

**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**THE PROTECTION OF AN ACCUSED'S RIGHT TO FREEDOM FROM TORTURE**

A mini-thesis submitted in partial fulfilment of the requirements for the award of LL.M degree in International Human Rights Law.

By

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## **KEY WORDS**

African

Committee

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

European Convention on Human Rights and Fundamental Freedoms,

Freedom From Torture

International Covenant on Civil and Political Rights

Prohibition against torture

Robben Island Guidelines

South Africa

South African Constitution

The African Charter on Human and Peoples' Rights

The American Convention on Human rights

Treaties

## LIST OF ACRONYMS

<b>ACHR</b>	American Charter on Human Rights
<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACtHPR</b>	African Court on Human and Peoples' Rights
<b>APT</b>	Association for the Prevention of Torture
<b>AU</b>	African Union
<b>CAT</b>	Committee Against Torture
<b>CIDT</b>	Cruel, Inhuman and Degrading Treatment and Punishment
<b>CPT</b>	European Committee For the Prevention of Torture
<b>ECHR</b>	European Convention on Human Rights
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>IPID</b>	Independent Complaints Directorate
<b>OAU</b>	Organisation of African Unity
<b>RIG</b>	Robben Island Guidelines
<b>SAPS</b>	South African Police Service
<b>SRP</b>	Special Rapporteur on Prisons
<b>UNCAT</b>	United Nations Convention Against Torture
<b>UDHR</b>	Universal Declaration Of Human Rights
<b>UN</b>	United Nations

## DECLARATION

I, **Mamello Matthews**, declare that **The Protection Of An Accused's Right To Freedom From Torture** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:

\_\_\_\_\_

Mamello Matthews

November 2014

Signed:

\_\_\_\_\_

Prof. Jamil Mujuzi

November 2014

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## **DEDICATION**

To my loving mother Yvonne Matthews, I am the woman I am because of you. This is not a product of my sacrifice, but of yours.

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# CHAPTER 1

## INTRODUCTION

### 1.1 Background to the Study

The prohibition of torture is embodied in several international human rights and regional instruments such as the International Covenant on Civil and Political Rights (ICCPR),<sup>1</sup> the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>2</sup>, the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>3</sup>, the American Convention on Human rights (ACHR)<sup>4</sup>, the African Charter on Human and Peoples' Rights (ACHPR)<sup>5</sup> and the Robben Island Guidelines(RIG)<sup>6</sup>.

The most common and important characteristic of these instruments is the protection of freedom from torture as a human right and the obligation on States to guarantee this protection. However, it is important to note that the UNCAT does not provide for the right to freedom from torture. It only prohibits torture and imposes an obligation on State Parties to eradicate torture and cruel inhuman and degrading treatment (CIDT). The relevant provisions of UNCAT will be discussed in Chapter Five. Under international law, the prohibition against torture is absolute and its use is prohibited even under circumstances such as war, public emergency or terrorist threat.<sup>7</sup> The prohibition against torture is universally accepted and viewed as a fundamental principle of customary international law.<sup>8</sup>

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<sup>1</sup> International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23 March 1976, UN.Doc A/6316(1966) 999 UNTS 171.

<sup>2</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *reprinted* in 23 I.L.M 1027 (1984).

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Signed by the States Members of the Council of Europe, at Rome, On 04 November 1950 and entered into force on 03 September 1963 and, as amended by Protocol No.11, on 1 November 1998, 213 UNTS.

<sup>4</sup> American Convention on Human Rights, signed at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969 and entered into force on 18 July 1978.(ACHR) 114 UNTS 123.

<sup>5</sup> African Charter on Human and Peoples', adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986, O.A.U. Doc.CAB/LEG/67/3/Rev.5(1982).

<sup>6</sup> The Robben Island Guidelines (RIG), adopted by the African Commission in 2002, is the first regional instrument for the prohibition and prevention of torture in Africa.

<sup>7</sup> *Prosecutor v Anto Furundzija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para 151.

<sup>8</sup> *Prosecutor v Anto Furundzija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para 32.

Torture is defined differently in the academic and international community.<sup>9</sup> However, the most important definition to this study is that of article 1 of UNCAT. The importance of the definition under article 1 lies in the fact that South Africa has ratified this treaty without any reservations<sup>10</sup> South Africa's ratification '[s]ignified to the international community that South Africa subscribes to the international ban on torture and that it would implement national measures to give effect to the objectives of the convention'.<sup>11</sup>

Article 1 defines torture as:

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, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or other person acting in an official capacity. It does not include pain or suffering arising only from only from, inherent in or incidental to law of sanctions.

## **1.2 The Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment or Punishment**

The right to freedom from torture is a more concrete interpretation of the right to life, liberty and security of the person<sup>12</sup>. It was developed with the aim of protecting the dignity, physical and psychological integrity of a person. The prohibition is found in a number of international human rights and humanitarian treaties; these include: Article 5 of the UDHR the ICCPR (article 7 and 10(1)), the ECHR (article 3), the ACHR, (article 5) the ACHPR (article 5) and the Arab Charter (article 8).

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<sup>9</sup> An example of one of the different definitions on torture is Article 2(1) of the Inter-American Convention on Torture, which defines torture as: "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. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article".

<sup>10</sup> Unlike South Africa some countries such as Botswana, Bahrain, United States of America, Mauritania, Morocco and Ecuador to name a few, have made reservations.

<sup>11</sup> Muntingh L ' The betrayal of Steve Biko –South Africa's initial report to the UN Committee against Torture and responses from Civil Society, (2010) 29.

<sup>12</sup> Smith RKM *International Human Rights 2ed* (2005) 240.

The absolute prohibition of torture carries a status of *jus cogens*,<sup>13</sup> and is underlined by its non-derogable status in human rights law.<sup>14</sup> The prohibition of torture enshrined in the above-mentioned treaties creates rights and obligations on State Parties, which includes the right of individuals to be protected by the State from torture; secondly, a duty on the States to prosecute torturers, and lastly, the right of individuals not to be returned or extradited to another State where they may face the danger of torture.<sup>15</sup>

### 1.2.1 Defining Torture

Determining whether certain treatment constitutes torture would be dependent on which legal instrument applies, based on which treaties, if any have been ratified by the State and whether the victim is engaging with the UN system or a regional human rights system.<sup>16</sup> However, the UNCAT provides the most precise and widely-cited definition of torture.

The history of torture as part of codified law starts with article 5 of the Universal Declaration of Human Rights (UDHR).<sup>17</sup> As a serious human rights violation, torture is one of the first issues dealt with by the United Nations (UN) in its aim to develop international human rights standard.

Article 5 is one of several provisions of the UDHR that has become part of customary international law<sup>18</sup>. Article 5 stipulates, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment”. Other legally binding international Conventions, such as, the ICCPR<sup>19</sup>, echo the same concept. The ICCPR was one of the first universal human rights treaties to explicitly prohibit the use of torture and other forms of CIDT. Article 7 of the Covenant states that, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation.”

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<sup>13</sup> Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) para 10.

<sup>14</sup> See Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the American Convention on Human Rights and The African Charter contains no emergency punishment. The African Charter contains no emergency clause and therefore allows no such derogation.

<sup>15</sup> <http://www.ijrcenter.org/thematic-research-guides/torture/> (accessed on 10 October 2014).

<sup>16</sup> <http://www.ijrcenter.org/thematic-research-guides/torture/> (accessed on 10 October 2014).

<sup>17</sup> UN General Assembly, Universal Declaration of Human Rights, 10/12/1948, 217 A (III) UN.GAOR, 3dSess, UN.Doc.A/810(1948).

<sup>18</sup> “Torture, Inhuman or Degrading Treatment” available at <http://www.hrea.org/index.php?doc-id=265> (accessed 3 December 2013).

<sup>19</sup> Communication No 845/1999: *Trinidad and Tobago*. 199/12/31.CCPR/C/67/D/845/1999. (Jurisprudence), ss 7.7-7.8.

The Human Rights Committee (HRC) has found that some States have violated article 7. For example in *Kennedy v Trinidad and Tobago*.<sup>20</sup> The Human Rights Committee in this case found that the beatings to which the author was subjected to while in police custody were a violation of article 7. The prohibition on torture and ill treatment under the ICCPR will apply regardless of whether the acts were committed by “public officials” or “private persons” or “other persons”. Thus, the prohibition of torture under article 7 creates two duties on a State Party, the first being a negative duty on State Agents not to engage in such treatment, and the second being a positive duty on the State to protect persons under its jurisdiction from acts of torture or CIDT by private individuals.<sup>21</sup> Torture is also prohibited under article 3 of the ECHR;<sup>22</sup>

Article 3 states that: “[n]o one shall be subjected to torture or to inhuman treatment or degrading treatment or punishment”.

The prohibition of torture and CIDT under article 3 differs to other Conventions because of its omission of the word “cruel”. It also differs to UNCAT and the ACHR because it does not define torture. The European Court of Human Rights, and before it the European Commission, has developed complex definitions of the prohibited acts<sup>23</sup> in cases such as the *Greek case*<sup>24</sup> and the *Ireland v United Kingdom case*.<sup>25</sup> Both illustrate how the court distinguished the prohibited acts. The court in these cases took a very restrictive review when it came to what constituted torture. It was held in *Ireland v UK*<sup>26</sup> that practices of sleep deprivation; requiring individuals to stand against a wall with their limbs stretched out for extended periods of time did not constitute torture and in that case the state had inflicted inhuman and degrading treatment.<sup>27</sup>

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<sup>20</sup> HRC, General Comment No.31, “*Nature of the General Legal Obligations imposed on States Parties to the covenant*”, UN Doc.CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>21</sup> HRC, General Comment No.31, “*Nature of the General Legal Obligations imposed on States Parties to the covenant*”, UN Doc.CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>22</sup> Convention for the Protection of Human rights and Fundamental Freedoms as amended by Protocols No.11 and No.14.

<sup>23</sup> For the purpose of this study, prohibited acts include torture, inhuman, degrading treatment or punishment.

<sup>24</sup> *Denmark, Norway, Sweden and the Netherlands v. Greece (“the Greek case”)*, nos.3321/67,3322/67,3323/67 and 3344/67, Commission’s report of 5 November.

<sup>25</sup> *Ireland v. The United Kingdom* No.5310/71, ECHR (sense A) No.25, Judgment of 18 January 1978.

<sup>26</sup> *Ireland v. The United Kingdom*, (1979-80) 2 EHHR 25 para 167.

<sup>27</sup> The victims were actually submitted to a form of “interrogation in depth” and the techniques consisted of:

- (a) Wall standing: forcing the detainees to remain for periods of some hours in a “stress position”.
- (b) Hooding: which is when a black hood or coloured bag over the detainees’ head and, having to wear it all the time except when being interrogated.
- (c) Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud or hissing noise.
- (d) Deprivation of sleep.

It was only in 1996 in *Aksoy v Turkey*<sup>28</sup> where the court found a state had violated the prohibition against torture. The court held that the act where a detainee who had been suspended by his arms whilst his hands were tied behind his back, constituted torture.

Like the ICCPR the American Convention on Human Rights<sup>29</sup> provides for an absolute right to freedom from torture. Article 5(2) states that:

“No one shall be subjected to torture or cruel inhuman treatment or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.<sup>30</sup>

As mentioned above, the UNCAT provides the most precise and widely-cited definition of torture. From the definition of article 1 of UNCAT, three elements as to what constitutes torture can be identified. The first identifiable element is the intentional infliction of severe pain or suffering; secondly, for a specific purpose, such as to obtain information, as punishment or to intimidate for any reason based on discrimination, and lastly, by or at the instigation of, or with the consent of, or acquiescence of State authorities.

### ***1.2.1.1 Purpose and Intent of Conduct or Intentional Infliction***

When establishing whether an act of torture has been committed, the most important criteria would be purpose and intent.<sup>31</sup> There needs to be the intentional infliction of pain and suffering on to the victim and the perpetrators actions need to serve a specific purpose for the act to constitute torture.<sup>32</sup> An example of a specific purpose would be the extracting of a confession or for the purpose of obtaining information. An indicator that is considered to be helpful when determining the intent and purpose of the conduct is the degree of control that a person exercises over another or whether a situation of unequal power exists, as is the case in situations of detention.<sup>33</sup>

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(e) And lastly, deprivation of food and drink, which entailed subjecting the detainees to a reduced diet during their stay at the center.

<sup>28</sup> *Aksoy v Turkey* (921987/93) [1996] ECHR 68 (18 December 1996).

<sup>29</sup> Organisations of American states, American convention on Human rights, “Pact of San Jose Costa Rica”, 22 November 1969.

<sup>30</sup> See Inter –American Convention to Prevent and Punish Torture.

<sup>31</sup> Nowak M & McArthur E *The United Nations Convention against Torture: A Commentary* (2008) 74.

<sup>32</sup> Nowak M & McArthur E (2008) 74.

<sup>33</sup> Nowak M 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.

### ***1.2.1.2 Infliction of Severe Pain and Suffering***

The severity of harm is an important element to the definition of torture and is considered by the Committee Against Torture to be the main distinction between torture and CIDT.<sup>34</sup> A certain degree of pain and suffering is an inevitable part of the description of torture. Although the severity of the pain and suffering inflicted is considered by some as the main distinction between torture and CIDT, the severity test used to make that distinction cannot be applied as the defining factor. Instead when considering the severity of the harm caused by torture States Parties should rather 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 institutionalization of the ill-treatment and other subjective criteria such as the physical and mental condition of the victim.<sup>35</sup> The African Commission recognises specific actions, such as sexual violence when used for the purpose of intimidation, humiliation or for the punishment of control, as a form of torture.<sup>36</sup>

Mental harm is also regarded as a form of torture; this was held to be so in the *Greek case*<sup>37</sup> in which the European Court of Human Rights developed the notion of mental suffering by holding “the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault may constitute psychological torture”.<sup>38</sup> Psychological torture takes the form of an action that forces a person to act against their will or conscience.<sup>39</sup> There are opinions and case law that support the view that the mere threat of death or torturous conduct can constitute torture.<sup>40</sup> An example of this would be mock executions or serious, realistic and immediate threats of death, threats of harm to the person. All of these can cause psychological pain and suffering which is equal to the infliction of physical pain.<sup>41</sup>

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<sup>34</sup> Refer to the Committee against Torture General Comment No: 2 for the same principle.

<sup>35</sup> 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 Kvočka et al., ICTY, IT 98-30/1, 2 November 2001, paragraph 143; Prosecutor v Brdjanin, ICTY, IT-99-36, 1 September 2004 para 484.

<sup>36</sup> Smith R K M (2005) 240.

<sup>37</sup> *Denmark et al v Greece European Commission* No. 3321-3/67; 3344/67, Yearbook XII, (1969)461 (The Greek-case).

<sup>38</sup> *Denmark et al v Greece European Commission* (1969)461 (The Greek-case).

<sup>39</sup> *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 para 79.

<sup>40</sup> The International Council for the Rehabilitation of Torture Victims: A global appeal on behalf of victims of torture (2004) available at <http://www.irct.org/Default.aspx?ID=3558&M=News&NewsID=152> (accessed on 10 October 2014).

<sup>41</sup> *Denmark et al v Greece, European Commission* No. 3321-3/67; 3344/67, Yearbook XII, (1969) 461 (The Greek-case). 186; *Akkoc v Turkey, European Court of Human Rights*, Application No. 22947/93; 22948/93, Judgment 10 October 2000, para 25, 116 & 117; *Campbell and Cosans v UK*, Case No. 7511/76, 7743/76, Judgment 25 February 1982, para 26 states that the mere threat of torture may in some situations, constitute CIDT.

### ***1.2.1.3 By the Instigation of, or with the Consent of a Person Acting in Official Capacity***

The element that an act must have been committed either at the instigation of; secondly with the consent of, thirdly, or with the acquiescence of a public official or another person acting in an official capacity is especially important to the definition of torture. This element is important because of the inclusion of State involvement. State involvement distinguishes the conduct from other forms of abuse. The term public official is one that implies the existence of even the most remote connection with interests or policies of the State.<sup>42</sup> As a consequence of this, States have been found responsible for acts of torture committed by private actors.<sup>43</sup>

### **1.3 Cruel Treatment, and Inhuman or Degrading Treatment**

Cruel treatment, and Inhuman or Degrading Treatment (CIDT) refers to ill-treatment that does not require the infliction of harm for a specific purpose. However, the intent of exposing individuals to conditions that might result or amount to ill-treatment needs to be present.<sup>44</sup> Degrading treatment refers to ill-treatment that may involve pain or suffering that is less severe than that of torture and will usually involve humiliation and debasement of the victim.<sup>45</sup> The essential elements which constitute ill-treatment not amounting to torture are namely the intentional exposure to significant mental or physical pain or suffering and the exposure of the aforementioned significant mental physical pain or suffering by or with the consent or the acquiescence of State authorities.<sup>46</sup> The identification of the exact boundaries between different forms of ill-treatment is difficult and requires an assessment of the degrees of suffering. These degrees may depend on the particular circumstances of the case.<sup>47</sup> Torture, ill-treatment is prohibited under international law, as even where the treatment does not have the element of purpose like that of torture or is not considered severe enough to amount to torture.<sup>48</sup>

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<sup>42</sup> Burgers HJ & Danelius H *The UN Convention against Torture: A Handbook on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (1988) 119.

<sup>43</sup> *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR).

<sup>44</sup> Foley C *Combating torture: A Manual for judges for judges and Prosecutors* (2003)12.

<sup>45</sup> Foley C (2003)12.

<sup>46</sup> Foley C (2003)12.

<sup>47</sup> Foley C (2003)12.

<sup>48</sup> Foley C (2003)12.

The instrument intended to protect the human rights and basic freedoms of all people of Africa is the African Charter on Human and Peoples' Rights (ACHPR).<sup>49</sup> Of the three regional systems<sup>50</sup>, the African regional system is the youngest. Under article 5 of the African Charter torture and other forms of ill-treatment are listed as examples under a more general prohibition of exploitation and degradation. Article 5 of the ACHPR states that "[e]very individual shall have the right to respect of dignity inherent in a human being and to the recognition of his legal status, all forms of exploitation and degradation of and, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment shall be prohibited." The African Commission on Human and Peoples' Rights has referred to the definition of torture under article 1 of UNCAT.<sup>51</sup>

The African system for the protection of human rights consists of a Commission and a Court. The African Commission on Human and Peoples' Rights has the mandate *inter alia* to promote respect for the ACHPR, and to ensure the protection of rights and fundamental freedoms contained therein.<sup>52</sup> To fulfil its mandate, the African Commission works with different partners. The relationship between the Commission and the Association for the Prevention of Torture (APT), an international non-governmental organization (NGO) with observer status at the African Commission,<sup>53</sup> is of specific importance to this study as the APT worked hand-in-hand with the Commission to develop the Robben Island Guidelines (RIG).<sup>54</sup>

The Robben Island Guidelines were formally adopted by a resolution of the African Commission during its 32nd ordinary session in October 2002,<sup>55</sup> and approved by the Conference of Heads of State of the African Union held in Mozambique in July of 2003.

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<sup>49</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 *Afr. Hum. Rts. L.J.* 40, *entered into force* Nov. 25, 2005.

<sup>50</sup> The Inter-American regional system, The European Regional System and the African regional system.

<sup>51</sup> Long D & Murray R 'Ten years of the Robben Island Guidelines and prevention of torture in Africa: for what purpose?' (2012) 12(2) *African Human Rights Law Journal* 324,328, see also provisions 33 and 34 of the Robben Island Guidelines and the commentary on these provisions in 'Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A practical guide for implementation' (2008) 52. See also Anjumah E A 'The African Commission on Human and Peoples' Rights: Practice and Procedures,' Nijhoff M, 1996 the Hague 118.

<sup>52</sup> Article 45 of the African Charter on Human and Peoples' Rights also known as the Banjul charter adopted on the 27 June 1981 and entered into force on 21 October 1986.

<sup>53</sup> The observer status at the African Commission given to APT was suggested during the African Commissions' 28<sup>th</sup> ordinary session held in Cotonou, Benin, in October 2000.

<sup>54</sup> Long D & Murray R (2012) 328.

<sup>55</sup> ACHPR /Res.61 (XXXII) 02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

The Robben Island Guidelines are an ideal tool for the prohibition and prevention of torture in Africa. The Robben Island guidelines reiterate the absolute universal and non-derogable condemnation of torture. There are three parts to the RIG, namely prohibition, prevention and responding to the needs of victims. All three parts are set out in a manner that is both particular and detailed, and provide the measures that should be taken in relation to each component.<sup>56</sup>

#### **1.4 The Prohibition of Torture and CIDT under the South African Constitution**

Although torture has been known in South Africa (SA) in the past, it reached increased prominence during the apartheid regime,<sup>57</sup> especially against its opponents. However, references from credible sources state the practice of torture and forms of CIDT unfortunately still remain very prevalent in South Africa today.<sup>58</sup>

Members of the South African Police Service (SAPS) have reportedly resorted to torture and other forms of police brutality with the objective of obtaining information and confessions.<sup>59</sup> The number of deaths under police custody range from an average of 500 to 700 deaths each year, however, how many of these deaths are a result of torture is unclear.<sup>60</sup> The victims of torture by SAPS are usually criminal suspects of violent crimes; and/or witnesses the police believe are not providing full disclosure. Both the perpetrators and victims are from all race groups, but most victims are young black men. In some cases children have also been subjected to torture and various forms of ill-treatment.<sup>61</sup>

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<sup>56</sup> The Robben Island guidelines are divided into three parts, the first part deals with the “Prohibition of Torture,” which calls on states to ratify existing legal instrument and integrate them into domestic legislation. The second part deals with the “Prevention of Torture” and presents a range of preventative measures, covering the different stages of criminal law procedure in which there is a real risk of torture occurring. The third part of the Guidelines looks at “Responding to the Needs of the Victims”.

<sup>57</sup> The truth and Reconciliation Commission received over 21000 submissions relating to human rights violations at the end of the apartheid regime. 300 former members of the security forces in their submissions before Commission’s Amnesty Committee described in detail the various practices of torture used. See Pigou P ‘*Monitoring Police Violence and Torture in South Africa*’, paper presented at the international seminar on indicators and diagnosis on human rights: The case of Torture in Mexico, convened by the Mexican National Commission for Human Rights, (April 2002).

<sup>58</sup> ‘Torture crimes treated with leniency in South Africa’ available at [http://www.SAHA.org.za/news/2012/June/torture\\_crimes\\_treated\\_with\\_leniency\\_in\\_SouthAfrica.htm](http://www.SAHA.org.za/news/2012/June/torture_crimes_treated_with_leniency_in_SouthAfrica.htm) (accessed on 10 December 2012).

<sup>59</sup> Bruce D Mwanajiti N Mhlangu P Sifuniso M et al (eds) (2002) *Police Brutality in South Africa* from report ‘Police brutality in Southern Africa-A human rights perspective’.

<sup>60</sup> Independent Complaints Directorate *Annual Report* (2011-2012) 42, see Independent Complaints Directorate ‘Investigating torture: The new legislative Framework and Mandate of the Independent Complaints Directorate’ March 2010, 12-13 which discusses ICD reports on statistics of torture, assault and deaths as a trend of torture among certain units in the South African Police Services dating from 1996-2009.

