondly, clause 8 states that the state must develop programmes to "provide assistance and advice to victims of torture."

41. These provisions do not comply fully with the requirements of article 14 of UNCAT, which contains a positive obligation on the state to ensure that victims of torture and other ill-treatment are entitled to full redress, irrespective of whether the alleged perpetrator has been identified, investigated and tried.[32] Therefore, providing redress, including monetary compensation, cannot be dependent upon a successful prosecution of the alleged perpetrator. Furthermore, the provisions of the Bill on the right to redress do not reflect the content of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[33] ("The Van Boven and Bassiouni rules"), which provide further guidance as to what comprehensive redress entails.

42. Under the Van Boven and Bassiouni rules, comprehensive redress includes five elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In order to fulfil its obligations under UNCAT, the state should be in a position to offer all five elements of redress. We recommend that some of these elements be explicitly addressed in the legislation, and that others form part of the mandate of state-sponsored reparation programmes available to victims of torture and other ill-treatment in South Africa.

43. The Bill does not contain a definition of "victim". We recommend that the Bill incorporate a definition drawn from the Van Boven and Bassiouni rules. Furthermore, UNCAT expressly stipulates that when a victim of torture has died as a result of the act of torture, his or her dependant are entitled to redress.[34] Finally, both the Committee against

[32] Report of the Committee against Torture to the General Assembly, 23rd and 24th session, A/55/44, Part IV, para 150(d); Nowak and McArthur (2008) at 467.
[33] Adopted by the General Assembly in December 2005.
[34] While article 14 of UNCAT states that dependants of deceased victims are entitled to monetary compensation, the Committee against Torture has interpreted this as extending to all forms of redress. See *O.R., M.M. and M.S. v. Argentina*, CAT Communications 1/1988, 2/1988 and 3/1988, 23 November 1989, para 9 and 10.

Torture and the Robben Island Guidelines state that victims of ill-treatment should also be granted redress.[35] Therefore, we recommend that the Bill include the following definition of "victim":

1. *Victims of torture and other ill-treatment are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental right to be free from torture and other ill-treatment, through acts or omissions that constitute violations of the provisions of this Act.*
2. *In the event that the victim of torture is deceased as a result of an act of torture, his or her dependants are regarded as direct victims of torture, and entitled to the same forms of reparation.*

44. The Bill, in its clause 7 or elsewhere, should be amended to reflect that the state is primarily responsible for providing redress to victims of torture and other ill-treatment, and that the state must ensure that full redress is available to victims, which includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

45. Under the common law, from which the current Bill does not derogate, a victim can only sue for civil damages sustained as a result of torture and other ill-treatment. Although the victim could ultimately sue the Department responsible for the acts of the public official who committed torture, this presupposes lengthy and expensive court proceedings, that the perpetrator be identified, and that the victim prove, on a balance of probabilities, that the act of torture occurred. However, UNCAT envisages that monetary compensation, as a form of redress, is available independent of such a claim. Therefore, the state under whose jurisdiction the acts of torture or other ill-treatment were committed bears the primary responsibility for providing monetary compensation to the victim. Compensation should cover all economically quantifiable damages caused to the victim, such as the victim's legal and medical expenses, compensation for physical and/or mental harm caused, or future rehabilitative services that the victim would need.[36]

46. We recommend that the relevant clauses of the Bill be amended to ensure that the victim can obtain compensation from the State under whose jurisdiction the acts of torture or

[35] Committee against Torture, "General Comment No. 2: Implementation of article 2 by States parties", 24 January 2008, CAT/C/GC/2, paras. 3 and 5; *Dzemajl et al. v. Yugoslavia,* CAT/C/29/D/161/2000, 2 December 2002, para 9.6 and 10; J-B Niyizurugero and P. Lassène (2008) *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation* Association for the Prevention of Torture at 67 to 69.

[36] Van Boven and Bassiouni Rules, para 20 and CAT, Draft General Comment No. 3, para 9. See also, Niyizurugero and Lassène (2008) at 68.

other ill-treatment occurred, even when the perpetrator is not identified. If the perpetrator is identified, the state could claim back the amount paid for compensation. Clause 7 of the Bill should therefore be amended to include the following:

a. Any victim of torture and other ill-treatment is entitled to compensation.
b. If the perpetrator cannot be identified, but the victim provides reasonable grounds to show that the perpetrator is a public official under the jurisdiction of the state, the victim can claim for compensation from the state, either through a civil claim, or through reparation programmes (see below).
c. Even when the victim claims for damages from the state, the victim should not be required to identify the perpetrator, and the same threshold of evidence as the criteria outlined in paragraph 33 above should apply.