<sup>61</sup> Bruce D Mwanajiti N Mhlangu P Sifuniso M et al (eds) (2002). *Police Brutality in South Africa* from report ‘Police brutality in Southern Africa-A human rights perspective’

However, in an attempt to remedy the situation and to comply with the obligations set out in UNCAT, the Independent Complaints Directorate (ICD) and the African Policing Civilian Oversight Forum hosted a workshop in March of 2010 on “Investigating Torture: The New Legislative Framework and Mandate for the Independent Complaints Directorate.”<sup>62</sup> The purpose of the workshop was to review the ICD mandate to include such issues as deaths in police custody or deaths as a result of police action, rape by a police officer, whether the police officer is on or off duty and to highlighted in this study, the investigation of any complaint of torture.

The merits of expanding the ICD’s mandate to include torture was one of the issues addressed at the workshop as well as what the challenges would be with regards to defining and investigating torture, as well as the required regulations to support the legislation and the implications for operating procedures and training for the ICD investigators.

On the 12 of May 2011 the Independent Police Investigative Directorate Legislation<sup>63</sup> was signed into law by President Jacob Zuma, and as of April 2012 the Act came into operation giving IPD the mandate to investigate inter alia matters such as any deaths in police custody<sup>64</sup> and any complaint of torture by a police officer in the execution of his or her duties.<sup>65</sup>

As indicated above, South Africa has ratified and acceded a number of treaties relevant to human rights and international humanitarian law at both the United Nations (UN) level and African levels. Prior to the enactment of Prevention and Combating of Torture of Persons Act,<sup>66</sup> the South African Constitution<sup>67</sup> was the only source of legislation prohibiting torture. The first prohibition was under s11(2) of the Interim Constitution, which stated that: ‘[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment’.

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<sup>62</sup> Independent Complaints Directorate *‘The New Legislative Framework and Mandate of the Independent Complaints Directorate: Rape by a police officer and rape while in police custody irrespective of whether a police officer is involved.’* (2010).

<sup>63</sup> Independent Police Investigative Directorate Act No 1 of 2011.

<sup>64</sup> S 28(1)(a).

<sup>65</sup> S 28 (1)(f).

<sup>66</sup> Act 13 of 2013.

<sup>67</sup> Constitution of the Republic of South Africa, 1996.

In the final amendment of the Constitution, the prohibition of torture is split into two paragraphs.<sup>68</sup> The prohibition under s12 is a derivative of the right to human dignity, which, along with the right to equality, is one of the core values of the Bill of Rights.<sup>69</sup> The right to dignity as a founding value of the Constitution gives every person the absolute right to be treated as worthy of respect and concern and this includes even those who have committed terrible crimes.<sup>70</sup> Although, the prohibition against torture is evident within the South African legal system, case law pertaining specifically to the application of the prohibition against torture and CIDT is considerably less, and this is mainly because prior to the Torture Act, the act of torture was not defined as a crime. Thus the absence of a recognised definition of torture, prosecuting authorities and courts were hindered from prosecuting and punishing an act of torture as an autonomous crime. The non-recognition of torture as a crime meant that the task of preventing and monitoring human rights violations at centres of detention was a difficult task due to the insufficient gravity given to crimes of torture.<sup>71</sup>

## **1.5 Cruel Treatment and Inhuman or Degrading Treatment Guaranteed by the Constitution**

Section 12(1)(e) of the Constitution states clearly that “[e]veryone has the right to freedom and security of the person, which includes the right, not to be treated or punished in a cruel, inhuman or degrading way.” Section 12 (1)(e) therefore creates six distinct prohibitions; such as the prohibition of CIDT.<sup>72</sup> The first important identifiable terms of s12(1)(e) are treatment and punishment, which are important when challenging a violation in terms of s12(1)(e). Violations pertaining to punishment under s12(1)(e) embraced most criminal sanctions. For example, the issue of the death penalty in the *Makwanyane* case; secondly, corporal punishment in *S v Williams*<sup>73</sup>, and thirdly, imprisonment in *S v Dodo*<sup>74</sup> - these have all been cases that have been found to constitute punishment in violation of s12(1)(e). Punishment is a sub-category of treatment and should be understood as a form of treatment by authority occasioned by the transgression of a rule.

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<sup>68</sup> S 12(1) of the Constitution of the Republic of South Africa, 1996.

<sup>69</sup> See S 7 (1), 36(1), 39(1)(a).

<sup>70</sup> *S v Makwanyane* 1995 6 BCLR 655 (CC) para 328.

<sup>71</sup> Dissel A Jensen S & Roberts S *Torture in South Africa, Exploring torture and cruel, inhuman and degrading treatment through the media*, Centre for the Study of Violence and Reconciliation, (2009) 12.

<sup>72</sup> *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) paras 93 and 276; *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) para 20; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) para 35.

<sup>73</sup> *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

<sup>74</sup> *S v Dodo* 2001 (3) SA 382 (CC).

Regarding the prohibition on cruel, inhuman and degrading treatment, South African courts have preferred not to split the terms when interpreting them against treatment complained of being in violation of the prohibition.

The courts have articulated in case law, specifically *S v Williams*, that a complaint of the violation of the prohibition can satisfy all three terms. In *S v Williams* the court held that “whether it is necessary to split the three terms of the phrase and interpret the concepts individually would largely depend on the nature of the conduct sought to be impugned. It may well be that in a given case, conduct that is degrading may not be inhuman or cruel but on the other hand the conduct may be all three.”<sup>75</sup>

However, some practices are inherently cruel, inhuman and degrading. In *S v Williams* the court characterised corporal punishment as arbitrary due to the severity of the pain inflicted.<sup>76</sup> The term cruelty implies that some form of intentional conduct by the perpetrator exists, a specific disregard for the physical and psychological suffering of the victim.<sup>77</sup> As previously discussed, neither inhuman nor degrading conduct requires intention.<sup>78</sup> Although, the absence of intention distinguishes cruel treatment from inhuman treatment, cruel treatment will generally be found to be inhuman and a similar hierarchy can be found between inhuman and degrading.<sup>79</sup> In the case of *S v Makwanyane*, the Constitutional Court held that inhuman treatment refers to treatment of others as if they were not human.<sup>80</sup> Punishment or treatment on the other hand is degrading if it causes feeling of fear, anguish and inferiority capable of humiliating and debasing the victim.<sup>81</sup> However, for those feelings to constitute degrading treatment, they must go beyond those ordinarily caused by criminal conviction or punishment.<sup>82</sup>

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<sup>75</sup> *S v Williams* para 25.

<sup>76</sup> *S v Williams* para 45.

<sup>77</sup> *S v Williams*, para 24.

<sup>78</sup> *Foley C* (2003)12.

<sup>79</sup> See *Tyrer v. the United Kingdom*, Application No. 5856/72.

<sup>80</sup> *S v Makwanyane and Another* 1995 (3) S.A. 391 para 281.

<sup>81</sup> *Ireland v United Kingdom* (5310/71) [1978] ECHR 1 para 167.

<sup>82</sup> *S v Williams*, paras 40-41.

## **1.6 Research Question**

The question to be addressed in this study is whether the government of South Africa is doing enough to protect the rights of the accused from torture.

This study will seek to analyse South Africa's constitution and its requirements to protect individual human rights, as well as South Africa's current legislative framework including the Prevention and Combating of Torture of Persons Act.

## **1.7 Research Methodology**

The research method that has been adopted in this study is that of a review of relevant national, regional and international existing material and literature on the question referring to protecting the accused's right to freedom from torture in South Africa.

## **1.8 Significance of this Study**

This study is particularly significant as it seeks to explore the mechanisms in place to protect an accused's right to freedom from torture in South Africa. The study aims to ask questions about the gap between law and reality on the ground and about the effectiveness of new approaches to enforcement and what the effect of the implementation of the Act will mean to South Africa's criminal legal framework.

## **1.9 Overview of Chapters**

The study consists of five chapters. Chapter One will provide the context in which the study is set – highlighting the basis and structure of the study. The second chapter describes the development standards for the protection of the right to freedom from torture in international law and what South Africa's obligations are under these standards. The third chapter will examine how an accused's fair trial rights protect an accused's right to freedom from torture in South Africa. Chapter Four critically reflects on the criminalisation of torture in SA and whether SA has met its obligations under UNCAT. The fifth chapter provides general recommendations and conclusions derived from the study.

## CHAPTER 2

### A REVIEW OF EXISTING MECHANISMS FOR THE PREVENTION OF TORTURE AND CIDT WITHIN THE INTERNATIONAL COMMUNITY

#### 2.1 Introduction

Torture is one of the most widely prohibited human rights violations and has a significant place in major international human rights instruments.<sup>1</sup> The prohibition against torture is absolute and has developed as a norm of customary international law with a *peremptory status or jus cogens*. During the last decade, the international community has increased its efforts to combat torture and other forms of CIDT through the introduction of special mechanisms such as the UN Special Rapporteur on Torture on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There are four regional systems for the protection of human rights, which are found in Europe<sup>2</sup>, in the Americas<sup>3</sup>, in Africa and the Arab League.<sup>4</sup>

The extent of State obligations to prevent torture is largely determined by international treaties as well as by the bodies that interpret them. States voluntarily sign and ratify treaties and submit themselves to the control of judicial or quasi-judicial organs that accept complaints from individuals when States do not fulfil their obligations set out in these international treaties<sup>5</sup>, and undertake fact-finding missions. The purpose of this chapter is to discuss the mechanisms for the protection of the right to freedom from torture at both international and regional levels.

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<sup>1</sup> Article 5 of the Universal Declaration of Human Rights, Common Article 3 of the Geneva Conventions, Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 31-34 of the Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, Article 7 of the International Covenant on Civil and Political Rights, Article 5 of the American Convention on Human Rights, "Pact of San Jose", Costa Rica, Article 5 of the African Charter on Human and Peoples' Rights ("Banjul Charter").

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S.221 at 223, Eur.T.S.5 (entered into force 3 September 1953).

<sup>3</sup> American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969.

<sup>4</sup> African Charter on Human and Peoples Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, League of Arab States, Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum.Rts. Rep. 893 (2005), entered into force March 15, 2008.

<sup>5</sup> For example the American Commission on Human Rights, the European Court of Human rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights.

## 2.2 UN Mechanisms Used to Combat Torture and Inhuman Treatment

### 2.2.1 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a multilateral treaty adopted by United Nations General Assembly.<sup>6</sup> Many African countries have ratified the ICCPR, including South Africa<sup>7</sup>. The rights provided for within this treaty represent the minimum set of civil and political rights recognised by the international community. The right to freedom from torture is expressly provided for in article 7<sup>8</sup> as a non-derogable and cannot be suspended for any reason.

Furthermore, article 7 is interpreted to impose similar obligations to those required by the United Nations Convention Against Torture (UNCAT).<sup>9</sup> The Human Rights Committee (HRC)<sup>10</sup> illustrates in its General Comment 20,<sup>11</sup> that article 7 cannot be interpreted in a vacuum and should be read together with other relevant articles in the treaty. A good example illustration of this point would be article 10, which sets out to protect the rights of all persons deprived of their liberty from torture and CIDT. Therefore interpreting and reading article 7 together with article 10 illustrates three points. First, detainees have the right to be protected from torture. Secondly, not to be subjected to treatment contrary to article 7,<sup>12</sup> and lastly this protection is guaranteed irrespective of the seriousness of the offence(s) they have committed or alleged to have committed.

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<sup>6</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with Article 49.

<sup>7</sup> Examples of African countries that are a party to the ICCPR, include Angola, Chad, Cameroon, Burundi, to name a few. For other African countries, see [http://www.ccprcentre.org/select\\_country](http://www.ccprcentre.org/select_country).

<sup>8</sup> Article 7 of the ICCPR States: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>9</sup> UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly, 10 December 1984, A/RES/39/46.

<sup>10</sup> The ICCPR is monitored by the Human Rights Committee, a body separate to the Human Rights Council.

<sup>11</sup> Human Rights Committee (HRC), CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

<sup>12</sup> In its General Comment on Article 10 the Human Rights Council evoked that “this Article supplements Article 7 with regards to the treatment of all persons deprived of liberty” Human Rights Committee, General Comment 7, Article 7 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 7 (1994), Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

## 2.2.2 The Human Rights Committee and Torture (HRC)

The supervision of the ICCPR is entrusted to the Human Rights Committee (HRC).<sup>13</sup> The HRC was established by the ICCPR<sup>14</sup> and the first Optional Protocol and<sup>15</sup> consists of a body of eighteen experts that are elected by States Parties for four-year terms.<sup>16</sup> The HRC is not a full-time body and holds three sessions per year. Its supervision of the Covenant happens in four ways. First, all State Parties are required to submit reports on measures they have adopted to give effect to the Covenant. The HRC considers each report, together with any information submitted to it by other sources.<sup>17</sup> The purpose of this process is to provide a State Party with an opportunity to clarify within the context of its own national framework the content of its obligations under the Covenant. It also serves as a valuable guide to other States Parties where similar issues arise. However, the reporting system has been met with some problems over the years, especially regarding report submissions. The problems include incomplete coverage, abstraction and formality that lead States to stress their formal constitutional or statutory provisions instead of offering a more realistic description of practices.<sup>18</sup>

The second supervisory task of the HRC is to make appropriate General Comments,<sup>19</sup> as well as comments on complaints of violations by individuals against State Parties.<sup>20</sup> For example, in its response to the complaint by *Bradley McCallum v. South Africa*,<sup>21</sup> the HRC made a request that South Africa provide information on the measures taken to give effect to the HRC's views and that it be done within 180 days.<sup>22</sup> The HRC specifically requested that the government effectively publish the views of the HRC's findings.<sup>23</sup>

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<sup>13</sup> The Human Rights Committee was established under Part IV of the ICCPR.

<sup>14</sup> Article 28(1) of the ICCPR.

<sup>15</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A.Res.2200A(XXI), 21 U.N.GAOR Supp.(No.16)at 59,U.N.Doc.A/6316 (1966),999 U.N.T.S.302,entered into force March 23,1976.

<sup>16</sup> When electing the expert members, consideration is given to the need for equitable geographical distribution and representation of the different forms of civilisation and of the principle legal systems. See Articles 28-32 of the ICCPR.

<sup>17</sup> See Article 40 of the ICCPR See also Rule 70(2) of the provisional rules of procedure, CCPR/C/3/Rev.1.

<sup>18</sup> Alston P & Goodman R *International Human Rights in Context, Law Morals and politics* (2010) 850.

<sup>19</sup> Article 40(4) of ICCPR.

<sup>20</sup> *Bradley McCallum v. South Africa* Communication No 1818/2008 U.N.Doc.CCPR/C/100/D/1818/2008(2010). See also 'Consideration of reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture, South Africa' CAT/C/ZAF/CO/1 (2006).

<sup>21</sup> *Bradley McCallum v. South Africa*, Communication No 1818/2008,U.N.Doc.CCPR/C/100/D/1818/2008(2010).

<sup>22</sup> 'Stakeholder hearings on the prevalence of Torture in Correctional Centres' available on <http://www.pmg.org.za/report/20111130-Stakeholder-hearings-prevalance-torture-correctionalcentres> (accessed on 12 April 2014).

<sup>23</sup> *Bradley McCallum v South Africa*, Communication No.1818/2008, U.N.Doc.CCPR/C/100/D/1818/2008 (2010) para 9.

However, the Department of Correctional Services only issued a joint media statement.<sup>24</sup> The HRC also pointed out that SA has a poor track record in its reporting obligations, and that it has also been reluctant to respond to enquiries from the UN Human Rights Commission.<sup>25</sup>

Thirdly, the HRC's may receive communications or individual complaints. It is permitted by the Optional Protocol to the ICCPR to receive and consider Communications from individuals alleging to be victims of violations of the Covenant by States Parties to the Covenant.<sup>26</sup> Although, before communications of alleged violations can be received by the HRC, victims must have exhausted all available domestic remedies and the matter before the HRC must not be the subject of any other any other international investigation.<sup>27</sup> Upon receiving the written complaint the HRC formulates its views and these views are then forwarded to the Defendant State, as well as the complainant. As a Party to the Optional Protocol to the ICCPR since 2002, South Africa has accepted the Committee's Jurisdiction, and as a result the HRC has heard a case of an alleged violation of human rights in a complaint *Bradley McCallum v. South Africa*.<sup>28</sup> In addition to the roles of the Committee members; there are currently three special rapporteurs who are appointed by the Committee to perform specific functions. The rapporteurs are; The Special Rapporteur on New Communications,<sup>29</sup> The Special Rapporteur on Follow-up To Views<sup>30</sup> and The Special Rapporteur on Follow-up To Concluding Observations.<sup>31</sup>

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<sup>24</sup> 'Stakeholder hearings on the prevalence of Torture in Correctional Centres' available on <http://www.pmg.org.za/report/20111130-Stakeholder-hearings-prevalance-torture-correctionalcentres> (accessed on 12 April 2014).

<sup>25</sup> 'Stakeholder hearings on the prevalence of Torture in Correctional Centres' available on <http://www.pmg.org.za/report/20111130-Stakeholder-hearings-prevalance-torture-correctionalcentres> (accessed on 12 April 2014).

<sup>26</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. See Moller H& Opsahl T 'Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee' 28 (1985) *German Year Book of International Law*, 9.

<sup>27</sup> Article 5, Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

<sup>28</sup> *Bradley McCallum v. South Africa* Communication No 1818/2008, U.N. Doc. CCPR/C/100/D/1818/2008(2010)

<sup>29</sup> The communications sent by the Special Rapporteur can be divided into two types, appeals, in cases of imminent danger of violations of the rights of the indigenous individuals and communities, and allegation letters in situations in which violations have already occurred.

<sup>30</sup> UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum : Follow-up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan*, 1 March 2012, A/HRC/19/61/Add.3 available at <http://www.refworld.org/docid/51406b1b2.html> (accessed 12 May 2014).

<sup>31</sup> UN Human Rights Committee (HRC), *Report of the Special Rapporteur for Follow-up on Concluding Observations (Ninety-fifth session, March 2009)*, 26 December 2011, CCPR/C/95/2/Rev.1.

Lastly, the HRC has jurisdiction to consider certain complaints made by a State Party that another State Party is not abiding by the obligations assumed under the Covenant.<sup>32</sup> Although the views of the HRC are not binding, they have become an important part of the jurisprudence of human rights.<sup>33</sup>

### 2.2.3 United Nations Convention Against Torture (UNCAT)

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is an entire treaty dedicated to addressing the problem of State-inflicted torture. As of February 2014, UNCAT had 144 states Parties.<sup>34</sup> It is based upon the recognition that torture and other practices of CIDT are already prohibited under international law.<sup>35</sup> The purpose of UNCAT is not to outlaw torture and other acts; instead the aim is to strengthen the existing prohibitions.<sup>36</sup> The UNCAT consists of 33 articles, which are divided into three parts<sup>37</sup>. The wording in the UNCAT is directed towards States and creates obligations for State Parties rather than rights for individuals. Notwithstanding that, the UNCAT is a human rights treaty, one that establishes rights that correspond with the explicitly formulated State obligations.<sup>38</sup> The preamble sets out the overall objective and purpose of the UNCAT.<sup>39</sup> The obligations referred to in the preamble are: article 3 which deals with refolement, articles 4-9 dealing with the prosecution of persons who have committed torture, article 10 establishing the obligation to educate and train law enforcement personnel and any other person who may be involved in the arrest, detention or imprisonment of people.

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<sup>32</sup> Rule 70(2) of *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.3 (1994).

<sup>33</sup> *Bradley McCallum v. South Africa* Communication No 1818/2008, U.N. Doc. CCPR/C/100/D/1818/2008 (2010).

<sup>34</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en) (accessed 2 September 2014).

<sup>35</sup> Examples of the prohibition can be found in Article 5 of the UNHR, Article 7 of the (ICCPR) as well as the 1975 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.

<sup>36</sup> Burgers JH & Danelius H *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. (1988) 1.

<sup>37</sup> Part I (Articles 1 to 16);

Part II (Articles 17 to 24);

Part III (Articles 25 to 33).

<sup>38</sup> DeHoogh AJJ *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1995) 18-9.

<sup>39</sup> “The States Parties to this Convention desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment and punishment throughout the world.

Articles 12-13 deal with the obligation to investigate alleged practices of torture, the rights of victims of torture to obtain redress and fair and adequate compensation<sup>40</sup>, the exclusion of evidence resulting from torture<sup>41</sup> and a general obligation to prevent other acts of CIDT as well as various monitoring mechanisms made available to the Committee Against Torture (CAT).<sup>42</sup> In June 2006 an Optional Protocol to the Convention Against Torture (OPCAT)<sup>43</sup> was adopted by the General Assembly with the objective of further preventing torture by establishing a monitoring system at both international and national levels. This system recommends regular visits to places where people could be deprived of their liberty. Although South Africa is a party to the UNCAT, it is yet to ratify OPCAT.

#### 2.2.4 The Committee Against Torture

The Committee Against Torture (CAT) is an autonomous treaty body within the United Nations (UN) system. It was established under Part II of the UNCAT. CAT is made up of persons nominated by State Parties to the UNCAT,<sup>44</sup> and it has the mandate to monitor the implementation and the enforcement of the UNCAT.<sup>45</sup> It consists of ten members that serve in their personal capacities and not as representatives of their respective States.<sup>46</sup> CAT has various monitoring mechanisms, but only one is compulsory, which is the submissions of country reports and this done in accordance with article 19 of UNCAT. The reporting procedure under CAT resembles that of the HRC and like the other Committees, CAT has been met with reporting problems; such as over-due reports and issues relating to the implementation of the UNCAT.<sup>47</sup>

Each report submitted to CAT is considered<sup>48</sup> and through its Concluding Observations<sup>49</sup> comments directly on States reports. Under article 20,<sup>50</sup> CAT has the mandate to initiate and enquire into the occurrence of a systematic practice of torture in the territory of a State Party.<sup>51</sup>

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<sup>40</sup> Article 14.

<sup>41</sup> Article 15.

<sup>42</sup> Article 16-22.

<sup>43</sup> UN General Assembly *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* 9 January 2003, A/RES/57/199.

<sup>44</sup> Article 17(2).

<sup>45</sup> "Committee Against Torture: Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment" available on <http://www.ochr.org/EN/HRBodies/CAT/Pages/CATintro.aspx> (accessed on 12 May 2014).

<sup>46</sup> Article 17(1).

<sup>47</sup> Ingelse C *United Nations Against Torture: An assessment* (2001) 129.

<sup>48</sup> Article 19(3).

<sup>49</sup> See for example, UN Committee Against Torture (CAT), *UN Committee against Torture: Conclusions and Recommendations, South Africa*, 7 December 2006, CAT/C/ZAF/CO/1, see also Committee Against Torture (CAT), *Conclusions and recommendations of the Committee against Torture: Nepal*, 15 December 2005, CAT/C/NPL/CO/2.

<sup>50</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Resolution/adopted by the General Assembly* 10 December 1984, A/RES/39/46.

<sup>51</sup> Article 20(1) "Report of the Committee against Torture" General Assembly Official Records sixty-sixth Session Supplement No 44(A/66/44), See also *K.K. v. Switzerland* Comm. 186/2001, U.N. Doc. A/59/44, at 159 (CAT 2003),

In a Communication brought before the CAT by five non-governmental organisations against Sri Lanka information was submitted alleging the systematic practice of torture in Sri Lanka.<sup>52</sup> CAT examined the information received and concluded that the information received was reliable and contained well-founded indications that torture was systematically being practiced Sri Lanka.<sup>53</sup> CAT invited Sri Lanka to cooperate in its examination of the information and to submit its observations to the CAT on a specified date.<sup>54</sup> After examining the observations made by Sri Lanka, CAT concluded that the information available reiterated that torture was being systematically practiced in Sri Lanka. In communicating its decision, the CAT also requested the government of Sri Lanka to agree to a visit by two Committee members designated to for the inquiry.<sup>55</sup>

In a second case, CAT in its Concluding Observations on the second periodic report of Nepal, expressed serious concerns about allegations concerning widespread use of torture. Following a visit to Nepal in 2005, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded that the police, armed police and Royal Nepalese Army were systematically practicing torture.<sup>56</sup> CAT also considered information submitted to it by non-governmental organisations under article 20 of UNCAT alleging systematic practice of torture in Nepal. Based on this information CAT considered that there were well-founded indications that torture was being systematically practiced in the territory of Nepal.<sup>57</sup>

Similar to the HRC, CAT has the mandate to receive and consider communications from State Parties that another State Party is not fulfilling its obligations under the Convention. To date no inter-state cases have been considered before the CAT.<sup>58</sup> The CAT may also receive and consider individual communications from, or on behalf, of individuals who are subject to the jurisdiction of that State Party

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*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution / adopted by the General Assembly 10 December 1984, A/RES/39/46, Special Action or Decisions Taken Re: Reporting CAT A/63/44(2009), CAT A/59/44.*

<sup>52</sup> ‘Sri Lanka CAT Article 20 Examinations Re: Systematic Torture CAT A/57/44 (2202) para 125-26’ available on [http://www.Bayefsky.com/html/srilanka\\_cat\\_article\\_20.php](http://www.Bayefsky.com/html/srilanka_cat_article_20.php) (accessed 15 March 2014).

<sup>53</sup> ‘Sri Lanka CAT Article 20 Examinations Re: Systematic Torture CAT A/57/44 (2202) para 125-26’ available on [http://www.Bayefsky.com/html/srilanka\\_cat\\_article\\_20.php](http://www.Bayefsky.com/html/srilanka_cat_article_20.php) (accessed 15 March 2014).

<sup>54</sup> See Article 20 (1) of the Convention and rule 76 of Its Rules and Procedures.

<sup>55</sup> ‘Sri Lanka CAT Article 20 Examinations Re: Systematic Torture CAT A/57/44 (2202) para 127’ available on [http://www.Bayefsky.com/html/srilanka\\_cat\\_article\\_20.php](http://www.Bayefsky.com/html/srilanka_cat_article_20.php) (accessed 15 March 2014).

<sup>56</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak - Mission to Nepal E/CN.4/2006/6/Add.5, para 31 (accessed 15 March 2014).

<sup>57</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak - Mission to Nepal E/CN.4/2006/6/Add.5, para 31 (accessed 15 March 2014).

<sup>58</sup> See [http://www.ohchr.org/EN/HRBodies/TBPetitions/pages/HR/BP\\_Petitions.aspx](http://www.ohchr.org/EN/HRBodies/TBPetitions/pages/HR/BP_Petitions.aspx) (accessed 15 April 2014).

and who claim to be a victim of a violation by a State Party.<sup>59</sup> However, for the complaint mechanism to function, it is necessary for the State party to have recognised the competence of CAT to receive and consider individual complaints.<sup>60</sup> All South Africans may turn to CAT to have violations of their right to freedom of torture addressed.<sup>61</sup> However, to date no communications against SA have been brought to CAT for consideration. Like the HRC, the views of CAT are not legally binding. However, the CAT considers its views to be declaratory in nature.<sup>62</sup>

### **2.2.5 Inter-American System of Human Rights and the Right to Freedom From Torture**

The Inter-American Human Rights System was established under the auspices of the General Assembly of the Organisation of American states (OAS).<sup>63</sup> The American Declaration of the Rights and Duties of Man (American Declaration) was adopted in April 1948, therefore foreshadowing the first international statement of human rights. It remained the only human rights instrument in the Inter-American System until 1978, when the American Convention on Human Rights came into effect. The American Declaration was never intended to be binding on States. This position was clarified in an advisory opinion of the Inter-American Court.<sup>64</sup>

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<sup>59</sup> Article 22 (1); See for example, *Kalinichenko v Morocco* (Communication no. 428/2010).

<sup>60</sup> Article 22 (1).

<sup>61</sup> The Committee Against Torture' available on <http://www.claiminghumanrights.org/cat.html> (accessed 18 May 2014).

<sup>62</sup> Communication No 34/1995: Switzerland.1997/05/29. CAT/C/18/D/34/1995,para 11.

<sup>63</sup> The Inter-American human rights system evolved overtime, in 1948 prior to the United Nations (UN) General assembly's adoption of the UDHR GA Res.217 A (III), UN Doc A/810 at 71(1948), the OAS adopted the American Declaration of the Rights and Duties of man OAS Res. XXX, International Conference of American States,9<sup>th</sup> Conference, OAS Doc. OEA/Ser.L/V/11.23.doc.21 rev.6 (1948).

<sup>64</sup> Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights 1/A Court Human Rights .OC- 10/89 14 July 1989, para 33.

The Declaration protects the right to humane treatment in articles I<sup>65</sup>, XXV<sup>66</sup> and XXVI<sup>67</sup>. It should be pointed out that article I of the Declaration while guaranteeing the protection of proper humane treatment of persons in custody makes no express reference to the prohibition of torture and related practices. Although the Declaration does not specifically enact against torture, it can, however, be interpreted to include torture and CIDT.<sup>68</sup>

### **2.2.6 American Convention on Human Rights (ACHR)**

The American Convention on Human Rights was adopted in 1969. The ACHR is the first and the most comprehensive OAS human rights treaty.<sup>69</sup> The ACHR provides that ‘no one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment’.<sup>70</sup>

The ACHR expressly prohibits torture and clearly states that State Parties are required to ensure that ‘all persons subject to their jurisdiction are not tortured’.<sup>71</sup> Article 5 of the ACHR protects the right to humane treatment extensively by protecting every person’s right to physical, mental and moral integrity respected<sup>72</sup> as well as prohibiting the use of torture and CIDT.<sup>73</sup> The remaining provisions of article 5 deals with the treatment and punishment of those deprived of their liberty and promotes the respect for the inherent dignity of the human person.<sup>74</sup> An essential element to the phenomenon of enforced disappearances is that it is a violation of article 5. The Inter-American Commission on Human Rights (the Commission) has examined cases of disappearances brought before it and has noted that disappearances even if they are temporary in nature, are cruel and inhuman.<sup>75</sup>

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<sup>65</sup> Article 1 states that “Every human being has the right to life, liberty and security of his person.”

<sup>66</sup> Article XXV states “[E]very individual who has been deprived of his liberty has... the right to humane treatment during the time he is in custody.”

<sup>67</sup> Article XXVI state “[E]very person accused of an offence has the right...not to receive cruel, infamous or unusual punishment.”

<sup>68</sup> The preamble provides that “the fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of men, while rights exalt individual liberty duties express the dignity of that liberty”. Also see Articles XVII and XXV.

<sup>69</sup> American Convention on Human Rights 1969, OAS Treaty Series No 1, reprinted in Basic Documents pertaining to Human Rights in the inter-American system, preamble, OEA/Ser.L /v/1.4 Rev 12, 31 January 2007.

<sup>70</sup> Article 5 (2).

<sup>71</sup> Article 1 (1).

<sup>72</sup> Article 5 (1).

<sup>73</sup> Article 5 (2).

<sup>74</sup> Article 5 (2).

<sup>75</sup> Case 10.508 (Guatemala) IACHR Annual Report 1994 51 para 54.

In the Honduran Disappearances cases, the Commission found that evidence of disappeared persons who had regained their liberty tended to show that they have been ‘[s]ubjected to torture and other cruel, inhuman and degrading treatment in violation of the right to physical integrity recognized in article 5...’<sup>76</sup> The Commission also found that acts such as a sitting a victim half- naked and wet in a metal tub and applying electric shocks; standing on his body beating him on his chest and abdomen; putting a hood over a victim’s head so he could not breathe and burning him with cigarettes<sup>77</sup> and rape<sup>78</sup> as acts of torture.

### **2.2.7 The Inter–American Convention to Prevent and Punish Torture**

The Inter-American Convention to Prevent and Punish Torture was adopted in 1985. This Convention defines torture in great detail under article 2, and prohibits torture, as well as any forms of CIDT.<sup>79</sup> It excludes defences such as superior orders or purported excuses such as a State of Public Emergency or a situation requiring extraordinary measures as a justification for the use torture or CIDT.<sup>80</sup> The Convention provides that the offence of torture should be punished severely.<sup>81</sup> It provides for a system of universal jurisdiction for the crime of torture and States are required to take preventative measures to offences in the OAS member jurisdictions.<sup>82</sup> Once domestic remedies have been exhausted, cases of alleged torture may be submitted to the relevant international fora (such as the Inter-American Court).<sup>83</sup>

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<sup>76</sup> *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACtHR), 29 July 1988, para 155; *Godínez Cruz Case (Preliminary Objections)*, Inter-Am.Ct.H.R. (Ser. D) No. 3 (1994). Inter-American Court of Human Rights (IACtHR), 26 June 1987, para 162.

<sup>77</sup> Case 10.574 (El Salvador) IACHR Annual Reprt 1993 ,para 174.

<sup>78</sup> Case 7481 Bolivia IACHR Annual Report 1981-2, 36 and case 10.970 (Peru) IACHR Annual Report 1995,157 para,182-8.

<sup>79</sup> Article 2 of the Inter- American Convention to Prevent and Punish Torture defines torture as “[F]or 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. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.”

<sup>80</sup> Articles 3-5.

<sup>81</sup> Article 6.

<sup>82</sup> Article 12.

<sup>83</sup> Article 8. See also *Velez Lloor v. Panama, Judgement* (IACtHR, 23 Nov. 2010) para 33.

## 2.3. THE EUROPEAN SYSTEM OF HUMAN RIGHTS AND THE RIGHT TO FREEDOM FROM TORTURE

### 2.3.1 European Convention on Human Rights (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950.<sup>84</sup> The ECHR's importance lies not only in the scope of the fundamental rights it protects, but also in the protection established to examine alleged violations and ensure that States comply with their obligations under the Convention. The ECHR is seen as an essential component of the political order of Europe with 45 signatories as of July 2014<sup>85</sup>, and it provides in clear terms under article 3 that no one shall be subjected to torture or inhuman or degrading treatment or punishment.<sup>86</sup>

Article 3 of the European Convention imposes an absolute prohibition on torture, inhuman and degrading treatment or punishment,<sup>87</sup> and has the primary feature of protecting the physical integrity of an individual. In addition to this the European Court of Human Rights (the Court) has interpreted article 3 to protect against the infliction of pain or other acts that cause severe mental suffering.<sup>88</sup> The Court has emphasised the principle of article 3 as being absolute regardless of either; (i) the conduct or circumstances of the victim or the nature of the offence, or (ii) the nature of any threat of the security of the State<sup>89</sup>.

Article 3 covers a wide spectrum of threat and punishment. However, as noted in the *Greek case*,<sup>90</sup> not all ill-treatment or punishment is prohibited. For the conduct to be embraced by the prohibition under article 3, it must 'attain a minimum level of severity'.<sup>91</sup> The effect of setting a high threshold is to eliminate trivial complaints, and activity that is illegal and undesirable.<sup>92</sup>

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<sup>84</sup> Van Dijk P Van Hoof f & van Rijn A *Theory and Practice of the European Convention on Human Rights* (4ed)(2006 )4.

<sup>85</sup>European Court of Human Rights 50 years of Activity: The European Court of Human Rights some facts and figures' available on [http:// www.echr.coe.int](http://www.echr.coe.int) (accessed on 15 May 2013).

<sup>86</sup>Article 3.

<sup>87</sup> Long D *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights* (2002) 9.

<sup>88</sup> Inter-rights Manual for lawyers-Prohibition of Torture, Inhuman or Degrading Treatment or Punishment under the ECHR (Article 3) (2007) 1.

<sup>89</sup> *Ramirez Sanchez v France* 59450/00, [2005] ECHR 42, para 96, see also *Labita v Italy*, 26772/95, Council of Europe: ECHR, (2000) para 11.

<sup>90</sup> *Denmark v Greece* (The Greek Case) Communication 3321/67 para 186.

<sup>91</sup>*Ireland v United Kingdom*, Judgment of 18 Jan. 1978 Series A, No 25 (1979-80) 2 EHRR 25 para 162; see also *Tyler v United Kingdom* Judgment of 25 Apr. 1978, Series A, No 26 (1979-80) 2 EHRR 1 para 30.

<sup>92</sup> Erdal U & Bakira H *Article 3 of the European Convention on Human Rights: A practitioner's Handbook* (2006) 49.

The objective of the Convention was to lay down certain human rights proclaimed in 1948 by the UN in the Universal Declaration of Human Rights and to do this within the framework of the Council of Europe with the result being a binding agreement.<sup>93</sup> Since November 1998, the machinery for the enforcement of the European Convention on Human Rights has undergone a major change in an attempt to make the Court accessible to all. Originally, under the enforcement scheme there was a system of three institutions, which were responsible for enforcing the obligations undertaken by States Parties: the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe.<sup>94</sup> The new position is that a single full-time European Court of Human Rights has replaced the European Commission of Human Rights and individual applicants are now entitled to submit their cases directly to the Court.<sup>95</sup>

### 2.3.2 Article 3 of the Convention in practice

The European Convention on Human Rights serves as an instrument of the Court it “[r]epresents the minimum human rights standards which could be agreed by the European States more than 50 years ago.”<sup>96</sup> Article 3 has proven to receive quite a bit of interpretation and there is a very large body of case law on article 3 of the Convention. The Court has, for example, read into this article a positive obligation, an obligation that is not apparent from the wording of the article itself.<sup>97</sup> Positive obligations have a growing importance in the jurisdiction of the European Court. The Court has increasingly recognised implied positive obligations of member States arising from the rights in the European Convention.<sup>98</sup> Although article 3 imposes an obligation upon member States to prohibit torture, inhuman and degrading treatment or punishment, this obligation, however, does not only encompass a duty to simply prohibit, but the Court and Commission has extended a mandatory positive duty upon States to protect individuals from these forms of abuses. For example, in *A v. The United Kingdom*,<sup>99</sup> where a young boy had been beaten badly by his stepfather, the stepfather pleaded the defence of “parental chastisement” as permitted by United Kingdom laws and was prosecuted for assault.

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<sup>93</sup> Van Dijk P Van Hoof F & van Rijn A (2006) 4.

<sup>94</sup>European Court of Human Rights 50 years of Activity: The European Court of Human Rights some facts and figures. Available on <http://www.echr.coe.int> (accessed on 15 May 2013).

<sup>95</sup>European Court of Human Rights 50 years of Activity: The European Court of Human Rights some facts and figures. Available on <http://www.echr.coe.int> (accessed on 15 May 2013).

<sup>96</sup> Leach P *Taking a Case to the European Court of Human Rights* 2ed (2005) 5

<sup>97</sup>. Erdal U & Bakira H (2006) 52.

<sup>98</sup> Mowbray AR *The Development of Positive obligations under the European Convention on Human Rights by the European Convention on Human Rights by the European Court of Human Rights* (2004) 229.

<sup>99</sup> *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR).

The child and his father challenged the law before the European Court of Human Rights, arguing that in effect it amounted to failure to have a legal system that protected individuals from prohibited treatment. The Court agreed with the victim and held that States are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment.<sup>100</sup>

### **2.3.3 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment adds a new approach to the promotion and protection of human rights.<sup>101</sup> Article 1 of the Convention states that a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment shall be established in order to examine by means of visits, the treatment of persons deprived of their liberty with a view of strengthening, if necessary, their protection from torture and from inhuman or degrading treatment.

The Convention was created with the intention of strengthening the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment by a non-judicial procedure of a preventative character based on visits.<sup>102</sup> The Convention is not to apply the law to certain facts that exist or to condemn a certain State for misconduct; instead the objective is based on the spirit of co-operation and that by providing advice improvements are made in the protection of persons deprived of their liberty<sup>103</sup>.

The Convention has three main features; there is the non-judicial character of the operations under the Convention, there is the principle of co-operation<sup>104</sup> and the confidential nature of the Committee's activities.<sup>105</sup> Under the aforementioned first feature, a Committee has been established that visits any place within the jurisdiction of the State Parties where persons are deprived of their liberty by a public authority.<sup>106</sup>

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<sup>100</sup> *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR) para 22.

<sup>101</sup> Cassese A 'New Approach to Human Rights: The European Convention for the Prevention of Torture' (1989) 83 *AJIL* 128.

<sup>102</sup> Article 1.

<sup>103</sup> European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment: Explanatory report European treaty series – No 126 para 15-20

<sup>104</sup> Article 2 -3.

<sup>105</sup> Article 11, See also Ginther K 'The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' (1990) 2 *EJIL* 126.

<sup>106</sup> Article 2.

Where necessary the Committee may suggest improvements in the protection of persons deprived of their liberty from torture and from inhuman or degrading treatment or punishment.<sup>107</sup> The Committee is guided by human rights norms and case-law.<sup>108</sup> However, the Committee carries out its mandate without taking an active part in the application and further development of these human rights norms and case-law.<sup>109</sup>

The Committee undertakes fact-finding visits, if necessary, on the basis that the information obtained can be used to make recommendations.<sup>110</sup> The Committee's findings are based purely on facts, with its evaluations derived from the information obtained and observations made during visits to the places of detention.<sup>111</sup> Should it be necessary, the findings and recommendations will be conveyed to the authorities of the State Party concerned.<sup>112</sup>

The Committee is non-judicial in character and therefore has no mandate to judge whether a violation of human rights have been committed.<sup>113</sup> Also, it has no mandate to express its views on the interpretation of human rights instruments, whether in abstract or in relation to concrete facts.<sup>114</sup> As the Convention's principle is that of co-operation, it undertakes visits to places where people have possibly been deprived of their liberty by a public authority, with the cooperation of the competent national authorities.<sup>115</sup> By acceding to the Convention, the States Parties assume an obligation to permit visits,<sup>116</sup> thus there is a mutual cooperation.<sup>117</sup> Under the Convention, a distinction is made between periodic visits and visits based on circumstances; circumstances that could call for an ad hoc and follow-up visits.<sup>118</sup>

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<sup>107</sup> Article (4), See also European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment: Explanatory report European treaty series – No 126 para 15.

<sup>108</sup> Ginther K (1990) 2 *EJIL* 123.

<sup>109</sup> Ginther K (1990) 2 *EJIL* 123.

<sup>110</sup> Article 7.

<sup>111</sup> Article 7.

<sup>112</sup> Article 10. See also Council of Europe: Committee for the Prevention of Torture, Report to the Armenian Government carried out by the European Committee for the prevention of torture and inhuman or degrading punishment (CPT) 1 inf (2012) 24 from 5-7 December.

<sup>113</sup> European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment: Explanatory report European treaty series – No 126 para 17.

<sup>114</sup> Article 10 (1). See also European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment: Explanatory report European treaty series – No 126 para 73.

<sup>115</sup> Article 3, Article 10 (2).

<sup>116</sup> Preamble.

<sup>117</sup> Article 2 and 8.

<sup>118</sup> Article 7 (1).

Under this principle, the Committee is required to duly notify the State concerned of its intentions as the Committee to carry out visits<sup>119</sup> and the visit should be made in a time span that is considered to be practicable and reasonable. The visits are carried out by visiting delegations consisting of at least two members of the Committee and if necessary assisted by experts and interpreters.<sup>120</sup> After the visit the Committee drafts its own report based on the delegation's findings.<sup>121</sup> The report shall be sent to the party concerned, with the Committee's recommendations included.<sup>122</sup> Should the State Party fail to cooperate or improve the situation in light of the Committee's recommendation, the Committee may make a public statement on the matter, taking due account of the principle of confidentiality.<sup>123</sup>

Visits by the Committee prove to be of great value when ascertaining whether practices of torture, ill-treatment or coercion have been used by public authorities, specifically the police, and therefore resulting in violations of the accused's right to a fair trial under article 6. During the Committee's periodic visit to Armenia<sup>124</sup> during May 2010, the delegation heard a significant number of credible and consistent allegations of physical ill-treatment of detained persons by police, operational staff, and occasionally senior officers at the time of initial interviews.<sup>125</sup> The alleged ill-treatment mainly consisted of punches, kicks and blows inflicted with water-filled bottles or wooden bats, with the view of securing confessions or other information. In several instances, the severity of the alleged ill-treatment was such that it could be considered as amounting to torture.<sup>126</sup> In its report to the Montenegro Government<sup>127</sup> the Committee reported that in 2004 the delegation received numerous allegations of deliberate physical ill-treatment of persons deprived of their liberty by the nation's police. Most of the allegations related to ill-treatment inflicted at the time of questioning with a view to extracting confessions or obtaining information. Several persons gave accounts of verbal abuse and threats to use physical force in order to make them confess to a crime or provide information.

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<sup>119</sup> Article 8 (1).

<sup>120</sup> Article 7 (2).

<sup>121</sup> Article 10 (1).

<sup>122</sup> Article 10 (1).

<sup>123</sup> Article 6.

<sup>124</sup> Council of Europe: Committee for the Prevention of Torture, *Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* para 12-14.

<sup>125</sup> Council of Europe: Committee for the Prevention of Torture, *Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* para 12.

<sup>126</sup> Council of Europe: Committee for the Prevention of Torture, *Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* para 12.

<sup>127</sup> Council of Europe: Committee for the Prevention of Torture, *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the prevention of torture and Inhuman or Degrading Treatment or Punishment (CPT)* 15-22 September 2008CPT/Inf (2010) 3 14 .

The delegation also observed physical marks or found medical evidence in documentation at the prison. In the 2008 findings, the delegation suggested that persons deprived of their liberty by the police in Montenegro continue to run a significant risk of being ill-treated while in police custody.<sup>128</sup>

## **2.4. THE AFRICAN HUMAN RIGHTS SYSTEM AND TORTURE**

### **2.4.1 The African Human Rights Instruments and Torture**

The African Charter on Human and Peoples' Rights (ACHPR)<sup>129</sup> was developed in 1981. Since its adoption the ACHPR has existed through several progressive developments in the protection of human rights under the African human rights system.<sup>130</sup> All States that are members of the African Union (AU), including South Africa have ratified the ACHPR.