47. We further recommend that South Africa sets up a national compensation fund for victims of torture and other ill-treatment. The fund should be managed by an independent body, in a transparent manner and be accessible to victims and/or to organisations providing rehabilitative services. Furthermore, the fund would present an alternative route to civil claims for damages for victims to obtain compensation. The legislation could provide direction to the state to set up such a fund.

48. Finally, we recommend that the Bill provides that the relevant Departments put in place comprehensive reparation programmes for victims of torture and other ill-treatment. The legislation should ensure that such programmes are set up within a reasonable time frame, for example 18 months from the enactment of the Bill. Furthermore, the legislation should ensure that Parliament engages with the reparation programmes, through an interactive dialogue taking place on a regular basis and, if state-funded, exercises effective oversight over the programmes.

49. Reparation programmes can be managed by the state or by civil society organisations. In the latter case, the state should ensure that the programme is adequately funded, and should provide funding where necessary.

50. Such programmes could manage the compensation fund outlined above, but should also be in a position to provide rehabilitative services (including legal, medical, psychological or social services). The aim of rehabilitative services is to allow the victim to be restored, as much as possible, with the functions he/she possessed before the violations occurred, or provided with new skills that will allow the victim to return to a similar situation.

51. We further recommend that rehabilitative services be accessible to all, no matter the nationality of the alleged perpetrator and the state ultimately bearing responsibility for the acts of torture and other ill-treatment. In particular, refugees who have fled their home countries because they were subjected to torture and other ill-treatment should be entitled to adequate medical, social and psychological services, no matter where they reside.

52. Furthermore, such programmes should provide information to victims of torture and other ill-treatment on their rights and on the mechanisms that are available to them.

53. Finally, reparation programmes should assess whether victims of torture and other ill-treatment have access to all forms of redress, i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, and that redress provided is proportional to the harm suffered and granted on a case-by-case basis. They should inform, on a regular basis, the relevant Departments and Parliament, as to whether the state is fulfilling its obligations under UNCAT with regards to the victims' right to redress, and make necessary recommendations.

The duty to prevent torture

54. In this portion of the submission we suggest additional items that should be added to the Bill in order to address some of the other obligations South Africa undertook when it became a party to UNCAT. It is specifically people deprived of their liberty that are vulnerable to torture and ill treatment and the recommendations below aim to address this.

55. Article 2.1 of the UNCAT requires that each state party "shall take effective legislative, administrative, judicial or other measure to prevent acts of torture in any territory under its jurisdiction." In addition, article 11 states, "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

56. To the extent that the Bill addresses the "prevention" aspect of torture, it does not, include the provisions such as, or similar to, the following:

a. all government departments, state institutions and private sector facilities dealing with people deprived of their liberty must create, maintain and continuously update policies on torture prevention as well as report claims of and incidences of torture to relevant oversight bodies, the National Prosecuting Authority (NPA) and Parliament;
b. measures to prevent and eradicate ill-treatment, including mandatory training;
c. all government departments, state institutions and private sector facilities dealing with people deprived of their liberty must create and maintain policies and/or regulations designed to ensure humane conditions of detention, including the systematic review of procedural safeguards;
d. UNCAT should be translated into all eleven official languages and be available to people deprived of their liberty.
e. there should be a general prohibition on the use, production and trade of equipment or substances designed to inflict torture and other ill-treatment;
f. every person, including those deprived of their liberty, has the right to lodge without delay a complaint regarding his or her treatment to an independent authority, including violations of the right to be free from torture and other ill-treatment;
g. the state must ensure that persons who have lodged complaints of torture and other ill-treatment, as well as witnesses to such acts, are protected from retaliation and intimidation;
h. If there is a prima facie case that an accused committed torture, then he or she must immediately be removed from their place of work and placed on suspension (or something along these lines)

57. Article 12 of the UNCAT states that a state party "must ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." We recommend that the Bill be amended so as to incorporate this article.

58. Similarly, we recommend that the Bill incorporate the text of article 13 of the UNCAT, which states: "[a]State Party shall ensure that any individual who alleges he or she has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

The duty to report

59. It is regrettably the case that South Africa has been late in submitting initial and periodic reports to nearly all the UN treaty monitoring bodies. In the case of CAT, the initial report was due in 1999 and submitted in 2005. The first periodic report was due at the end of 2010 and has as yet not been submitted. Late reporting does not reflect well on the country and it is therefore submitted that this should be addressed through law reform.