Article 5 of the ACHPR states:

[E]very 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 the implementation and existence of African human rights instruments prohibiting torture<sup>131</sup>, as well as mechanisms to protect the right to freedom from torture in Africa, some African States still use torture as an instrument of State policy. In an inter-session activity report of the Committee for the Prevention of Torture in Africa<sup>132</sup> it was reported that the Committee has continued to receive reports of acts of torture perpetrated by law enforcement agents, excessive use of pre-trial detention, incommunicado detention, inhuman and degrading conditions (that are characterised by high levels of overcrowding), poor hygienic conditions, as well as immunity for perpetrators of torture.

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<sup>128</sup> Council of Europe: Committee for the Prevention of Torture, *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the prevention of torture and Inhuman or Degrading Treatment or Punishment(CPT)* 15-22 September 2008CPT/Inf (2010) 3 14.

<sup>129</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>130</sup> Senyonjo M S *The African Regional Human Rights system: 30 years after the African* (2011) 49.

<sup>131</sup> The African Charter, also known as the Banjul Charter adopted on 27 June 1981 and entered into force on 21 October 1986, The African Charter on the Rights and welfare of the child, entered into force 29 November 1999.

<sup>132</sup> Intersession Activity Report of the Committee for the Prevention of Torture in Africa presented by Commissioner Catherine Dupe Atoki to the 51<sup>st</sup> Ordinary Session of the African Commission on Human and peoples' rights 18 April -2 May 2012.

## 2.4.2 Mechanisms of the African Charter used to Protect an Accused's right to Freedom from Torture

### 2.4.2.1 The African Commission

The ACHPR provides for the establishment of the African Commission on Human and Peoples Rights. Its mandate includes two main mechanisms such as the African Commission's communications procedure and the State reporting procedure. Under article 5 of the ACHPR torture and other forms of ill-treatment are listed as examples under a more general prohibition of exploitation and degradation and therefore appear in the same category as slavery, which is one of only a few practices treated as seriously as torture under international law. The African Commission's mandate includes the capability of adopting resolutions, promoting human and peoples' rights by collecting documents, doing research on problems within Africa, especially in the field of human and peoples' rights.<sup>133</sup> It also creates working groups, and may create subsidiary mechanisms<sup>134</sup> and adopt decisions on complaints submitted by individuals and others who allege that a State has violated their rights under the ACHPR.<sup>135</sup> The African Commission is also responsible for the interpretation of the ACHPR and other functions assigned to the African Commission by the Assembly of Heads of State.<sup>136</sup>

Additionally, it has the task of preparing cases<sup>137</sup> for the submission to the African Court on Human and Peoples' Rights.<sup>138</sup> The African Commission is merely a quasi-judicial body and does not have enforcement mechanism for its decisions and recommendations.<sup>139</sup> However, the Commission has both a protective and promotional responsibility, as it is responsible for receiving communications on violations of rights protected under the Charter and investigating them with the view of reconciling Parties.<sup>140</sup>

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<sup>133</sup> Article 45 (1) (a).

<sup>134</sup> Rule 23.

<sup>135</sup> Article 45 of the African Charter provides the mandate of the African Commission.

<sup>136</sup> Article 45(2-3).

<sup>137</sup> 373/09 INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme / Mauritania, 310/05 Darfur Relief and Documentation Centre / Sudan, 292/04: Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) / Angola.

<sup>138</sup> Art 5 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and peoples' rights, 1998, OAU DOC; OAU/LEG/EXP/AFCHPR/Prot(III).

<sup>139</sup> Baderin M A & Ssenyonjo M S 'International Human Rights Law: six decades after the UDHR and Beyond' (2013) 415.

<sup>140</sup> 310/05 Darfur Relief and documentation Centre 279/03-296/05 Sudan Human Rights Centre.

### 2.4.2.2 The Communication Procedure

One of the principal functions of the African Commission is to protect the rights and freedoms guaranteed under the ACHPR. To achieve this it has been empowered to receive and consider communications submitted by a State claiming that another State Party to the ACHPR has violated one or more of the provisions of the ACHPR,<sup>141</sup> the African Commission also receives communications from individuals or NGO alleging that a State Party to the ACHPR has violated one or more of the rights guaranteed in the ACHPR.<sup>142</sup> For a communication to be considered by the African Commission, it has to be against a State Party to the ACHPR.

Article 56 sets out a criterion of seven points for the admissibility of a communication, and it is important that all seven be met. First, the Communication should indicate the names of the authors and this is so, even if the victim requests anonymity.<sup>143</sup> The name and address of the author must be provided, but it does not necessarily need to be the name and address of the victim. The victim who wishes to remain anonymous need not justify his reason for his request. This first criterion point is important because loss or lack of proper contact may result in a communication being declared inadmissible or closed altogether.<sup>144</sup> Secondly, 56(2) states that the Communication should be compatible with the Charter of the OAU (...) or with the present Charter, it should invoke the provisions of the ACHPR alleged to have been violated and or the principles enshrined in the OAU Charter.

Under article 56(3) it is required that the communication not be written in an insulting language directed against the State concerned and its institutions or to the AU. Therefore when submitting a communication the language used in the Communication should be neutral in nature and not aimed at insulting a person or institution<sup>145</sup>

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<sup>141</sup> Articles 48-49.

<sup>142</sup> Article 55.

<sup>143</sup> Article 56(1). See also *David Mendes v Angola* Comm. No 413/12 para *Priscilla Njeri Echaria v Kenya*, Comm. No 375/09 para 41, *Southern Africa Human Rights NGO Network and Others v Tanzania* Comm. No 333/06 para 49 and *Dr. Farouk Mohamed Ibrahim v Sudan* Comm. No 386/10 para 41.

<sup>144</sup> See for example *Krishna Achutan and Amnesty International v Malawi* Comm. No 62/92 *Dioumessi and Others v Guinea* Comm. No 70/92, *Joana v Madagascar* Comm. No. 108/93.

<sup>145</sup> *Ligue Camerounaise des Droits de l'Homme v Cameroon* Comm. No. 65/92.

Article 56(4) prohibits communications “based exclusively on news disseminated through the mass media.” It is important for the author to investigate and ascertain the truth of the facts before requesting the Commission to intervene. All communications submitted must be clear and information stated in the communication must be obtained from sources other than mass media.<sup>146</sup>

Under article 56(5) a Complainant is required to send communication to the Commission only after he has exhausted all local remedies, unless it is obvious that this procedure is unduly prolonged.<sup>147</sup> This rule is a cornerstone of the adjudication and protective mandate of the Commission under the Charter.<sup>148</sup> This requirement is founded upon the international rule that the State responsible must have an opportunity to redress by its own means within the framework of its own domestic system the wrong alleged to be done to the individual.<sup>149</sup> All Communications are required under article 56(6) to be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.

The ACHPR does not state the timeframe within which the local remedies must be exhausted; the determination of a reasonable period is often left to the Commission to decide.<sup>150</sup>

Article 56(7) provides that a communication is inadmissible if it has already been settled under the ACHPR. Furthermore it provides that a communication would also be considered inadmissible if it has already been settled in terms of principles of the United Nations Charter. If a case has been decided under the auspices of the UN, no claim may be made to the African Commission. The effect of this is to limit any opportunity for Complainants who wish to seek protection from one or more human rights system.<sup>151</sup>

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<sup>146</sup> Ankumah E *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 65. See also *Sir Dawda K. Jawara v Gambia (The)* Comm. No. 147/95- 149/96.

<sup>147</sup> Evans M & Murray R *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2ed) 2008. For Communications that were ruled as inadmissible for not meeting the s 56(5) requirement, see Communication 340/07 *Nixon Nyikodzino (represented by Zimbabwe Human Rights NGO forum) v Zimbabwe*, Communication 278/2003- *Promoting Justice for women and Children (Project NGO) v Democratic Republic of Congo*.

<sup>148</sup> Odinkalu CA ‘The role of case and complaints procedures in the reform of the African regional human rights system’ (2001) 1 (226) *African Human Rights Law Journal*.

<sup>149</sup> *Interhandel Case (Switzerland v USA)* ICJ Reports (1959) 6 at 27.

<sup>150</sup> Gumedze S ‘Bringing Communications before the Commission’ (2003) 3 *African Human Rights Law Journal* 134.

<sup>151</sup> Evans M & Murray R (2008) 126.

Once a Communication has been declared admissible and has not been settled amicably, the Commission will proceed to consider the substantive issues of the case.<sup>152</sup> The Complainants are then invited to make submissions on the merits within 60 days. The State has a right of reply within 60 days after the Complainant submits its submissions on the merits.<sup>153</sup> There are usually instances where the respondent State completely ignores the allegations made by the Complainant, thus refusing to cooperate with the Commission.<sup>154</sup> In such circumstances, the Commission has no choice but to rely on the facts at its disposal for its final decision<sup>155</sup>. The Commission applies the ACHPR and the general international human rights law, principles and standards.<sup>156</sup>

### **2.4.2.3 The State Reporting Procedure Under Article 62 of the Charter**

State reporting under the ACHPR is meant to monitor State compliance with the ACHPR and establish a dialogue with States on the promotion and protection of human rights. This mechanism has been designed to encourage States to learn from each other's experiences in the implementation of the provisions of the ACHPR.<sup>157</sup> However, in practice the State reporting system has enjoyed very little success mainly because State Parties default on their reports, or the reports lack depth, quality and consistency.<sup>158</sup>

Article 62 states that, 'Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'. All reports submitted by States must be in accordance with the guidelines of the Commission and the report should include the measures that each State has taken to give effect to the provisions of the ACHPR. It should highlight all challenges affecting the implementation of the ACHPR and all protocols relevant to it.<sup>159</sup>

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<sup>152</sup> 'The African Commission on Human and Peoples' Rights information sheet No 3' available on <http://www.org/communications/procedure> (accessed 10 June 2014).

<sup>153</sup> Rule 108 of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

<sup>154</sup> 'The African Commission on Human and Peoples' Rights information sheet No 3' available on <http://www.org/communications/procedure> (accessed 10 June 2014).

<sup>155</sup> 'The African Commission on Human and Peoples' Rights information sheet No 3' available on <http://www.org/communications/procedure> (accessed 10 June 2014).

<sup>156</sup> Article 60- 61.

<sup>157</sup> 'Concept paper on UN High Commissioner for Human Rights' [UNCHR] *proposal for a unified standing treaty body*, Report by Secretariat 22 March 2006 para 8.

<sup>158</sup> Rule 73 of the interim rules now provides that where a State Party fails to comply with the reporting obligations under Article 62, the commission shall fix a new date and communicate this to the state concerned. See, Wright R 'Finding an Impetus for institutional change at the African Court on Human and Peoples' rights' (2006) 24 (46) *Beckley Journal of International Law*.

<sup>159</sup> Rule 73.

All States Parties to the ACHPR have a duty to submit reports and the Commission shall inform all States Parties, who have not submitted their reports under article 62, of their obligation to do so and at which date they are expected to comply.<sup>160</sup> When considering the reports of the different States Parties the Commission explores all relevant information relating to the human rights situation in the State concerned, including statements and shadow reports from national human rights institutions and NGOs,<sup>161</sup> from this information the Commission shall formulate their Concluding Observations and these observations shall form part of the Commission Activity Report.<sup>162</sup> Furthermore if necessary, the Commission shall specify in its Concluding Observations any issues that require the urgent attention of the State Party. The members of the Commission shall follow up on the implementation of the recommendations from the Concluding Observations.<sup>163</sup>

As discussed above, article 62 sets out clear guidelines of what the State reporting procedure is, however the system still enjoys very little success because of problems like infrequent and inadequate reporting. For example by July 2014 13 States had submitted all their reports, 10 States were late by one or two reports, 24 States had been late with three or more and seven States had not submitted any reports at all.<sup>164</sup> This can be attributed to the fact, that unlike other reporting systems enjoyed by the American and European systems, the AU as the main political organ of the African human rights system, has not been actively involved in ACHPR's reporting system.<sup>165</sup> Some countries including SA, have reported on the measures they have taken to protect the right to freedom from torture.

## **2.5 Special Mechanisms: Special Rapporteurs**

The creation of Special mechanisms such as Special Rapporteurs may be done so by the Commission. Other procedures such as Special Rapporteurs have been established over time by the Commission to supplement its initial mandate.<sup>166</sup>

Pursuant to article 45(1)(a) of the African Charter, the Commission has established and appointed three such Special Rapporteurs<sup>167</sup> permitting the Commission to investigate and promote human rights of the

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<sup>160</sup> Rule 76 (1).

<sup>161</sup> Rule 74.

<sup>162</sup> Rule 77.

<sup>163</sup> Rule 78.

<sup>164</sup> See State reporting statistics available at <http://www.achpr.org/states/stats/> (accessed on 7 September 2014).

<sup>165</sup> Murray R *Human Rights in Africa: From the OAU to the African Union* (2004) 51-52.

<sup>166</sup> See "Special Rapporteur on Prisons and Conditions of Detention" available on <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/> (accessed 7 September 2014).

<sup>167</sup> The Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 1994); the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP - in 1996) and the Special Rapporteur on the Rights of Women in Africa (in 1999).

continent.<sup>168</sup> At the Commission's 20<sup>th</sup> session in October 1996 the position of the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) was established.<sup>169</sup>

It is the mandate of the SRP to examine the situation of persons deprived of their liberty within the territories of State Parties to the ACHPR and its mandate and functioning is of particular importance and relevance to the issue of torture and ill-treatment<sup>170</sup>. Secondly, the SRP is also tasked with inspecting and reporting on prison conditions with the aim of protecting the rights of those held therein.<sup>171</sup> Thirdly, it also hears individual complaints about prison conditions and reports to the Commission on its research on prison conditions and its communications with African governments regarding the state of their penal systems.<sup>172</sup> The establishment of the SRP is especially important in ensuring the safeguard against torture and ill-treatment in places of detention.<sup>173</sup> Regular and periodic visits from the SRP and other independent monitoring groups are central to ensuring that places of detention are as transparent as possible and therefore results in ensuring the protection of the rights of detainees,<sup>174</sup> and brings some degree of accountability to the prison management.<sup>175</sup>

Fourthly, the SRP monitors places of detention by way of undertaking missions to various member States. The missions carried out by the SRP over the years have consisted of inspecting prisons and reporting on the conditions of these prisons. To date the SRP has conducted over 25 visits to 23 countries.<sup>176</sup> All visits made by the SRP follow a similar agenda, and once the visits have been conducted, the SRP will meet with government officials to make recommendations on pressing issues. After the visit a report with recommendations and concerns is drafted and forwarded to the government.

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<sup>168</sup> African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 2.

<sup>169</sup> Viljoen F & Odinkalu C *The prohibition of Torture and ill-treatment in the African Human Rights System: A handbook for victims and their advocates* (2006) 103.

<sup>170</sup> Viljoen F & Odinkalu C (2006) 103.

<sup>171</sup> Viljoen F & Odinkalu C (2006) 104.

<sup>172</sup> African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 5.

<sup>173</sup> African Commission on Human and Peoples' Rights (2012) 16.

<sup>174</sup> Proceedings from the regional conference held in Dakar *The prevention of Torture in Africa* (2010) 28.

<sup>175</sup> African Commission on Human and Peoples' Rights (2012) 17.

<sup>176</sup> African Commission on Human and Peoples' Rights (2012) 7.

## 2.6 Robben Island Guidelines (RIG)

### 2.6.1 The Robben Island Guidelines and its Approach to Torture

The RIG are an additional instrument adopted by the Commission, to encourage African nations to adopt minimum international standards on prison conditions and therefore is considered a pioneering instrument in the protection of people deprived of their liberty in Africa. The RIG have also been developed to provide a torture-specific instrument with the objective of addressing the prevalence of torture in Africa.<sup>177</sup> The RIG set out three ways in its approach to the issue of torture; prohibition, prevention and by responding to the needs of victims. Under the RIG, African States are required to take six measures to prohibit torture; the ratification of regional and international instruments,<sup>178</sup> the promotion and support of co-operation with international mechanisms,<sup>179</sup> criminalisation of torture, and non-refoulement.<sup>180</sup> The RIG were also adopted to assist African States meet their obligations under international law.

### 2.6.2 How the Robben Island Guidelines Protect the Accused's Right to Freedom from Torture

The standards and principles contained in the RIG have been adopted from existing soft and hard international instruments.<sup>181</sup> They also consists of a number of procedural safeguards that address the conditions that contribute to the likelihood of torture and other ill-treatment. They play an important role in preventing torture and other ill-treatment of those deprived of their liberty, as well as 'demonstrate a structural approach to humanising the treatment of people or an accused deprived of their liberty'<sup>182</sup>.

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<sup>177</sup> Nkirete Igweta R "The African Commission on Human and Peoples' Rights and The Promotion and Protection of Prisoners' Rights: An Analysis" unpublished LLM thesis University of the Western Cape 2008. See also Lessene P & Niyizurugezo JB 'Robben Island Guidelines for the prohibition and prevention of torture: Practical guide for implementation' (2008) 5 available on <http://projects.essex.ac.uk/ehrr/V6N2/NiyizurugeroLessene.pdf> (accessed on 10 June 2013).

<sup>178</sup> Part I A (1 a-d).

<sup>179</sup> Part I B (2-3) International mechanisms include the African Commission, UN human rights treaty bodies and the UN special Rapporteur on Torture.

<sup>180</sup> Part I D (15).

<sup>181</sup> Long D & Murray R 'Ten years of the Robben Island Guidelines and prevention of Torture in Africa: for what purpose?' (2012) 12 *African Human Rights Law Journal* 327.

<sup>182</sup> Niyizurugero B & Lessène GP 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' 68 available on <http://www.projects.essex.ac.uk/ehrr/V6N2/NiyizurugeroLessene.pdf> (accessed on 7 September 2014).

There are two types of basic safeguards prescribed by the RIG for people deprived of their liberty; the general procedural safeguards under s 20 and specific safeguards for pre-trial detention.<sup>183</sup> S 20(a) makes it a requirement to allow those deprived of their liberty to inform a close relative or third person of their detention. Facilitating this intervention with lawyers and other relevant individuals are of particular importance due to the fact that the risk of torture and other forms of ill-treatment are higher when there is a lack of information about a detainee. In *Egyptian Initiative for Personal Rights Interights v Egypt*<sup>184</sup> the Commission made reference to Section 20 of the RIG and urged States Parties to adhere to S 20 and ensure that “all persons who are deprived of their liberty by public order be offered this right by having legally constituted regulations and that such regulations of basic safeguards that must apply from the moment they are first deprived of their liberty”.

In this instance the Commission highlighted that victims were denied counsel during their detention, including at a critical interrogation session. This act contributed to the risk of being tortured and in this case victims were tortured to make confessions. The African Commission stated that it recognised that the right of access to a lawyer as a basic procedural safeguard and one of the necessary safeguards against abuse or in this case torture during the pre-trial process.

There are also specific safeguards under the RIG to protect the accused or detained in pre-trial detention.<sup>185</sup> During pre-trial, detainees are vulnerable to torture and ill-treatment and therefore the link between the prevention of torture and the prompt access to a lawyer has been reaffirmed and emphasised by other international human rights bodies.<sup>186</sup>

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<sup>263</sup> All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

- a) The right that a relative or other appropriate third person is notified of the detention;
- b) The right to an independent medical examination;
- c) The right of access to a lawyer;

<sup>184</sup> *The Egyptian initiative for personal Rights Interights v Egypt* Communication No.323/2006 para 203.

<sup>185</sup> Article 21-32.

<sup>186</sup> *The Egyptian initiative for personal Rights Interights v Egypt* Communication No 323/2006 para 180.

### 2.6.3 The African Court on Human and Peoples' Rights (ACtHPR): The Interim Court

In June of 1998 an agreement was reached to create an African Court on Human and Peoples' Rights (ACtHPR or the Interim Court). This Court was established in an effort to address the limitations of the African Commission procedure and to serve as a mechanism, to monitor States protection of the rights set out in the ACHPR. The ACtHPR was formally established by a Protocol to the Charter adopted in 1998.<sup>187</sup> The Protocol entered into force in 2004, and the ACtHPR came into being in 2006 when the first set of Judges were appointed.<sup>188</sup> The ACtHPR was established to ensure greater efficiency to the existing protection system through the adoption of binding judicial decisions that may result in sanctions of violations and compensation for victims of human rights violations.<sup>189</sup> The creation of the ACtHPR was thus an essential step towards the establishment of a coherent and effective system of human rights protection on the African continent.<sup>190</sup>

Under the Protocol, the ACtHPR is empowered to exercise jurisdiction over all human rights instruments 'ratified by the States concerned'.<sup>191</sup> Therefore, a person whose rights are not adequately protected under the ACHPR can invoke other treaties, which States Parties have ratified.<sup>192</sup> However, the paradox to the establishment of the ACtHPR as a Court established with the function to complement the protective mandate of the Commission is that individuals and NGOs who are the primary intended users of this protective function are not automatically entitled to petition before the ACtHPR.<sup>193</sup>

The African Commission is able to bring a case involving a violation of rights of the ACHPR by a State Party to the Protocol to the ACtHPR therefore serving as a route to the ACtHPR when the offending State has not made a declaration under article 34(6) of the Protocol that allows direct appeal to the ACtHPR by individuals and NGOs.<sup>194</sup>

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<sup>187</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>188</sup> Africa's New Human rights Court: Whistling in the wind? available on <http://www.Chathamhouse.org.uk> (accessed 3 September 2014).

<sup>189</sup> International Federation for Human Rights, *Practical Guide, The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights*. (2010) 13.

<sup>190</sup> International Federation for Human Rights, *Practical Guide, The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights*. (2010) 13.

<sup>191</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>192</sup> Eno RW 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002). *African Human Rights Journal* Vol. 29, No. 223(

<sup>193</sup> Mgimba L 'Jurisprudential Analysis of the African Court on Human and Peoples' Rights: From 2004-2010.' (2012) 11.

<sup>194</sup> Rule 87 and Chapter III of the interim Rules of the ACHPR.

The ACtHPR may also ask the Commission to provide an advisory opinion of any particular case before it.<sup>195</sup> The relationship between the ACtHPR and the Commission is therefore crucial in the effectiveness of the ACtHPR and its fulfilment of its mandate.

The ACtHPR's main functions are to advise, arbitrate and judge, and Articles 3, 4 and 9 of the Protocol govern its jurisdiction. The ACtHPR may also give an opinion on any legal matter concerning the ACHPR or any other relevant instrument on human rights. This can be done at the request of an AU member State, any organ of the AU (such as the Assembly of Heads of State and Government) or an organisation recognised by the AU.<sup>196</sup>

In December 2009, the ACtHPR delivered its first decision. To date it has received 27 cases and rendered decisions in 19 cases. However, so far few countries have made declarations under article 34(6) and this has resulted in the ACtHPR rejecting most cases on the ground that the respondent did not make a declaration under article 34(6) of the African Court Protocol.<sup>197</sup>

The scope of the ACtHPR's decisions allows it to render binding judgments and it can give advisory opinions in compliance with article 4 of the Protocol.<sup>198</sup> Under adversarial proceedings the ACtHPR can make provisional measures during the examination of the case. An example of a provisional measure made by the ACtHPR is in the case *African Commission on Human and Peoples' Rights v the Great Socialist Libyan People's Arab Jamahiriya*.<sup>199</sup> The African Commission alleged that the violent suppression of demonstration by aerial bombardment and excessive use of heavy weapons and machine guns against the population resulting in deaths and injuries amounted to serious human rights violations. In this case the ACtHPR ordered provisional measures against Libya.<sup>200</sup>

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<sup>195</sup> Rule 29(4) of the Final Rules of Court on Human and Peoples' rights.

<sup>196</sup> Article 4.

<sup>197</sup> See for example *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, application No. 005/2011, Decision of 16 June 2011; *National Convention of Teachers Trade Union v The Republic of Gabon*, Application No 012/2011, decision 15 December 2011; *Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v The Republic of South Africa*, Application No 002/2012, decision 30 March 2012; *Emmanuel Joseph Uko and Others v The Republic of South Africa*, Application No 004/2012; *Amir Adam Timan v The Republic of Sudan*, Application No 005/2012, decision 30 March 2012; *Baghdadi Ali Mahmoudi v. The Republic of Tunisia*, Application No 007/2012, decision 26 June 2012.

<sup>198</sup> Article 4.

<sup>199</sup> *African Commission on Human and Peoples' Rights v the Great Socialist Libyan People's Arab Jamahiriya*, Application No 004/2011.

<sup>200</sup> *African Commission on Human and Peoples' Rights v the Great Socialist Libyan People's Arab Jamahiriya*, Application No. 004/2011, para 9.

A second kind of decision that can be taken by the ACtHPR is a judgment – which is binding on States.<sup>201</sup> States Parties commit themselves to executing judgments within the time limit determined by the ACtHPR.<sup>202</sup> However, a notable weakness is that under the African system, access to the ACtHPR is open by right to the Commission to States whose citizens have been subject to human right violations. The right of individuals or NGOs with observer status to the Commission to access the ACtHPR is conditional to whether or not the States involved have previously made a declaration under article 34(6) of the Protocol. Most applications received by the ACtHPR were applications brought against States that are not a party to the Protocol or have not deposited the declarations allowing individuals and non-governmental organisations to submit applications<sup>203</sup>.

#### **2.6.4 The African Court of Human and Peoples’ Rights Merger with the African Court of Justice: The African Court of Justice and Human Rights (The Permanent Court)**

In mid-2008, African leaders voted to establish an African Court of Justice and Human Rights (The Permanent Court) to serve as the main judicial organ of the AU.<sup>204</sup> This therefore means that there will be an increased legitimisation of the system by which Court rulings are followed up by the Executive Council of the African Union.<sup>205</sup> The AU Assembly at the 11th AU Summit adopted a protocol establishing a merged court called the African Court of Justice and Human Rights in 2008.<sup>206</sup> The earlier Protocols establishing the two separate Courts are now replaced by the merger agreement, which provides clear evidence that the merged Court will be the principal judicial organ of the AU.<sup>207</sup>

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<sup>201</sup> Article 27.2.

<sup>202</sup> Article 30.

<sup>203</sup> Killander M & Nkrumah B ‘Recent developments: Human Rights in the AU during 2012 and 2013’ (2014) 14 *African Human Rights Law Journal* 289.

<sup>204</sup>Oppong RF ‘The African Union, The African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web’ (2010) 18(1) *African Journal of International and Comparative Law* 92.

<sup>205</sup> “Africa’s New Human rights Court: Whistling in the wind?” available on <http://www.Chathamhouse.org.uk> (accessed 3 September 2014).

<sup>206</sup> African Union *Protocol on the Statute of the African Court of Justice and Human Rights* 1 July 2008.

<sup>207</sup> Elias O ‘Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights’ (2009) 48 (2) *International Legal Materials* 334.

The Permanent Court will have two sections to it, namely, the General Affairs section and the Human Rights section.<sup>208</sup> The Human Rights section to a certain extent will be a continuation of the ACtHPR. This is of particular importance because human rights such as the right to freedom from torture may achieve a heightened status within the AU's principal judicial organ<sup>209</sup>. The Human rights section of the Permanent Court will be governed by more or less the same principles of that of the ACtHPR.<sup>210</sup> The Human Rights section of the Permanent Court will be able to give a legal opinion on any legal matter not pending before the Commission and the African Committee of Experts.<sup>211</sup> However, fewer bodies are entitled to lodge a legal matter with the Permanent Court than compared to the ACtHPR. Under the General Affairs section the Permanent Court will hear disputes over matters such as the powers of the AU and breaches of States treaty obligations.<sup>212</sup>

The Human Rights section of the Permanent Court's key task is to hear matters brought against African States for the failure to respect human rights.<sup>213</sup> Where violations are found, the Permanent Court will have the power to issue binding judgments and award compensation and other remedies to victims.<sup>214</sup> The Permanent Court may also issue advisory opinions on more general questions of human rights.<sup>215</sup> The Permanent Court will be the ultimate but not exclusive guardian of the ACHPR.<sup>216</sup> The Court may also enforce international human rights treaties, such as the ICCPR and UNCAT provided these have been ratified by the State concerned.<sup>217</sup>

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<sup>208</sup> Article 16.

<sup>209</sup> Africa's New Human rights Court: Whistling in the wind? available on <http://www.Chathamhouse.org.uk> (accessed 3 September 2014).

<sup>210</sup> International Federation for Human Rights, *Practical Guide, The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights* (April 2010) 13.

<sup>211</sup> Article 53.3.

<sup>212</sup> Article 28.

<sup>213</sup> Article 17.2.

<sup>214</sup> Article 45-46.

<sup>215</sup> Article 53.

<sup>216</sup> Africa's New Human rights Court: Whistling in the wind? available on <http://www.Chathamhouse.org.uk> (accessed 3 September 2014).

<sup>217</sup> International Federation for Human Rights, *Practical Guide, The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights* (2010) 152.

## **2.7 Conclusion**

The above discussion has set out the prohibition of torture in international law; the obligation associated with this prohibition; and describes some of the supervisory bodies that have been established to monitor compliance with these obligations. As previously outlined, there are instruments and mechanisms in place to prevent and punish torture, and these systems can be found in the Inter-American system, the African system, and the European system. A number of regional human treaties have been developed within the Council of Europe, the Organisation of the American States and the African Union.

The next chapter deals with the question of how the fair trial rights of an accused person protect an accused's right to freedom from torture under both international law and South African domestic legislation.

## CHAPTER 3

### HOW THE RIGHTS OF THE ACCUSED TO A FAIR TRIAL PROTECT AN ACCUSED'S RIGHT TO FREEDOM FROM TORTURE: INTERNATIONAL LAW VERSUS SOUTH AFRICAN LAW

#### 3.1 International Law

Values such as freedom from want, freedom from fear, freedom of belief and freedom of expression<sup>1</sup> are core principles of the UDHR that form the basis of modern human rights. In addition to being core principles of these values set out the fundamental elements of international human rights accepted by UN member States and elaborated in many subsequent human rights treaties.<sup>2</sup> It is the duty of a State to protect all human rights and fundamental freedoms, regardless of their political economic and cultural systems.<sup>3</sup> International human rights standards require governments to adhere to certain key universal principles. If these principles are ignored or abused by governments, as a general principle they are to be held accountable by an independent and impartial judicial or quasi-judicial body.<sup>4</sup>

#### 3.2 International Criminal Law, How Relevant is it to Human Rights: The Rights of the Accused

The development of international human rights has played a key role in the development of international criminal law.<sup>5</sup> International criminal law can be seen as a blending of principles of human rights law, the laws of war, and international humanitarian law<sup>6</sup> with some specific sources of a State's national law. In many cases this will mean an obligation on States Parties to suppress violations, prosecute those responsible for acts at a national level and provide a remedy to victims.<sup>7</sup>

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<sup>1</sup> Office for the Democratic institutions and Human Rights *Organisation for Security and Co-operation in Europe Countering Terrorism, Protecting Human rights: A manual (2007) 16.*

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble.

<sup>3</sup> <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>. (Accessed on 15 August 2014).

<sup>4</sup> Office for the Democratic institutions and Human Rights *Organisation for Security and Co-operation in Europe Countering Terrorism, Protecting Human rights: A manual (2007) 16.*

<sup>5</sup> International criminal law is a branch that combines principles of criminal and international law incorporated into human rights and humanitarian law. The influence of international law is visible particularly in the area of substantive law; it is believed that war crimes derive from humanitarian law and crime against humanity from human rights law. See Cassese A, Gaeta P Beig L et al *International Criminal Law (2003) 64.*

<sup>6</sup> Cassese A Gaeta P Beig L et al *International Criminal Law 3ed(2003) 64.*

<sup>243</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* : resolution / adopted by the General Assembly.(1984) A/RES/39/46 in accordance with article 27 (1) Article 4.

There are eleven different fundamental rights associated with the protection of an accused's rights in the criminal process. However, not all of these will be discussed in this section. Emphasises will be put on the rights relevant to an accused's right to freedom of torture. Each of these rights which protects an accused's rights in the criminal law process and in turn his right to freedom from torture can be found in a number of international instruments and constitutions.<sup>8</sup>

In ensuring fairness in the criminal process, these rights are considered to be fundamental to be basic, as without them the criminal process could be abused and manipulated to limit individual liberties.<sup>9</sup>

Rights may be limited or qualified under certain circumstances, for example civil and political rights can be categorised as absolute, limited rights and qualified rights. International human rights law recognises that all persons should be protected from interferences with their right to liberty except that right may be limited under defined circumstances<sup>10</sup>. In such instances international human rights law recognises that those in detention require special protection due to their vulnerable position, which places them at a higher risk of abuse.<sup>11</sup>

### **3.3 The Fundamental Rights Under the South African Constitution**

The incorporation of international human rights in domestic constitutions has become widespread.<sup>12</sup> Human rights are considered to be fundamental, basic, and inalienable to every person.<sup>13</sup> Before South Africa became a constitutional democracy, the fundamental rights of the majority of South Africans enjoyed no protection. International law received no constitutional recognition and was ignored by courts.<sup>14</sup>

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<sup>8</sup> Kremens K, 'The protection of the accused in International Criminal Law according to the Human Rights law standard' (2011) 26 vol1:2 *Wroclaw Review of Law, Administration & Economics*.

<sup>9</sup> See International Covenant on civil and Political Rights, GA.Res.2200(XXI), U.N. GAOR, 21<sup>st</sup> Sess, Supp.No 16, at 52, U.N. Doc.A/6316(1966); Universal Declaration on Human Rights, G.A.Res.217A(III), U.N. GAOR, 3d Sess, at 71, U.N. Doc.A/810(1948).

<sup>10</sup> Shaw M *International Law* 4ed (2000) 206.

<sup>11</sup> Shaw M (2000) 208.

<sup>12</sup> Hon K 'The metamorphosis of international human rights in domestic constitutions: South Africa and Kosovo as Case studies' (2013) *Student Scholarship paper* 237.

<sup>13</sup> 'Your rights The Bill of Rights' available at <http://www.constitutionalcourt.org.za> (accessed on 6 August 2013).

<sup>14</sup> Dugard J *International law and the South African Constitution* (1997) 1 *EJIL* 77-92.

However, this has changed and a new attitude exists towards international law, and human rights now enjoy constitutional protection.<sup>15</sup> S 7 of the Bill of Rights (BOR) highlights that the BOR '[i]s a cornerstone of democracy in South Africa' and therefore protects the rights of all South Africans and asserts the democratic values of human dignity, equality and freedom.<sup>16</sup>

Human rights can be classed into three categories, namely, first, second and third generation rights. First generation rights are rights that are considered to be civil and political rights and the right to life, dignity, equality and privacy. They also include the fundamental freedoms associated with democracy. Second generation rights refer to economic, social, and cultural rights. Third generation rights refer to collective rights, such as the right to self-determination, development and the right to safe and secure environment.<sup>17</sup>

The Constitution protects all three generation rights and the State has the obligation to protect, respect and fulfil the rights found in the BOR.<sup>18</sup> This section of this chapter will focus on the core civil and political rights contained in the BOR and how they afford the accused protection from torture and cruel, inhuman and degrading treatment.

Many of the civil and political rights are contained in international and regional human rights instruments, such as, the UDHR and the ICCPR as well as the many regional instruments on human rights.<sup>19</sup> Today many of these rights are considered customary international law, and some even rise to the level of *jus cogens*, which creates binding obligations on all States. There is clear evidence that the BOR is modelled on international human rights conventions as on occasion it refers directly to international law.<sup>20</sup>

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<sup>15</sup> Dugard J (1997) 1 *EJIL* 77-92 .

<sup>16</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>17</sup> Harris DJ *Cases and materials on International Law* 3ed (1983) 601-602.

<sup>18</sup> Section 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>19</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, and the Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008.

<sup>20</sup> See for example, s 37(4).

S 39<sup>21</sup> provides the clearest evidence of South Africa's desire to achieve a balance and connection between South African and international human rights jurisprudence. S 39, which together with s 23 require a court, when interpreting legislation to '[p]refer any reasonable interpretation of the legislation that is consistent with international law.' Thus, courts have shown a willingness to be guided by international human rights law.

The status of international agreements in South African law is governed by s 231 of the Constitution.<sup>22</sup> The Constitutional structure of s 231 contemplates three legal steps that may be taken in relation to an international agreement, and each of these steps produces a different legal consequence.<sup>23</sup> Approving an international agreement conveys South Africa's intention to be bound by the provisions of an agreement and to make an undertaking at international level to take steps to comply with the substance of the agreement.<sup>24</sup> This undertaking is given effect by incorporating the agreement into South African law or taking further steps to bring its law in line with the agreement.<sup>25</sup>

It is therefore important for all rights protected by South African law to be in line with rights protected under international law because international law sets more precise norms than the BOR and provides clarity regarding the adoption, content and interpretation of national legislation.<sup>26</sup> South African courts have held that international law, especially that relating to human rights, is imperative in providing a framework within which the rights in the Constitution can be evaluated and understood as well as strengthen domestic mechanisms for promoting rights.<sup>27</sup> Justice Sachs noted: '[W]e need to locate ourselves in the mainstream of international democratic practice'. Once an international agreement has been ratified by Parliament it becomes binding on SA and failure to observe these agreements may result in SA incurring responsibility towards other signatory states.<sup>28</sup>

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<sup>21</sup> The Constitution of the Republic of South Africa, 1996.

<sup>23</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) (2011) ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC), para 89.

<sup>24</sup> *Glenister v President of the Republic of South Africa and Others* (2011) para 91.

<sup>25</sup> *Glenister v President of the Republic of South Africa and Others* (2011) para 91.

<sup>26</sup> Chenwi L 'Using international human rights law to promote constitutional rights: The (potential) role of the South African parliament' *Law democracy and development* volume 15 (2011).

<sup>27</sup> See *S v Makwanyane and Another* 1995(3) SA 391 (CC), para 35, *Government of the Republic of South Africa and Others v Grootboom and Others* 2000(11) BCLR 1169, para 26, *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) para 96 -97 and 192.

<sup>28</sup> *Coetzee v Government of the Republic of South Africa; Matiso v Commanding officer, Port Elizabeth Prison* 1995 10 BCLR 1382 CC, para 92.

### 3.4 Fundamental Rights and Cluster of Rights Associated with the Protection Afforded to the Accused in the Criminal Process under South African Municipal Law

When discussing the rights of persons, s 7 of the Constitution<sup>29</sup> is the lead point. The BOR does two things, first, it protects the rights of all people in South Africa, and second, it affirms the democratic values of human dignity, equality and freedom. Therefore, making it the duty of the State to respect, protect, promote and fulfil the rights in the BOR. S 7 also states that although every person is entitled to these rights they can be limited in certain instances in terms of s 36 of the Constitution. S 8 supports s 7 and states that all the rights in the BOR bind both natural and juristic persons, as well as the legislature, the judiciary, the executive and all organs of State.

When discussing the rights of an accused person, detained and arrested persons s 35 of the Constitution would be the lead point,<sup>30</sup> and of particular importance to this study are the rights of an accused to a fair trial as set out in s 35(3). S 35(3) provides an extensive list of rights to be protected to ensure an accused's right to a fair trial and s 35(3) States: [E]very accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it<sup>31</sup>, to have adequate time and facilities to prepare a defence<sup>32</sup>, to a public trial before an ordinary court<sup>33</sup>, to have their trial begin and conclude without unreasonable delay<sup>34</sup>; to be present when being tried, to choose, and be represented by, a legal practitioner, and to be informed of this right promptly<sup>35</sup>, to be presumed innocent, to remain silent, and not to testify during the proceedings<sup>36</sup> to adduce and challenge evidence<sup>37</sup> and, not to be compelled to give self-incriminating evidence.<sup>38</sup>

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<sup>29</sup> Constitution of the Republic of South Africa, 1996.

<sup>30</sup> S 35.

<sup>31</sup> S 35 (3) (a ).

<sup>32</sup> S 35 (3) (b ).

<sup>33</sup> S 35 (3 ) (c ).

<sup>34</sup> S 35 (3) (d ).

<sup>35</sup> S 35 (3) (f ).

<sup>36</sup> S 35 (3) (h ).

<sup>37</sup> S 35 (3 ) (i ).

<sup>38</sup> S 35 (3) (j ).

S 35 also states that whenever information is required to be given to a person, it must be given in a language, which the person understands<sup>39</sup>. Moreover, 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.<sup>40</sup>

Although it is emphasised that all individual rights enjoy protection under the Constitution very few rights are absolute, including an accused's fair trial rights.<sup>41</sup> In terms of s 37 (5) (c), certain rights are non-derogable. For example, the right to equality<sup>42</sup> is non-derogable with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language. The right to human dignity<sup>43</sup> and the right to life<sup>44</sup> are non-derogable in their entirety. Freedom and security of the person<sup>45</sup> is non-derogable with respect to not being tortured in any way and not being treated or punished in a cruel, inhuman or degrading way. Individual rights that are considered not to be non-derogable are subject to limitations in terms of s 36.<sup>46</sup> In order for the limitation of a fundamental right to be sustained, it must satisfy the requirements in s 36(1) of the Constitution.<sup>47</sup>

For the purpose of this study, the focus will be on the protection of an individual's first generation rights, specifically, an accused person's civil and political rights and freedoms and how they protect an accused's right to freedom from torture.

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<sup>39</sup> S 35(4).

<sup>40</sup> S 35(5).

<sup>41</sup> Motala Z & Ramaphosa C *Constitutional Law: Analysis and cases* (2002) 414.

<sup>42</sup> S 9.

<sup>43</sup> S 10.

<sup>44</sup> S 11.

<sup>45</sup> S 12.

<sup>46</sup> Motala Z & Ramaphosa C (2002) 414.

<sup>47</sup> Motala Z & Ramaphosa C (2002) 416.

## **3.5 Fair trial rights of an accused: How these Rights Protect the Rights of the Accused from Torture**

### **3.5.1 The Right to a Fair Trial**

Every accused has a right to a fair trial.<sup>48</sup> The right to a fair trial is an essential right in all countries and forms part of customary international law.<sup>49</sup> Its fundamental principles are applicable at all times, this includes armed conflict and even during a state of emergency.<sup>50</sup> The right to a fair trial is provided for in treaties, such as, the ICCPR (article 14(1), the ACHPR (article 7), the ACHR (article 8) and the ECHR (article 6).

Some non-treaty standards relevant to the right to a fair trial include, the Basic Principles on the Independence of the Judiciary,<sup>51</sup> the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment,<sup>52</sup> and the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.<sup>53</sup> The above instruments do not provide an exhaustive list of rights to be guaranteed, but merely focus on some human rights that are considered to be of importance in connection with the criminal process and the protection of the accused's right from torture.

An underlying principle of a fair trial is that each person must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage. Elements of the right to a fair trial embodied in legally binding treaties such as the ICCPR as well as in regional human rights instruments can be grouped into pre-trial rights, rights during trial and post-trial rights.<sup>54</sup>

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<sup>48</sup> Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 18(1) of the Migrant Workers Convention; Article 13 of the Arab Charter; Article 6(1) of the European Convention; Section A(1)-(2) of the Principles on Fair Trial in Africa.

<sup>49</sup> Shaw M ( 2000) 204.

<sup>50</sup> Shaw M ( 2000) 204.

<sup>51</sup> UN Commission on Human Rights Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers 26 April 1999 E/CN.4/RES/1999/31.

<sup>52</sup> UN General Assembly Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly 9 December 1988 A/RES/43/173.

<sup>53</sup> UN General Assembly United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System: resolution / adopted by the General Assembly 28 March 2013 A/RES/67/187.

Some of the rights guaranteed at the pre-trial stage are also essential at the trial stage.<sup>55</sup> However the right to a fair trial is synonymous with the trial process itself.<sup>56</sup> The elements of pre-trial rights include:

The right to liberty and security of person and freedom from arbitrary arrest and detention<sup>57</sup>; the right to know the reasons for arrest;<sup>58</sup> the right to legal counsel;<sup>59</sup> the right to a prompt appearance before a judge and to be tried within reasonable time<sup>60</sup> and the right to humane treatment during pre-trial detention<sup>61</sup>.

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<sup>55</sup> Office Of the High Commissioner for Human Rights in cooperation with the International Bar Association *Professional training series No. 9, human rights in the administration of justice: A manual on human rights for Judges, Prosecutors and Lawyers* (2003) 215.

<sup>56</sup> Robinson P 'The right to a fair trial in international law with specific reference to the Work of the ICTY' (2009) 3 *Berkeley Journal of International Law Publicist* 1.

<sup>57</sup> Article 9(1) of the ICCPR, Article 3 of the Universal Declaration, Article 16(1) of the Migrant Workers Convention, Article 6 of the African Charter, Article 7(1) of the American Convention, Article 14(1) of the Arab Charter, Article 5(1) of the European Convention, Section M (1) of the Principles on Fair Trial in Africa, Article 1 of the American Declaration.

<sup>58</sup> Article 9(2) of the ICCPR, Article 7(4) of the American Convention, Article 14(3) of the Arab Charter, Article 5(2) of the European Convention, Principle 10 of the Body of Principles, Section M(2)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas; See Articles 55(2) and 60(1) of the ICC Statute, Rule 117(1) of the ICC Rules of Procedure and Evidence, Rule 53

<sup>59</sup> Article 17(2)(d) of the Convention on Enforced Disappearance, Article 37(d) of the Convention on the Rights of the Child, Article 16(4) of the Arab Charter, Principle 1 of the Basic Principles on the Role of Lawyers, Principle 17 of the Body of Principles, Principle 3 and Guideline 4 of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines. To name a few.

<sup>60</sup> Article 9(3) of the ICCPR, Article 16(6) of the Migrant Workers Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European Convention, Section M(3) of the Principles on Fair Trial in Africa, Article 59(2) of the ICC Statute.. Applicable to all people deprived of their liberty, Article 7(5) of the American Convention, Article XI of the Inter-American Convention on Disappearance, Principles 4 and 11(1) of the Body of Principles, Article 10(1) of the Declaration on Disappearance, Guideline 27 of the Robben Island Guidelines.

<sup>61</sup> Principle 5 of the Basic Principles for the Treatment of Prisoners, Principle VIII of the Principles on Persons Deprived of Liberty in the Americas, Rule 2 of the European Prison Rules.