60. The Bill does not make provision for the duty to report as required by the UNCAT article 19. A provision of this nature should be included, and include the following requirements:

a) the state must submit and keep up to date a common core document that provides an overall description of the ways in which it is complying with its obligations under the UNCAT; and

b) Initial and Periodic Reports should be provided to the Committee against Torture with up to date information on the practical implementation of obligations under the UNCAT. The aim is to ensure that departments set up the necessary systems to ensure that information is collected and, monitored and followed-up on.

c) All government departments and private agencies dealing with people deprived of their liberty shall establish such systems and procedures to enable accurate reporting on measures taken to give effect to obligations under the UNCAT.

ANNEXURE

Campaign to Domesticate the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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

Introduction

Torture and other cruel, inhuman or degrading treatment or punishment is prohibited by a number of international and regional legal instruments and widely recognized as crime against humanity. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) expresses the commitment to making more "effective the struggle against torture and other cruel inhuman or degrading treatment or punishment throughout the world" and requires that states adopt a number of measures in order to prevent torture and other ill treatment within their borders.

The fulfilment of obligations under UNCAT by states will involve a broad range of sectors at the legislative, policy and implementation level. UNCAT, in Article 1, defines tortures as follows:

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

Article 16 of UNCAT also prohibits acts of cruel, inhuman or degrading treatment or punishment ("ill treatment") and, as stated by the Committee against Torture, the obligation to prevent ill treatment under CAT is "indivisible, interdependent and interrelated to the obligation to prevent torture."

The Constitution of South Africa states, in section 12(1), that "Everyone has the right…not to be tortured in any way and not to be treated in or punished in a cruel, inhuman or degrading way."

Despite the prohibition of torture in the Bill of Rights and the government's ratification of UNCAT on 10 December 1998, the act of torture has not been criminalised under South African law and other obligations have neither been fulfilled nor, where relevant, domesticated. Recently, the Department of Justice and Constitutional Development announced that it plans to submit the Combating of Torture Bill to Parliament by September 2011.

The Domesticate UNCAT Campaign

The domestication of UNCAT is of great importance to South African society, particularly vulnerable and marginalised communities and persons deprived of their liberty. This latter category emcompasses a wide range of people in addition to those within the criminal justice system, such as: undocumented foreigners or immigrants being transported or detained, those detained in military detention facilities, children in secure care or educational facilities and those confined in health care facilities for medical, psychiatric or rehabilitative reasons. Although incidences of "torture" are generally not officially recorded and reported on, departmental annual reports, research and media reports indicate that torture and other ill treatment remains a problem in custodial settings.

It is for these reasons that the Civil Society Prison Reform Initiative (CSPRI) and the Parliamentary Programme (PP) at the Community Law Centre, University of the Western Cape, launched a campaign for the domestication of UNCAT. The campaign seeks the fulfilment of all relevant obligations under UNCAT and in particular:

- The adoption of effective legislation, administrative, judicial and other measures to prevent and punish acts of torture and ill treatment;
- The criminalisation of torture in domestic law;
- To refrain from returning or extraditing persons to another country where there may be tortured;
- Extraditing or prosecuting perpetrators of torture;
- Assisting other states to bring perpetrators of torture to book;
- Educating its officials on the absolute prohibition of torture and ill treatment;
- Regularly reviewing interrogation rules, instructions, methods, practices and arrangements of people deprived of their liberty;
- Promptly investigating, by impartial authorities, any cases where there are reasonable grounds to suspect that torture may have taken place;
- Ensuring that any individual who alleges to have been tortured has a right to complain and that such allegations will be promptly and impartially examined;
- Protecting witnesses and victims of torture;

- Enabling redress for victims of torture and ill treatment;
- Ensuring that South Africa complies with its reporting obligations to the Committee against Torture.

Support the Domesticate UNCAT Campaign

Given the importance and urgency of the objectives of the Campaign, it is important that the Campaign is carried by a broad range of members in civil society. The Community Law Centre therefore invites anyone interested in advocating for the domestication of UNCAT to join the Campaign. Current members of the Campaign are: Nicro, the Institute for Security Services, the Association for the Prevention of Torture, Lawyers for Human Rights, the UCT Gender Health and Justice Unit and the African Policing Civilian Oversight Forum.

Please contact Lukas Muntingh (lmuntingh@uwc.ac.za) or Clare Ballard (cballard@uwc.ac.za) at the Civil Society Prison Reform Initiative or Sam Waterhouse (swaterhouse@uwc.ac.za) at the CLC Parliamentary Programme for more information.

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