Elements embodied in “during trial” rights include: The right to a fair<sup>62</sup> and public hearing<sup>63</sup> by a competent, independent and an impartial tribunal established by law;<sup>64</sup> the right to be presumed innocent until proven guilty;<sup>65</sup> the right to legal counsel<sup>66</sup>; the right to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them and the prohibition on self-incrimination,<sup>67</sup> and elements embodied in post-trial rights are the right to appeal to a higher authority<sup>68</sup> and the right to compensation in case prior convictions are subsequently reversed on facts which show that there has been a miscarriage of justice or in case of pardon<sup>69</sup>.

### **3.5.1.1 The Protection of Fair Trial Rights under the South African Constitution**

S 35 (3) of the South African Constitution lists 15 specific guarantees that are incorporated in the right to a fair trial. The right to a fair trial is expressly set out as a residual right which includes but is not

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<sup>62</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 18(1) of the Migrant Workers Convention, Article 13 of the Arab Charter, Article 6(1) of the European Convention, Section A(1)-(2) of the Principles on Fair Trial in Africa, Article 67(1) of the ICC Statute, Articles 19(1) and 20(2) of the Rwanda Statute, Articles 20(1) and 21(2) of the Yugoslavia Statute; See Article 40 of the Convention on the Rights of the Child, Article 7(1) of the African Charter, Article 8 of the American Convention, Article XXVI of the American Declaration.

<sup>63</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 18(1) of the Migrant Workers Convention, Article 8(5) of the American Convention, Article 13(2) of the Arab Charter, Article 6(1) of the European Convention, Principle 36(1) of the Body of Principles, Section A(1) and (3) of the Principles on Fair Trial in Africa, Article XXVI of the American Declaration, Articles 64(7), 67(1) and 68(2) of the ICC Statute, Articles 19(4) and 20(2) of the Rwanda Statute, Articles 20(4) and 21(2) of the Yugoslavia Statute; See Article 7(1) of the African Charter.

<sup>64</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Article 18(1) of the Migrant Workers Convention, Articles 7(1) and 26 of the African Charter, Articles 8(1) and 27(2) of the American Convention, Articles 12 and 13 of the Arab Charter, Article 6(1) of the European Convention, Basic Principles on the Independence of the Judiciary, Section A(1) of the Principles on Fair Trial in Africa, Article XXVI of the American Declaration.

<sup>65</sup> Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 18(2) of the Migrant Workers Convention, Article 7(1)(b) of the African Charter, Article 8(2) of the American Convention, Article 16 of the Arab Charter, Article 6(2) of the European Convention, Principle 36(1) of the Body of Principles, Article XXVI of the American Declaration, Article 66 of the ICC Statute, Article 20(3) of the Rwanda Statute, Article 21(3) of the Yugoslavia Statute.

<sup>66</sup> Principle 5 of the Basic Principles on the Role of Lawyers, Guideline 3, s 43 of the Principles on Legal Aid, Section N(2)(b) of the Principles on Fair Trial in Africa, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute; See Article 14(3)(d) of the ICCPR.

<sup>67</sup> Article 14(3)(g) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(g) of the Migrant Workers Convention, Article 8(2)(g) and (3) of the American Convention, Article 16(6) of the Arab Charter, Principle 21 of the Body of Principles, Section N(6)(d) of the Principles on Fair Trial in Africa, Article 67(1)(g) of the ICC Statute, Article 20(4)(g) of the Rwanda Statute, Article 21(4)(g) of the Yugoslavia Statute.

<sup>68</sup> Article 14(5) of the ICCPR, Article 40(2)(b)(v) of the Convention on the Rights of the Child, Article 18(5) of the Migrant Workers Convention, Article 8(2)(h) of the American Convention, Article 16(7) of the Arab Charter, Article 2(1) of Protocol 7 to the European Convention, Section N(10)(a) of the Principles on Fair Trial in Africa, Article 81(1)(b) and 81(2) of the ICC Statute, Article 24 of the Rwanda Statute, Article 25 of the Yugoslavia Statute; See Article 7(1)(a) of the African Charter.

<sup>69</sup> Article 14(6) of the ICCPR, Article 18(6) of the Migrant Workers Convention, Article 10 of the American Convention, Article 3 of Protocol 7 to the European Convention, Section N(10)(c) of the Principles on Fair Trial in Africa, Article 85(2) of the ICC Statute.

limited to the listed fair trial rights. The rights listed in s 35(3) do not constitute a closed list<sup>70</sup> and many of these listed rights are themselves open to interpretation. It had been extended to substantive fairness or a residual right to a fair trial.<sup>71</sup> Therefore, there are unspecified aspects of a right to a fair trial that are to be added to the rights set out in s 35(3). However, these specified rights themselves determine their own extension.<sup>72</sup> The first listed right under s 35(3) is the right to be informed of the charge with sufficient detail to answer it.<sup>73</sup> An accused person may examine the charge against him at any stage of the relevant criminal proceedings.<sup>74</sup> In principle an accused is entitled to have access to the charge in the police file, which will form the basis of the prosecution's case.<sup>75</sup> Under South African law there are strict requirements that need to be satisfied in the drawing of a charge.<sup>76</sup> It is important that these requirements are met.

In *S v Shabalala* the Constitutional Court held that that in such instances, the court should exercise proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by prosecution if access were to be allowed against the degree of risk that a fair trial violation might follow if access to the accused was denied.<sup>77</sup>

S 35(3) guarantees an accused the right to have adequate time and facilities to prepare a defence.<sup>78</sup> The facilities provided to the accused must allow for confidential oral and written communications between the accused and his legal representative.<sup>79</sup>

The right to adequate time guaranteed under S 35(3) embodies not only the right to not be subjected to an unduly hasty trial; it is also linked to the time to prepare oneself and the quality of such preparation. A proper defence cannot be prepared if there is inadequate time.<sup>80</sup>

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<sup>70</sup> *S v Zuma* 1995 1 SACR 568 CC. See also *S v Mazingane* 2002 (6) BCLR 634, 637 (W).

<sup>71</sup> *S v Mazingane* 2002 (6) BCLR 634,637 (W).

<sup>72</sup> *S v Nombewu* 1996 (12) BCLR 1635 (E) 556E.

<sup>73</sup> S 35(3) (a).

<sup>74</sup> S 80 of the Criminal Procedure Act.

<sup>75</sup> Bekker M P Geldenhuys T & Joubert JJ *Criminal Procedure Handbook* (2005) 172.

<sup>76</sup> S 84 of the Criminal Procedure Act sets out the essentials of a charge.

<sup>77</sup> *Shabalala & Others v Attorney-General of Transvaal & Another* 1995 (12) BCLR 1593 (CC), [1995 \(2\) SACR 761 \(CC\)](#) para 55.

<sup>78</sup> S 35(3) (b).

<sup>79</sup> Amnesty International *Fair Trial Manual* 2ed (2014) 48.

<sup>80</sup> Steytler N C *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa* 1996 (1998) 232.

S 35(3) (c) provides that an accused's right to fair trial include his right to a public trial before an ordinary court. An accused's right to a public trial before an ordinary court is an essential safeguard of the fairness and independence of the judicial process, as well as a means of protecting public confidence in the justice system.<sup>81</sup>

S 35(3)(c) has two requirements to it. First, it requires that the trial be public. Secondly, that it be before an ordinary court. The purpose of a public trial is to ensure legitimacy, openness and transparency.<sup>82</sup>

An accused's right under s 35(3)(d) seeks to protect three interests of the accused, namely, the right to security of the person, the right to liberty, and the right to a fair trial. Therefore when determining what represents unreasonable delay, a court must consider whether the protection of these interests has been met.<sup>83</sup> Therefore one could accept that prejudice suffered is to be the focal point of an inquiry as to the reasonableness of a delay.

Under s 35(3)(e) of the Constitution, an accused person is guaranteed the right to be present when being tried. However, there are exceptions to this rule, for example, under section 159 of the Criminal Procedure Act. The presence of the accused when being tried is important to the accused in a number of ways. First, an accused needs to be physically present at trial. This allows him to participate in the criminal proceedings against him in a meaningful and informed manner.<sup>84</sup> The right to be present is also important for effective exercise of his defence. The presence of an accused is also important in establishing the factual circumstances of the case and enables the court to correctly assess the accused's personality and character.<sup>85</sup> The presence of an accused not only includes his physical presence but equally as important his mental presence.<sup>86</sup> Thus, an accused needs to be able to fully understand what is happening to him and therefore the right to be present is linked to his understanding.

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<sup>81</sup> Amnesty International (2014) 121.

<sup>82</sup> *Klink v Regional Court Magistrate NO & Others* 1996 (3) BCLR 402, 414.

<sup>83</sup> Mubangizi J C *The Protection of Human Rights in South Africa: A legal and Practical guide* (2004) 104

<sup>84</sup> Chapter eight 'Right to be present' available on <http://uir.unisa.ac.za/bitstream/handle/10500/1840/08chapter8.pdf> (accessed on 26 October 2014).

<sup>85</sup> Chapter eight 'Right to be present' available on <http://uir.unisa.ac.za/bitstream/handle/10500/1840/08chapter8.pdf> (accessed on 26 October 2014).

<sup>86</sup> See s 77-79 of the Criminal Procedure Act, 1977.

Everyone who is arrested or detained and everyone facing criminal charges have the right to a legal representative.<sup>87</sup> Under s 35(3), an accused has the right to choose and be represented by a legal practitioner of his choice and to also be informed of this right promptly.

Furthermore, s 35 (3)(g) states that an accused has the right to have a legal practitioner assigned to him by the State and at State expense if substantial justice would otherwise result. Thus, an accused's right to legal representation under s 35(3)(f) of the Constitution has three aspects to it. First, an accused has the right to choose his legal practitioner. Secondly, he has the right to be represented by the chosen legal practitioner and lastly, he has the right to be promptly informed of the above rights. The right of an accused to have a legal practitioner present at trial ensures the respect of an accused's right to equality<sup>88</sup>, the protection of the right to remain silent<sup>89</sup> and the right to self-incrimination<sup>90</sup> and the right to be presumed innocent.<sup>91</sup> It is also a primary means of protecting the human rights of an accused, especially his right to freedom from torture;<sup>92</sup> as well as the requirement for the meaningful exercise of the right to a fair trial. An accused's right to legal representation under both the Constitution and international and how it protects an accused against torture is discussed in detail later in this chapter.

S 35(3)(i) of the Constitution guarantees an accused's right to challenge any evidence submitted by the State and present evidence in support of his defence.<sup>93</sup> S 35(3)(i) provides a two folded right instead of two separate rights: first, an accused has the right to adduce evidence and secondly, the right to challenge evidence. An accused's right to present evidence applies to all aspects of court proceedings where the court has to make a factual finding. It is an expression of the *audi alteram partem principle* and part and parcel of the right to a fair trial.<sup>94</sup>

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<sup>87</sup> S 35(3)(e) and S 35(2)(b).

<sup>88</sup> S 9.

<sup>89</sup> S 35(3)(h).

<sup>90</sup> S 35(3)(j).

<sup>91</sup> S 35(3)(h).

<sup>92</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 10.

<sup>93</sup> *S v Mosoetsa* 2005(1) SACR 304 (T) 310.

<sup>94</sup> See, *S v Suliman* 2969(2) SA 385.

A fair trial requires that an accused be given an adequate opportunity not only to present his case but also to challenge and question witnesses against him.<sup>95</sup> To allow an accused to present his case effectively, he must have access to statements of state witnesses, so as to adduce and challenge evidence effectively.<sup>96</sup>

Furthermore, the right to challenge and adduce evidence contains a number of sub-rights which are contained in the CPA. These include the right to cross-examine witnesses,<sup>97</sup> the right to address the court on evidence to be adduced,<sup>98</sup> the right to give and adduce evidence,<sup>99</sup> and lastly, the right to address the court at the conclusion of evidence.<sup>100</sup>

Another guarantee to the fair trial right under s 35(3) of the Constitution is the right to be tried in a language one understands or if that is not practicable, to have proceedings interpreted in that language.<sup>101</sup> However, this does not mean that the trial should be in the first language of an accused but rather in a language the accused person understands.<sup>102</sup>

The essence of the principle of legality is that a person should not be convicted of an offence unless it is quite clear at the time of the commission of the offence that the relevant conduct was a crime and subject to criminal punishment by a court.<sup>103</sup> This principle is guaranteed under s 35(3) (l) and (n). The principle is a basic element of justice and is expressed in two maxims. Namely, *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law).<sup>104</sup> S 35(l) and (n) prohibit declarations of conduct as criminal and retrospective increases in prescribed punishment.<sup>105</sup>

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<sup>95</sup> Chapter 10 Right to present one's case available on <http://uir.unisa.ac.za/bitstream/handle/10500/1840/08chapter10.pdf> (accessed on 28 October 2014).

<sup>96</sup> *Shabalala & Others v Attorney-General of Transvaal & Another* 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC).

<sup>97</sup> S 166 of Criminal Procedure Act, 1977.

<sup>98</sup> S 151 of Criminal Procedure Act, 1977.

<sup>99</sup> S 196 of Criminal Procedure Act, 1977.

<sup>100</sup> S 175 of Criminal Procedure Act, 1977.

<sup>101</sup> S 35 (3)(k).

<sup>102</sup> See, *Mthethwa v De Bruin No and Another* 1998(3) BCLR 336 (W) 338.

<sup>103</sup> Jordan L Terblanche SS 'Does the principle of legality require statutory crimes to have specific penalty clauses? A critical analysis of the decisions of the Hugh Court and the Supreme Court of Appeal in DPP, Western Cape v Prins (2012) SACJ 380.

<sup>104</sup> Jordan L Terblanche SS (2012) SACJ 380.

<sup>105</sup> See *Director of Public Prosecutions, Western Cape DPP v Prins* 2012 (2)SACR 67(WCC).

S 35(3)(m) of the Constitution stipulates that no person shall be subjected to repeated prosecution for the same criminal act, the prohibition under s 35(3) is also recognised international law.<sup>106</sup> In *S v Basson*<sup>107</sup> the Constitutional Court held that the purpose of this right was to protect individuals against the possibility of repeated prosecutions for the same criminal conduct. Such protection was deemed necessary in the interest of fairness and public interest in the finality of judgments.<sup>108</sup>

### ***3.5.1.2 How the Right to a Fair Trial Protects an Accused's Right to Freedom from Torture***

The right to a fair trial does not focus on a single right but rather consists of a set of rules and practices. This right is interpreted as rules administered through courts and in accordance with established and sanctioned legal principles and procedures with safeguards for the protection of individual rights.<sup>109</sup> Fair trial rights that are independent and interrelated protect an accused from torture individually and collectively. For example, the right to presumption of innocence which gives root to other rights such as the right not to be compelled to testify against oneself, the related right to remain silent and the right not to be compelled to confess guilt, all protect an accused's right to freedom from torture by prohibiting courts from allowing confessions elicited under torture or ill-treatment or coercion to be used as evidence because such evidence violates the presumption of innocence.<sup>110</sup> Another fair trial right that protects an accused's right to freedom from torture is an accused's right to legal representation. Ensuring and guaranteeing this right is a safeguard against torture. The Special Rapporteur on Torture has stated that no statement or confession made by an accused without the presence of a lawyer should have probative value in court.<sup>111</sup> The importance of the above mentioned rights and other fair trial rights in the protection of human rights is underscored by the fact that the implementation of human rights, like the right to freedom from torture depends on the administration of justice.<sup>112</sup>

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<sup>106</sup> See s 20 of ICC statute, Article 10 of ICTY statute and Article 9 of ICTR statute.

<sup>107</sup> *S v Basson* 2004 1 SACR 285 (CC).

<sup>108</sup> *S v Basson* 2004 1 SACR 285 (CC) para 66.

<sup>109</sup> Icelandic Human Right Centre 'The right to due process' available on <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process> (accessed on 28 October 2014).

<sup>110</sup> See *Inter-American Commission: Alfonso Martin Del Campo Dodd v Mexico* (2009) para 45-63,76.

<sup>111</sup> Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002) para 26(e).

<sup>112</sup> Icelandic Human Right Centre 'The right to due process' available on <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process> (accessed on 28 October 2014).

### 3.5.2 The Right to Liberty and Security of the Person

All human beings have the right to liberty and security, and without an efficient guarantee of liberty and security of the person, the protection of other individual rights becomes increasingly vulnerable.<sup>113</sup> All States are bound by international law to respect and ensure the protection of everybody's right to liberty and security of the person and this is so irrespective of their treaty obligations.<sup>114</sup> The right to life, liberty and security of the person is considered to be a cornerstone right of international human rights law and of civil rights in all countries which recognise the supremacy of the rule of law.<sup>115</sup> Its protection is guaranteed under article 9(1) of the ICCPR, article 6 of the ACHPR, article 7(1) of the ACHR and article 5(1) of the ECHR.

It is important to establish what constitutes deprivation of liberty, as well as to establish the moment at which liberty is deprived. This is especially important in the context of the criminal process. Establishing whether there has been a deprivation of liberty is important because there can certainly be situations where someone has been deprived of their liberty but might not be aware of it, particularly if no physical restraint has been used.<sup>116</sup> When establishing whether there has been a deprivation of liberty, certain elements may be considered, elements, such as, the nature of the confinement involved, an example of this is where a law enforcement officer, whether or not force is used, makes it clear that a person either cannot leave a particular place or is obliged to come with the officer to some other place. Another element is the status of the person affected.<sup>117</sup>

An individual may only be deprived of his liberty according to procedures established by law.<sup>118</sup> Thus all domestic legislation authorizing arrest and detention, and domestic legislation which sets out procedures for arrest and detention must conform to international standards.<sup>119</sup>

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<sup>113</sup> Shaw M (2000) 206.

<sup>114</sup> Office Of the High Commissioner for Human Rights in cooperation with the International Bar Association *Professional training series No. 9, human rights in the administration of justice: A manual on human rights for Judges, Prosecutors and Lawyers* (2003) 163.

<sup>116</sup> Macovei M *The right to liberty and security of the persons: A guide on the implementation of article 5 of the European Convention on Human Rights* Human Rights handbook No. 5(2003) 17 .

<sup>117</sup> Macovei M (2003) 17.

<sup>118</sup> Article 9(1) of the ICCPR, Article 17(2)(a) of the Convention on Enforced Disappearance, Article 37(b) of the Convention on the Rights of the Child, Article 16(4) of the Migrant Workers Convention, Article 6 of the African Charter, Articles 7(2) and 7(3) of the American Convention, Article 14(2) of the Arab Charter, Article 5(1) of the European Convention, Principle 2 of the Body of Principles, Section M(1)(b) of the Principles on Fair Trial in Africa, Article XXV of the American Declaration, Principle IV of the Principles on Persons Deprived of Liberty in the Americas.

<sup>119</sup> *A v Australia*, HRC, UN Doc.CCPR/C/59/D/560/1993 (1997) para 9.5.

International human rights standards are there to provide protective measures to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily as well as to safeguard detainees against other forms of abuse such as torture and other forms of ill-treatment.<sup>120</sup>

### **3.5.2.1 The Right to Liberty and Security of the Person a South African Perspective**

Under South African domestic law, the right to freedom and security of the person is guaranteed under s 12(1) of the Constitution,<sup>121</sup> and reads as follows:

“[E]veryone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way

In the context of s 12, the right to freedom and security is not confined primarily to the protection of the physical liberty of the individual.<sup>122</sup> S 12(1) includes a number of freedoms, such as the freedom from arbitrary arrest or detention, freedom from violence, torture and cruel punishment. It is clear from the use of the word “includes” that the listed freedoms are not intended to be an exhaustive catalogue of the ambit of s 12(1). Its purpose is to indicate the minimum content and that what s 12(1) does at the very least, is protect the individual against arbitrary arrest or detention, violence and torture and cruel punishment.<sup>123</sup> The meaning and interpretation of the right to “freedom and security of the person” has three likely interpretative possibilities.

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<sup>120</sup> Working Group on Arbitrary Detention Report UN .doc. E/CN.4/1999/63.

<sup>121</sup> Act 108 of 1996.

<sup>122</sup> Currie I & Woolman S ‘39 Freedom and Security of the person’ (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

<sup>123</sup> Currie I & Woolman S ‘39 Freedom and Security of the person’ (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

The first interpretation notes that the right protected under s 12(1) need to be read disjunctively and that the right protected therefore protects the freedom and security of the person. It is also held that the protection of the security of person relates to the physical integrity of the person and that the protection also relates to the liberty of the person to pursue his or her chosen ends without interferences.<sup>124</sup>

In a second interpretation, it is held that the right to freedom and security of the person primarily protects an individual's physical integrity. However, "freedom of the person" may be a residual right, protecting freedom of a fundamental nature that does not find protection anywhere else in the Bill of Rights.<sup>125</sup> The last interpretation offered, seems to be in disagreement with the previous interpretation. This interpretation states that the right under s 12(1) only protects the physical freedom and integrity of an individual and that it should be read as a residual right, important freedoms must be protected by a generous interpretation of the ambit of the enumerated rights in the Bill of Rights and not only unwarranted extension of the concept of the "freedom of person".<sup>126</sup>

In *Ferreira v Levin* the Constitutional Court held that s 12(1) should be taken to protect an individual's physical integrity against invasion from public and private sources. The protection offered is specifically, although not solely against invasions of physical integrity by way of arbitrary arrest, violence, torture or cruel treatment or punishment. The Court also held that the section might have a residual role in protecting fundamental freedoms that are not adequately protected by other freedoms of the Bill of Rights.<sup>127</sup>

S 12(1) provides for both the substantive protection and procedural protection for any deprivation of physical liberty. The substantive component requires that the State possess good reasons for the deprivation. The procedural component requires the State to use fair proceedings or even trials when any deprivation of freedom is contemplated.<sup>128</sup>

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<sup>124</sup> Currie I & Woolman S '39 Freedom and Security of the person' (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

<sup>125</sup> Currie I & Woolman S '39 Freedom and Security of the person' (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

<sup>126</sup> Currie I & Woolman S '39 Freedom and Security of the person' (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

<sup>127</sup> Currie I & Woolman S '39 Freedom and Security of the person' (1998) available on [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/39-Freedom%20and%20Security.pdf) (accessed on 15 October 2014).

<sup>128</sup> See *Bernstein and Others v Bester NO and Others*(1996) (4) BCLR 449; 1996 (2) SA 751.

### 3.5.2.2 How does the Constitution Prevent Torture and Protect an Accused's Right to Freedom from Torture?

As discussed above, the right to liberty and security of the person is guaranteed under both international law and s 12(1) of the South African Constitution. Both international law and s 12(1) of the Constitution guarantee the protection of an individual's physical integrity against arbitrary arrest, violence and torture or cruel treatment or punishment. This is especially important, considering; the treatment of all categories of people deprived of their liberty, especially under criminal proceedings remains a major challenge.<sup>129</sup> Anyone who is arrested and placed in pre-trial detention is to a considerable extent in a situation of inferiority and weakness and at the mercy of the police or prison officials. It is at this point where an accused is vulnerable to treatment violating his rights.<sup>130</sup> When an accused is deprived of his liberty, the State assumes a duty of care to maintain the safety of an accused and safeguard their welfare. An accused, when detained, should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.<sup>131</sup> The protection of a person's right to be treated humanely and with respect for the inherent dignity of the human person when deprived of their liberty can be found under article 10(1) of the ICCPR. The protection of the right to freedom of torture is guaranteed under article 7 of the ICCPR. These rights, which respectively prohibit torture and ill treatment and safeguard the rights of persons deprived of their liberty, are also reflected in a number other international human rights treaties.<sup>132</sup>

The prohibition against torture applies at all times and protects all. Safeguards, which are necessary for the prohibition of torture, such as limiting periods in which people can be held in incommunicado detention must continue to apply.<sup>133</sup>

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<sup>129</sup> Office Of the High Commissioner for Human Rights in cooperation with the International Bar Association *Professional training series No. 9, human rights in the administration of justice: A manual on human rights for Judges, Prosecutors and Lawyers* (2003) 161.

<sup>130</sup> Office Of the High Commissioner for Human Rights in cooperation with the International Bar Association *Professional training series No. 9, human rights in the administration of justice: A manual on human rights for Judges, Prosecutors and Lawyers* (2003)163 .

<sup>131</sup> Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 33 (1994), para. 3.

<sup>132</sup> See for example, Article 3 European Convention on Human Rights; Article 5 American Convention on Human Rights; Article 5 African Charter on Human and People's Rights; Article 37 Convention on the Rights of the Child; Article 1 Convention on the Elimination of All Forms of Discrimination Against Women; Articles 2 and 4 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; Article XVI The African Charter on the Rights and Welfare of the Child.

<sup>133</sup> Human Rights Committee General Comment No 29, States of Emergency (art 4), adopted at the 1950<sup>th</sup> meeting, on 24 July 2001, para 16.

The provision of such safeguards are extremely important because an individual may be at risk of torture before he is subject to legal formalities.<sup>134</sup> The European Committee for the Prevention of Torture (CPT) found that it was during the period that immediately followed the deprivation of liberty that the risk of torture and ill-treatment was at its greatest.<sup>135</sup> It is evident from the above discussion that an accused deprived of their liberty is at risk and vulnerable to treatment violating his rights. This is especially so given that torture is used to promote terror, used as a form of punishment and as a means of extracting evidence, thus creating the need for strict rules about the treatment of an accused deprived of their liberty. International law does contain strict rules governing the treatment of an accused deprived of his liberty.

### **3.6 The Right to be Free from Arbitrary Arrest and Detention**

The prohibition of arbitrary deprivation of liberty<sup>136</sup> is an essential consequence to the right to liberty and security of the person and is recognised in all major human rights instruments, such as, articles 9 of the UDHR and the ICCPR, article 6 of the African Charter, article 7(1), of the American Convention, article 14 of the Arab Charter, and article 5(1), of the European Convention. This prohibition is also widely enshrined in national Constitutions and legislation and closely follows the international norms and standards<sup>137</sup>. The prohibition of arbitrary arrest and detention has been recognized both in times of peace and armed conflict<sup>138</sup>. An individual or an accused arbitrarily deprived of their liberty has the right to challenge the legality of the detention and to bring proceedings before a court in order to challenge the deprivation are non-derogable under international law<sup>139</sup>.

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<sup>134</sup>The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment uses the following terms: (a) ‘Arrest’ means the act of apprehending a person for the alleged commission of an offence or by the action of an authority; (b) ‘Detained person’ means any person deprived of personal liberty except as a result of conviction for an offence; (c) ‘Imprisoned person’ means any person deprived of personal liberty as a result of conviction for an offence; (d) ‘Detention’ means the condition of detained persons as defined above; (e) ‘Imprisonment’ means the condition of imprisoned persons as defined above; (f) The words ‘a judicial or other authority’ mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

<sup>135</sup> European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, *the CPT Standards, Substantive Sections of the CPT’s General Reports*, Council of Europe, October 2001 CPT/Inf/E(2002) p.12, para 41.

<sup>136</sup> Report of the Working Group on arbitrary detention A/HRC/22/44 (2012). See also [http://www.bristol.gov.uk/page/health-and-adult-care/deprivation-liberty-safeguards\(accessed 15 November 2014\)](http://www.bristol.gov.uk/page/health-and-adult-care/deprivation-liberty-safeguards(accessed 15 November 2014)).

<sup>137</sup> Report of the Working Group on arbitrary detention A/HRC/22/44 (2012) para 41.

<sup>138</sup> See International Committee of the Red Cross, Customary International Humanitarian Law Database, rule 99 (deprivation of liberty). See also Human Rights Committee, concluding observations on the combined fourth and fifth periodic reports of Sri Lanka, CCPR/CO/79/LKA para 13.

<sup>139</sup> Report of the Working Group on arbitrary detention A/HRC/22/44 (2012) para 47.

Arbitrary deprivation of liberty can never be a necessary or proportionate measure, thus a state can never claim that illegal, unjust or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.<sup>140</sup>

### **3.6.1.1 The Right to be Free from Arbitrary Arrest and Detention a South African**

#### **Perspective**

The right to be free from arbitrary arrest and detention is a freedom protected under s 12(1)(a) of the Constitution. S 12(1)(a) requires that the deprivation of freedom must be for just cause and therefore the right does not include a right not to be imprisoned or detained at all but rather that the detention must not be done arbitrarily.<sup>141</sup>

The South African Constitution recognises that an individual's right to liberty may be not deprived for reasons, which are not acceptable. In instances where an individual is deprived of his liberty for acceptable reasons, it may not be done in a manner that is procedurally unfair.<sup>142</sup> S 12 (1)(a) is the substantive aspect to the right to freedom of security because it protects individuals against arbitrary deprivation of freedom or without just cause.<sup>143</sup> Therefore, the substantive aspect of s 12 (1)(a) ensures that deprivation of liberty cannot take place without adequate reasons and there needs to be a rational connection between the deprivation and some objectively determinable purpose. If no such connection exists, the substantive aspect of the protection will have been denied, however the purpose reason or cause must be a just one.<sup>144</sup> There are instances where a lawful deprivation would be arbitrary, for example, if it is not in accordance with fair due process.<sup>145</sup> Where a court orders detention of an individual, the detention would be arbitrary if it follows extraordinary procedures that operate unfairly on the detainee.<sup>146</sup>

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<sup>140</sup> Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras. 11 and 16.

<sup>141</sup> *De Lange v Smuts* 1998(3) SA 785 (CC), para 16.

<sup>142</sup> *De Lange v Smut,s*, para 159.

<sup>143</sup> *De Lange v Smuts*, para 20.

<sup>144</sup> *De Lange v Smuts*, para 23

<sup>145</sup> *Nel v Le Roux No and Others* 1996 (4) BCLR 592; 1996 (3) SA 562,para 12-14.

<sup>146</sup> *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and others* (CCT19/94,CCT 22/94)[1995](10) BCLR 1382;1995(4) SA 631, para 10.

### **3.6.1.2 How Protecting the Right to Freedom from Arbitrary Arrest and Detention can Protect and Accused's Right to Freedom from Torture**

The most obvious instances of arbitrary deprivation of liberty are secret or incommunicado detention and instances where the deprivation has no justification or basis in law. Providing safeguards against such instances is important and contributes to the protection of an accused's right against torture. Incommunicado detention facilitates torture and, depending on the circumstances, can constitute torture.<sup>147</sup> Its purpose is usually to facilitate and ultimately cover up torture and CIDT, used either as a method of obtaining information or silencing people.<sup>148</sup> Even in instances where a detainee has been criminally charged, the secrecy and insecurity caused by the denial of contact with the outside world violates an accused's right to the presumption of innocence and is conducive to confessions being obtained under torture and ill-treatment.<sup>149</sup>

Incommunicado detention renders safeguards contained in international law meaningless by effectively taking detainees outside the legal framework. By States implementing safeguards such as explicitly prohibiting secret detention and other forms of unofficial detention, will result in the protection of an accused's right to freedom from torture.<sup>150</sup> Secondly, protection from incommunicado detention and from torture can also be achieved by the implementation of saving detention records, the implementation of internal inspections, independent institutions and ensuring that they all have timeous access to all places where persons are deprived of their liberty for monitoring purposes.<sup>151</sup> Thirdly, independent institutions should promptly investigate secret detention and any allegations of such detentions and the status of all pending investigations into allegations of torture and ill-treatment of detainees should be made public.<sup>152</sup> Lastly, an important safeguard against arbitrary deprivation of liberty and the protection against torture are the implementation and practice of judicial oversight of detention.<sup>153</sup>

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<sup>147</sup> Amnesty International (2014) 53.

<sup>148</sup> *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development* A/HRC/13/42 (2010) 5.

<sup>149</sup> *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development* A/HRC/13/42 (2010) 2.

<sup>150</sup> *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development* A/HRC/13/42 (2010) 6.

<sup>151</sup> *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development* A/HRC/13/42 (2010) 6.

<sup>152</sup> *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development* A/HRC/13/42 (2010) 6.

<sup>153</sup> *Ferrer-Mazorra et al v United States* (9903) Inter-American Commission, Report 51/01 (2001) para 232.

Judicial oversight aims to prevent human rights violations, such as torture, CIDT or arbitrary detention and enforced disappearances.<sup>154</sup> Bringing an accused promptly before a judge guarantees the prevention of violations of detainee rights and safeguards the well-being of the detainee.

### **3.7 The Right to be Presumed Innocent**

The right to be presumed innocent is a norm of customary international law and applies at all times and in all circumstances.<sup>155</sup> Everyone has the right to be presumed innocent and to be treated in accordance with presumption until they are convicted according to the law<sup>156</sup>, and convicted in the course of the proceedings that meet at least the minimum prescribed requirements of fairness.

The presumption of innocence is a key element to the right to a fair trial and is an overarching principle. Due to the presumption, a person cannot be compelled to confess guilt or give evidence against him or herself, therefore imposing the burden of proving the charge on the prosecution. The presumption of innocence guarantees that no guilt can be presumed until the charge has been proven beyond a reasonable doubt by the prosecution, rather than the accused having to prove his innocence,<sup>157</sup> thus ensuring that the accused has the benefit of doubt. The principle of the presumption of innocence requires that persons accused of a criminal act must be treated in accordance with this principle. The presumption also places a duty on all public officials to refrain from prejudging the outcome of a trial.<sup>158</sup>

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<sup>154</sup> *Ferrer-Mazorra et al v United States* (2001), para 232.

<sup>155</sup> Human Rights Committee: General Comment 24, para 8, General Comment 29, para 11, 16, General Comment 32, para 6.

<sup>156</sup> See for example UN instruments such as See for example, Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 84(2) United Nations, Standard Minimum Rules for the Treatment of Prisoners, as well as regional instruments such as Article 26 of the, Inter-American Convention on Human Rights Article 2( c) , African Charter on the Rights and Welfare of the Child, Article 8(2) , American Convention on Human Rights,, Article 7(b) , African Charter on the Rights and Welfare of the Child.

<sup>157</sup> *Mwamba v. Zambia*, CCPR/C/98/D/1520/2006, (HRC).

<sup>158</sup> Human Rights Committee, General Comment 13 Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003) para 7.

### 3.7.1 The Right to be Presumed Innocent under the Constitution

S 35(3) (h) of the Constitution states that every person is presumed innocent and has the right to remain silent and not testify during a trial. Therefore, every person is regarded innocent until properly convicted in a court of law. Although the definition of the presumption of innocence as a constitutional right has a narrowly defined content, the efficiency of its operation as a right is dependent on a number of associated rights. Such as, the right to remain silent, at both the pre-trial<sup>159</sup> and, trial<sup>160</sup> phase of the proceedings, the privilege against self-incrimination at trial,<sup>161</sup> and the right not to make an admission or confession at the pre-trial stage.<sup>162</sup>

South African case law shows that the presumption of innocence is used to describe two components. The first component is a rule regulating the standard of proof and the second, is a policy directive that an accused must be treated as innocent at all stages of the criminal process and this is so irrespective of the probable outcome.<sup>163</sup>

The Constitutional Court has through numerous cases reiterated that the right to be presumed innocent requires the prosecution to prove the guilt of an accused person beyond a reasonable doubt.<sup>164</sup> The principle applies to those elements of the State's case that needs to be established in order to justify punishment to be faced by the accused.<sup>165</sup> The presumption of innocence is infringed whenever there is the possibility of a conviction despite the existence of reasonable doubt. The greatest application of the presumption of innocence has been in cases regarding reverse onus. The Constitutional Court considered the provision of the reverse onus for the first time in *S v Zuma*.<sup>166</sup> The issue was whether s217(1)(b)(ii) of the Criminal Procedure Act, which placed a burden on the accused to prove, in specified circumstances, the inadmissibility of a confession on a balance of probabilities, infringed on an accused's constitutional right to be presumed innocent. The Court held that the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt. Furthermore, where a statutory presumption requires the accused to prove or disprove an element of an offence or excuse on a balance of probabilities, such a presumption would create the possibility of conviction despite the existence of a reasonable doubt.

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<sup>159</sup> S 35(1)(a).

<sup>160</sup> S 35(3)(h).

<sup>161</sup> S 35(3)(j).

<sup>162</sup> S 35(1) (c).

<sup>163</sup> Schwikkard PJ 'Presumption of innocence: what is it?' (1998) 11 *S.Afri.J.Crim Just* 396.

<sup>164</sup> See, for example, *S v Zuma* 1995 (1) SACR 568 (CC); *S v Coetzee* 1997 (3) SA 527 (CC); *S v Bhulwana*; *S v Gwadiiso* 1995 (2) SACR 748 (CC); *S v Boesak* 2001 (1) SA 912 (CC) para 16.

<sup>165</sup> Schwikkard PJ (1998) 396.

<sup>166</sup> *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC).

Finding that the effect of the presumption contained in CPA s 217(1)(b)(ii) was to place a burden on the accused to prove a fact on a balance of probabilities, the court concluded that the section breached the constitutional right to be presumed innocent. The same approach was followed in subsequent cases with, for example, buying stolen property<sup>167</sup> and the holding company directors criminally liable for the offences committed by their companies.<sup>168</sup>

Although the Constitutional Court has made it clear that there may well be instances where a reverse onus provision is justified,<sup>169</sup> it has been remarkably consistent in refusing to find justification for an infringement of the presumption of innocence. The normative value accorded to the presumption as a fundamental right has been underlined by the Court's insistence that any justification for infringing the presumption of innocence would have to be clear, convincing and compelling.<sup>170</sup>

### **3.7.2 How does the right to be presumed innocent Protect an Accused's Right to Freedom from Torture**

A fundamental aspect to the presumption of innocence is the prohibition against self-incrimination and with the presumption of innocence reinforces the prohibition against torture and other CIDT, as well as the requirement that evidence acquired as a result of such mistreatment be excluded from the proceedings.<sup>171</sup>

Factors such as the treatment of pre-trial detainees and their conditions of detention, the prohibition of the imposition of judicial sanctions to compel an accused to testify must all be consistent with the presumption of innocence. The prohibition against self-incrimination requires a court to establish before a guilty plea is accepted that the plea is voluntary and that the accused has not been put under any kind of pressure to make such a plea.<sup>172</sup> Therefore judges have to ensure that only evidence that has been properly obtained is admissible and that those responsible for the upholding of the law are bound

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<sup>167</sup> *Minister of Defence v Von Benecke* (115/12)[2012] ZASCA 158 (15 November 2012).

<sup>168</sup> *S v Coetzee* 1997 (1) SACR 379 (CC).

<sup>169</sup> *S v Zuma* 1995 (1) SACR 568 (CC) para 41.

<sup>170</sup> See *S v Mbatha*; *S v Prinsloo* 1996 (1) SACR 371 (CC), para 10. *S v Ntsele* 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC), para 4.

<sup>171</sup> Article 14(3)(g) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(g) of the Migrant Workers Convention, Article 8(2)(g) and (3) of the American Convention, Article 16(6) of the Arab Charter, Principle 21 of the Body of Principles, Section N (6)(d) of the Principles on Fair Trial in Africa.

<sup>172</sup> *Jean Kambanda v The Prosecutor* ICTR-97-23-A (2000) para 61.

to it strictly. Judges also need to be alert at all times to the possibility that defendants and witnesses may have been subjected to torture.<sup>173</sup>

Prosecutors have a particular responsibility too. They have to ensure that all evidence gathered in the cause of the criminal investigation has been gathered so properly,<sup>174</sup> and when they come into the possession of evidence against suspects that is believed on reasonable grounds to have been obtained through torture, it should be rejected.<sup>175</sup> Treatment of pre-trial detainees must be consistent with the presumption of innocence and therefore, any decision to detain a person pending trial and the length of such detention must be consistent with the presumption of innocence.<sup>176</sup> An excessive period of pre-trial detention violates the presumption of innocence.<sup>177</sup>

Judicial sanctions such as solitary confinement used to compel an accused to testify should be prohibited. Physical and social segregation may be necessary in some instances during criminal investigations; however the practice of solitary confinement during pre-trial detention creates a de facto situation of psychological pressure that can influence detainees to make confessions or statements. When solitary confinement is used intentionally during pre-trial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article 1 of CAT.<sup>178</sup>

### **3.7.3 The Right to Remain Silent**

The right to remain silent can be described as the absence of a legal obligation to speak.<sup>179</sup> While there is no direct provision which relates to the right to remain silent in any of the major human rights instruments, the right of an accused to remain silent during police questioning or during trial is considered to be implied in two internationally protected rights, namely, the right to be presumed innocent and the right not to be compelled to testify against oneself or to confess guilt.<sup>180</sup> The right to silence is not a single right but consists of a cluster of procedural rules that protect an accused against

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<sup>173</sup> Council of Europe: Committee for the Prevention of Torture, *The CPT standards*, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010, para 45.

<sup>174</sup> *Foley C* (2003) 42.

<sup>175</sup> *Foley C* (2003) 42.

<sup>176</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 30.

<sup>177</sup> *Cagas et al v The Philippines* HRC, UN Doc. CCPR/C/73/D/788/1997 (2001) para 7.3..

<sup>178</sup> Interim Special Report of the Special Rapporteur of Human Rights Council on torture and Cruel, inhuman and degrading treatment A /66/268 para 73.

<sup>179</sup> *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) para 55.

<sup>180</sup> OSCE Office for Democratic Institutions and Human rights (ODHR) Legal digest of international fair trial rights (2012) 103.

self-incrimination,<sup>181</sup> therefore the right to choose whether or not to respond to questioning or to testify is guaranteed by the right not to be compelled to testify against oneself or confess guilt.

As mentioned above, the accused's right to remain silent is guaranteed at both the pre-trial stage, which is during the investigation stage, as well as during the trial stage. The protection of the right to remain silent during the pre-trial stage, for example during police or law enforcement questioning, is an important safeguard of the right not to be compelled to incriminate oneself. The safeguard is also important because it is at this stage that an accused is vulnerable to acts of torture in an attempt to get him to confess guilt.

Privilege against self-incrimination is expressly guaranteed under article 14(3)(g) of the ICCPR which makes it clear that a confession of guilt by an accused shall be valid only if it is made without coercion of any kind. The African Charter only indirectly provides for the right to a fair trial and none of the articles that provides for the right to a fair trial specifically contain provisions relating to silence. However, the African Commission Principle and Guidelines, although not binding on State Parties to the African Charter provides for the right to silence, including pre-trial silence.<sup>182</sup>

If there is an allegation from an accused that he has been compelled to make a statement or to confess guilt, the burden of proof is on the prosecution to show that the statements of the accused have been given voluntarily and therefore the standard of proof should in principle be consistent with the presumption of innocence, beyond a reasonable doubt.<sup>183</sup> In order to coerce an accused to confess or testify against himself, methods which violate an accused's right to freedom from torture and other cruel and inhuman treatment (CIDT) are used, it is therefore important that the law of a State requires that evidence provided by such methods or any other form of compulsion be excluded and considered unacceptable.<sup>184</sup>

### **3.7.4 The Right to Remain Silent during Trial Stage**

The most direct result of the prohibition against compulsion to testify against oneself is that an accused cannot be compelled to give testimony against him in court. The privilege against self-incrimination

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<sup>181</sup> Michael J & Emmerson B 'Current Topic: the right to silence' (1995) *European Human Rights Law review* 6.

<sup>182</sup> See sections M, N and O of the Principle guidelines.

<sup>183</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 41; HRC: *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) para 7.4, *Koreba v Belarus*, UN Doc. CCPR/C/100/D/1390/2005 (2010) para 7.3.

<sup>184</sup> Human Rights Committee, General Comment 13 Article 14 (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003), para 14.

means that the prosecution must prove its case against the accused without resorting to “[e]vidence obtained through methods of coercion or oppression in defiance of the will of the accused”<sup>185</sup>.

Protecting an accused person from improper compulsion by authorities is aimed at contributing to the avoidance of miscarriages of justice.<sup>186</sup> In limited circumstances, an accused might be legally compelled to answer questions, however this is only so as long as safeguards are in place to protect the integrity of the right to silence, such as the use of immunity. For the effectiveness of the right to silence, great care must be taken as to what inferences might or might not be drawn from the exercise of accused persons right to silence.<sup>187</sup> An important question to answer in the context of the right to a fair trial is whether a court is allowed to draw adverse inferences from an accused’s decision to remain silent. The Principles on Fair Trial in Africa<sup>188</sup> expressly prohibit the drawing of adverse inferences from an accused’s exercise of remaining silent at trial. The drawing of an adverse inference against an accused for remaining silent would be a violation of the accused’s right to be presumed innocent and his right against self-incrimination, if a conviction was based solely or mainly on the accused’s silence.<sup>189</sup>

### **3.7.5 The Right to Remain Silent under the Constitution**

The right to remain silent under the South African Constitution is a right related to the presumption of innocence and is firmly rooted in both the common law and statute.<sup>190</sup> The common law principle to the right to silence is that no person can be compelled to give evidence that incriminates him either before or during the trial.<sup>191</sup> The Constitution protects an accused’s right to remain silent under both the pre-trial procedure and the trial procedure. The objective of the right to silence during trial is to secure a fair trial and the protection of the right to pre-trial silence seeks to expel any compulsion to speak.<sup>192</sup> Under the South African Constitutional setting, the pre-trial silence of an accused can never warrant the drawing of an inference of guilt, such an inference would undermine both the right to remain silent and the right to be presumed innocent.<sup>193</sup>

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<sup>185</sup> *Saunders v the United Kingdom* [1996] ECHR 65 para 68; *Heaney and McGuinness v Ireland* [2000] ECHR 684 paras 54–55; and *Allan v the United Kingdom* [2002] ECHR 702 para 44.

<sup>186</sup> *Saunders v the United Kingdom* [1996] ECHR 65 para 68.

<sup>187</sup> OSCE Office For Democratic Institutions and Human rights (ODHR) Legal digest of international fair trial rights (2012) 99.

<sup>188</sup> Section N(6)(d)(ii) of the Principles on Fair Trial in Africa.

<sup>189</sup> Amnesty International (2014) 131.

<sup>190</sup> *Osman and another v Attorney- General TVL* 1998 4 SA 1224 (CC).

<sup>191</sup> *R v Camane and others* 1925 AD 570,575).

<sup>192</sup> *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) para 55.

<sup>193</sup> *S v Thebus*, para 58.

South African courts have made a clear distinction between pre-trial silence<sup>194</sup> and the right to silence at trial.<sup>195</sup> The right to remain silent becomes operative from the moment of arrest.<sup>196</sup>

S 35(1)(a) of the Constitution states that everyone who is arrested has the right to remain silent, in the case of *S v Brown*<sup>197</sup> the High Court held that although the right to remain silent was recognised at common law, its constitutional status required a change in emphasis in its application and that the right to silence calls for even stricter enforcement and when needed, protection to its Constitutional status. At Common law the principle is that accused persons have the right to remain silent during pre-trial investigations and this includes the right not to answer questions put to them by the police. However, despite this right, police officials are still entitled to question the individual during the investigation of a crime.<sup>198</sup>

In terms of s 35 (1)(b), an arrested person must be informed promptly of his right to remain silent and of the consequences of not remaining silent. He must therefore also be informed that what he says may later be used as evidence against him. The idea is that if the accused, after being informed decides to make a statement, the decision will be an informed one. If the accused is not properly informed of his right and he makes a statement, this evidence may be excluded from the trial in terms of the Constitution<sup>199</sup>. The purpose of this right is to protect the arrested person against being tempted into making unfair, self-incriminating statements.<sup>200</sup> The courts have ruled where an arrested person makes a statement and the police have not waited for the arrested person's attorney to be present, such a statement would be inadmissible because the mere presence of the arrested person's attorney protects his right to remain silent.<sup>201</sup>

In *Osman and Another v Attorney General* the Constitutional court held that that the right to silence has many facets.<sup>202</sup> The right to silence consists of a different group of immunities that differ in nature. These facets include, a general immunity, possessed by all from being compelled on pain of punishment to answer questions posed by other persons or bodies. Secondly, a general immunity, possessed by all from being compelled on pain of punishment to answer questions which may

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<sup>194</sup> S 35 (1) (a).

<sup>195</sup> S 35(3) (h).

<sup>196</sup> *S v Agnew* 1996(2) SACR 535 (C).

<sup>197</sup> *S v Brown* 1996 2 SACR 49 (NC).

<sup>198</sup> *S v Van der Merwe* 1997(10) BCLR 1470(O).

<sup>199</sup> S3 5(5).

<sup>200</sup> *S v Nombewu* 1996(12) BCLR 1635 (E).

<sup>201</sup> *S v Agnew* 1996(2) SACR 535 (C).

<sup>202</sup> *Osman and another v Attorney- General TVL* 1998 4 SA 1224(CC) para 18.

incriminate them. Thirdly, a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority from being compelled on pain of punishment to answer questions of any kind.

Fourthly, there is a specific immunity possessed by accused persons undergoing trial from being compelled to give evidence, and from being compelled to answer questions put to them in the dock and lastly a specific immunity possessed by accused persons undergoing trial, from having adverse comment made on any failure to answer questions before trial or to give evidence at the trial. Therefore the South African Constitution provides that an arrested person may not be compelled to make any confession or admission that could be used in evidence against him or her and torture is unacceptable.<sup>203</sup>

An accused's right to remain silent during trial proceedings is guaranteed under s 35(3)(h) of the Constitution. Although this is the case, there is still a debate at international and national levels on whether an adverse inference can be drawn from an accused exercising his right to remain silent at trial.<sup>204</sup> The position under South African law remains unclear. However, authority does exist for the proposition that an accused's refusal to testify could be a factor in assessing guilt in circumstances when the prosecution has established a prima facie case.<sup>205</sup>

The Constitutional Court has not expressly ruled whether drawing an adverse inferences would pass constitutional muster, however, it did in the case of *S v Thebus*, state that '[i]f there is evidence that requires a response and no response is forth coming...then the Court may be justified in concluding that evidence is sufficient in the absence of an explanation to prove guilt of the accused'.<sup>206</sup>

### **3.7.6 How does the Right to Remain Silent Protect an Accused's Right to Freedom from Torture?**

It does so by imposing an obligation on prosecutors and law enforcement officials to ensure that evidence in the course of a criminal investigation has been properly obtained and that the fundamental right of the accused not to be tortured or ill-treated has not been violated in the process.<sup>207</sup> Because of this obligation prosecutors are required to inform police officials that evidence placed before them by

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<sup>203</sup> S 35(1)(c).

<sup>204</sup> See Van Dijkhorst K 'The Right to Silence: Is the Game Worth the Candle?' (2001) 118 *SALJ* 26.

<sup>205</sup> *S v Mthetwa* 1972 (3) SA 766 (A); *S v Snyman* 1968 (2) SA 582 (A); *S v Letsoko* 1964 (4) SA 768 (A); *R v Ismail* 1952 (1) SA 204 (A).

<sup>206</sup> *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC), para 58.

<sup>207</sup> *Foley C* (2003) 42.

the officials has to be obtained free of any coercion if it is to be admissible in court.<sup>208</sup> This should therefore deter law enforcement officials from doing so, and torturing or coercing a confession from the accused, in order to be able to secure a conviction.

### 3.8 The Right to Legal Assistance

Everyone who is arrested or detained and everyone facing criminal charges whether detained or not, have the right to the assistance of a legal counsel.<sup>209</sup> The right to the assistance of a legal counsel is guaranteed at both the pre-trial and trial proceedings, and includes rights to access to a lawyer, time to consult with a lawyer and to do so in confidence and to have a lawyer present during questioning at pre-trial proceedings. The pre-trial proceeding which guarantees an accused person's right to the assistance of a lawyer are set out in a range of treaty and non-treaty standards.<sup>210</sup> International and regional human rights bodies have clarified that the right to legal assistance is a requirement for the meaningful exercise of the right to a fair trial.<sup>211</sup>

At the pre-trial proceedings, the right to legal representation has three legs to it. First, an accused has the right to access to a lawyer without unreasonable delay. This enables an accused to protect their rights and to begin the preparation for their defence. This leg is of particular importance to an accused because it enables them to challenge their detention and therefore serves as a safeguard against torture and other ill-treatment, such as coerced "confessions", and other human rights violations like enforced disappearances.<sup>212</sup> Secondly, an accused person has the right to have the lawyer of his choice or the one appointed to him by court present during questioning. The right to legal representation becomes operative from the very start of a criminal investigation and it is of importance that an accused has access to his legal representative as soon as he is deprived of their liberty.<sup>213</sup> The legal representative

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<sup>208</sup> Foley C (2003) 43.

<sup>209</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 para 34.

<sup>210</sup> Article 17(2)(d) of the Convention on Enforced Disappearance, see also Article 37(d) of the Convention on the Rights of the Child, Article 16(4) of the Arab Charter, Principle 1 of the Basic Principles on the Role of Lawyers, Principle 17 of the Body of Principles, Principle 3 and Guideline 4 of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Sections A(2)(f) and M(2)(f) of the Principles on Fair Trial in Africa.

<sup>211</sup> HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) para 27, see also Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) para 11; *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (250/2002), African Commission, 17th Annual Report (2003) para 55; *Barreto Leiva v Venezuela*, *Inter-American Court* (2009) para 62; *Salduz v Turkey* (36391/02), European Court Grand Chamber (2008) paras 54-55.

<sup>212</sup> UN Special Rapporteur on torture, UN Doc. E/CN.4/1992/17 (1991) para 284; *Salduz v Turkey* (36391/02), European Court Grand Chamber (2008) para 54.

<sup>213</sup> Human Rights Council *Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers* UN Doc. A/HRC/RES/13/19 (2010) para 6, Human Rights Committee *Concluding Observations: Georgia*, UN Doc. CCPR/C/79/Add.75 (1997) para 27, Committee Against Torture: *Concluding Observations: Latvia*, UN Doc. CAT/C/CR/31/3 (2004) para 6(h), 7(c); *Dayanan v Turkey* (7377/03), European Court

should be there to assist the accused during police questioning and this is applicable even if the accused chose to exercise their right to remain silent.<sup>214</sup>

Lastly, an accused has the right to be allowed time to consult with his lawyer in confidence.<sup>215</sup> The confidentiality of communications and consultations between an attorney and the accused has to be respected at all times<sup>216</sup> and States need to ensure that an accused can consult and communicate with his legal representative without delay, interception or censorship.<sup>217</sup>

It is important that the right to access legal assistance be effectively available to an accused person, should it not be made available it will result in a violation of article 14(3) of the ICCPR,<sup>218</sup> and a denial of the right to a fair trial.<sup>219</sup> The Inter-American Court of Human Rights found that article 8(2)(d) of the American Convention had been violated, where the victim had been held incommunicado for 36 days, during which time he was unable to consult any lawyer.

As discussed above, the right to legal representation is a primary means of protecting the human rights of an accused<sup>220</sup>, and many of the guarantees found under the pre-trial stage are available to the accused at the trial stage.

### 3.8.1 The Right to Legal Assistance as Protected by the Constitution

The right to legal representation is guaranteed under s 35(2)(b) regarding pre-trial proceedings and s 35(3)(f) of the Constitution,<sup>221</sup> regarding trial proceedings. S 35(2)(b) of the Constitution states that: '[e]veryone who is detained, including every sentenced prisoner, has the right, to be informed promptly of the reason for being detained; to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;' s 35(3) states that an accused's right to a fair trial includes the right to

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(2009) para 30-33.

<sup>214</sup> United Nations Human Rights Council: *Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers* A/HRC/RES/13/19, para 6; Human Rights Committee Concluding Observations: Japan, UN Doc. CCPR/C/JPN/CO/5 (2008) para 18, para 11.

<sup>215</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007). Para 32 -34.

<sup>216</sup> Principle 22 of the Basic Principles on the Role of Lawyers, Section I(c) of the Principles on Fair Trial in Africa.

<sup>217</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007). para 10.

<sup>218</sup> See amongst many cases, *Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay*, Communication No. R. 2/8, U.N. Doc. Supp. No. 40 (A/35/40) at 111 (1980), para 16; and *Miguel Angel Millan Sequeira v. Uruguay*, Communication No. R. 1/6, U.N. Doc. Supp. No. 40 (A/35/40) at 127 (1980) para 16.

<sup>219</sup> *Al-Moayad v Germany* (35865/03), (inadmissibility) Decision of the European Court (2007) para 101, *Othman v United Kingdom* (8139/09), European Court (2012) para 259.

<sup>220</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 10.

<sup>221</sup> Act 108 of 1996.

choose, and be represented by, a legal practitioner and to be informed of this right promptly; .<sup>222</sup> S 35(3) further states that an accused person has the right ‘[t]o have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;’.

What this right entails, is that an accused person has the right to choose a legal representative, and needs to be given the opportunity to choose one who will represent him. This right is especially important because there needs to be trust and confidence in the relationship between an accused and his legal representative.<sup>223</sup> An accused’s right to choose his legal representative may not be limited by a judicial body by assigning a lawyer to represent an individual if a qualified lawyer of the accused’s choice is available.<sup>224</sup>

For an accused to be afforded this guarantee, it is required that he be given a fair and reasonable opportunity to obtain legal representation.<sup>225</sup> However, what would constitute a reasonable opportunity is determined by the circumstances of each case. How this is determined is based on various factors such as, the gravity of the charges, the availability of a sufficiently experienced practitioner and lastly, the amount of preparation needed and the complexity of the case.<sup>226</sup> Secondly, an accused has the right to consult with the legal representative and has the right to be informed of this right promptly.<sup>227</sup> An accused’s right to have a legal practitioner assigned to him, by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly must be regarded as operating independently from the right to counsel under s 35(3)(f). This is because of the independent entrenchment of information rights under both s 35(3)(f) and (g).<sup>228</sup> An accused does however need to be informed of his rights under s 35(3)(f) and (g) and failure to do so would render the trial unfair.<sup>229</sup>

Having a legal representative appointed at State expense does not entitle the accused to choose the representative that the State is to appoint.<sup>230</sup> However, the absence of such right does not mean that

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<sup>222</sup> S 35(3)(f).

<sup>223</sup> Article 14(3)(d) of the ICCPR, Article 7 of the African Charter, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention.

<sup>224</sup> Principle 9 of the UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187.

<sup>225</sup> *S & Others v Swanepoel* 2000 (7) BCLR 818 (O).

<sup>226</sup> *K v The Regional Court Magistrate NO & Others* 1996 (1) SACR 434 (E).

<sup>227</sup> 35(3)(f).

<sup>228</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>229</sup> *S v Gouwe* 1995 (8) BCLR 968 (B)

<sup>230</sup> *S v Du Plessis* 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

such an accommodation is not required.<sup>231</sup> Such a requirement should not be seen as granting the accused the right to choose the representative to be appointed, rather as part of an assessment whether substantial injustice would result.

In *S v Manguanyana*,<sup>232</sup> the court held that the refusal to allow an accused to reject an attorney assigned to him by the Legal Aid Board amounted to a denial of the accused's rights and that "It is so that an accused . . . who has been assigned a legal representative at state expense . . . is generally speaking to accept the practitioner assigned to him. . . . Circumstances may arise where the accused person is quite justified in seeking to dispense with the services of the practitioner assigned."<sup>233</sup>

### **3.8.2 How does the Right to Legal Assistance Protect the Accused from Torture**

From a preventative point, prompt access to legal assistance is an important safeguard against torture and ill-treatment because such violations happen in secret in almost all cases.<sup>234</sup> The presence of a lawyer is especially important during the period which immediately follows the deprivation of liberty. It is during this period that the risk of intimidation and physical ill-treatment is at its greatest.<sup>235</sup> Ensuring that an accused's right to access to legal assistance is respected especially during the immediate period following his arrest and during his interrogation can significantly reduce the risk of torture. Having a lawyer present during police questioning serves at least two purposes: it deters the police from resorting to torture and ill-treatment; and is key in assisting an accused in exercising his right, including access to complaint mechanisms in situations of torture.<sup>236</sup> Preventative monitoring bodies such as the European Committee for the Prevention of Torture and the UN treaty bodies, such as, the Human Rights Committee and the Committee Against Torture have all recognised the right to legal assistance as an essential safeguard for the prevention of torture.<sup>237</sup>

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<sup>231</sup> See *S v Solo* 1995 (5) BCLR 587 (E).

<sup>232</sup> *S v Manguanyana* 1996 (2) SACR 283 (E)

<sup>233</sup> *S v Manguanyana* 1996 (2) SACR 283 (E) 287.

<sup>234</sup> Association for the prevention of torture "legal safeguards to prevent torture, the right of access to lawyer for persons deprived of liberty." (2010) 1.

<sup>235</sup> CPT Standards Document – extracts of "substantive" sections of CPT reports (2009) (2009) 8 available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf> (accessed on 20 October 2014).

<sup>236</sup> Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, (CAT/OP/MDV/1 26 February 2009) at para 62.

<sup>237</sup> Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 11 and Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007) at para 13.

### 3.9 Conclusion

The above chapter has discussed how the protection of fair trial rights of an accused contributes and protects an accused's right to freedom from torture. The author has highlighted how a State is required by international human rights standards to adhere to certain key universal principles that impose a certain level of discipline to protect the right to freedom from torture.

There are different fundamental rights associated with the protection of an accused's rights. However, as discussed in chapter 3, not all of them are relevant to the protection of an accused's right to freedom from torture.

Those that are relevant have been highlighted and the safeguards they provide in protecting an accused's right to freedom from torture have been discussed. Furthermore, this chapter has shown that in terms of fundamental rights associated with the protection afforded to an accused in the criminal process under South African domestic legislation, that although every accused is entitled to the rights discussed, these rights can be limited in certain instances in terms of s 36 of the Constitution.<sup>238</sup> An accused's right to a fair trial under both international and South African law is an essential right and is needed in protecting an accused's right to freedom from torture and that many of these are interrelated and support each other in protecting an accused's right to freedom from torture.

The next chapter looks at the obligations on States Parties under the United Nations Convention Against Torture, including South Africa and how South Africa has met its obligations in the criminalisation and prevention of torture in relation to its Prevention and Combating of Torture Act.

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<sup>238</sup> Constitution of the Republic of South Africa, 1996.

## CHAPTER 4

### CRIMINALISATION OF TORTURE IN SOUTH AFRICA:

#### 4.1 The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and South Africa's Obligations as a State Party to it

##### 4.1.1 Introduction

The aim of this chapter is to serve as a comparative study and to investigate South Africa's legal position relating to torture and cruel, inhuman and degrading, treatment or punishment (CIDT) under the UNCAT legal framework and State Parties obligation under it. The discussion will consist of an examination of UNCAT's five main objectives such as, the prevention of torture<sup>1</sup>, secondly, the implementation of the *non-refoulement* principle<sup>2</sup>, thirdly, the application of the exclusionary rule,<sup>3</sup> fourthly, the criminalization of torture<sup>4</sup> and lastly, providing redress to victims<sup>5</sup> and how it relates to South Africa's legal framework, specifically the Prevention and Combating of Torture Act<sup>6</sup> (Torture Act) in relation to its obligations under UNCAT.

##### 4.1.2 The Criminalisation of Torture

The criminalisation of torture under UNCAT can be regarded as the first step towards the successful prevention and combating of torture. States Parties to the Convention have an obligation under article 4(1) to ensure that all acts of torture, including attempts to commit torture, acts constituting complicity or participation in torture are acknowledged as offences under its criminal law. Furthermore, such offences must be punishable by appropriate penalties.<sup>7</sup> The criminalisation of torture fulfils two important functions. First, it fulfils a deterring function aimed at the prevention of torture.<sup>8</sup> Secondly, it fulfils the function of prosecution and punishment of the perpetrator of torture.<sup>9</sup>

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<sup>1</sup> Article 2.

<sup>2</sup> Article 3.

<sup>3</sup> Article 15.

<sup>4</sup> Article 4.

<sup>5</sup> Article 14.

<sup>6</sup> The Prevention and Combating of Torture of Persons Act No. 13 of 2013.

<sup>7</sup> Article 4(2).

<sup>8</sup> The Annual Report of the Committee Against Torture (2008) A/64/44 para 52 (10).

<sup>9</sup> Human Rights Watch, *Struggling to Survive*, 29 September 2004, paragraph VI International Legal Standards, available at

Introducing distinct offences of torture under the criminal law of a State Party, is the most effective way of implementing the obligations under article 4 of UNCAT.<sup>10</sup> It is of importance that tortures as a crime under the national law of a State Party includes the elements of the crime of torture as embodied in article 1(1) of UNCAT.<sup>11</sup> Under the national law of the State Party, conduct such as all forms of participatory actions, such as complicity, superior orders, instructions, instigation, acquiescence, active and passive concealment should be expressly recognised as a criminal offence.<sup>12</sup> In addition to introducing distinct offences of torture, another step which is important to the criminalisation of torture, is for States to adopt the necessary measures to ensure the immediate and impartial investigation of complaints of torture as envisioned by article 12 of UNCAT<sup>13</sup> The obligation created under article 12 of UNCAT is to provide for a prompt and impartial investigation where there are reasonable grounds to believe that torture has been committed, to make the results of these investigations public and prosecute the offenders before a competent, independent and impartial tribunal and to provide for the appropriate implementation of sanctions.<sup>14</sup> The creation and implementation of an effective investigative system as envisioned by article 12 of UNCAT plays a primary role in the prohibition and control of the occurrences of torture.<sup>15</sup>

Although South Africa was a party to UNCAT, for many years it failed to meet its obligation of criminalising torture as set out in article 4 of UNCAT and defining acts of torture. Offences, which amounted to torture or CIDT were treated as either assault and or assault with the intent to do grievous bodily harm and or indecent assault and or attempted murder.<sup>16</sup> The Constitution was the primary contributor to South Africa's legal framework pertaining to torture and other forms of CIDT.

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<http://www.hrw.org/en/node/11975/section/7> (accessed on 22 October 2014).

<sup>10</sup> Marchesi A 'The Legal Contours of the Crime of Torture: Implementing the UN Convention Definition of Torture in National Criminal Law (with reference to the special case of Italy)' (2008) (6) 2 *Journal of International Criminal Justice* 195 – 214.

<sup>11</sup> Rodley N & Pollard M 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) *European Human Rights Law Reports* 122- 3.

<sup>12</sup> Rodley N & Pollard M (2006) 122- 3.

<sup>13</sup> Committee Against Torture, Concluding Observations, Nicaragua, CAT/C/NIC/CO/1 10 June 2009 para 11.

<sup>14</sup> World Organisation Against Torture "India: No proper investigation into allegations of torture and ill-treatment by BSF officers, Case No. IND 100809, Torture and ill-treatment/ Lack of a proper investigation/ Harassment" available at <http://www.omct.org/urgent-campaigns/urgent-interventions/india/2009/08/d20201> (accessed 23 October 2014).

<sup>15</sup> Amnesty International Public Statement "Spain: Amnesty International calls for a thorough independent and impartial investigation to determine whether human rights were violated during the arrest of Igor Portu" (2008) available at <http://www.amnesty.org/en/library/asset/EUR41/001/2008/en/d8804f1a-3482-4dfc-a039-5ef7e6b0d4dd/eur410012008eng.pdf> (accessed on 23 October 2014).

<sup>16</sup> Committee against Torture *South Africa's initial report to the Committee against Torture*, CAT/ C/52/Add.3. (2005) para 68.

However, this all changed when South Africa enacted its Prevention of Combating and Torture of Persons Act (the Torture Act).<sup>17</sup> Under this Act, acts constituting torture are defined under s 3 which provides that:

“[...a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person –

(a) for such purposes as to –

- (i) obtain information or a confession from him or her or any other person;
- (ii) punish him or her for an act he or her any other person has committed, is suspected of having committed or is planning to commit; or
- (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The definition of torture under s 3 of the Torture Act exhibits three essential factors found under article 1(1) of UNCAT, which need to be present for an act to constitute torture. The three essential factors are namely, the infliction of severe mental or physical pain or suffering. By or with the consent or acquiescence of state authorities and lastly, the act has to be for a specific purpose, such as gathering information or a confession, to punish or intimidate. The inclusion of the clause “...inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in official capacity...” in s 3 contributes to the strength of the definition of torture under South Africa’s domestic law. This clause covers a range of important scenarios, such as the scenario of private guards perpetrating torture and officials being aware or warned that torture is being perpetrated but refusing to act against it.<sup>18</sup>

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<sup>17</sup> Act No. 13 of 2013.

<sup>18</sup> Muntingh L & Ballard C *Submissions on the Prevention and Combating of torture of persons Bill* [B21 of 2012] (2012 ) 5.

Its inclusion is also especially relevant and important to South Africa in light of the fact that South Africa has one of the largest private security industries in the world and issues of the accountability of these actors have often been raised.<sup>19</sup> Furthermore, its inclusion also provides for the liability of public officials who knew or should have known that torture would likely be committed.<sup>20</sup>

The criminalisation of the actions of a person who commits torture<sup>21</sup>, attempts to commit torture,<sup>22</sup> or incites, instigates, commands or procures any person to commit torture,<sup>23</sup> is provided for under s 4 of the Torture Act and is liable to imprisonment, which includes life imprisonment, if found guilty.<sup>24</sup> As discussed above, one of South Africa's obligations under article 4 is to ensure that all acts of torture are offences, which are punishable by appropriate penalties, which take into account the grave nature of the acts.<sup>25</sup> To establish whether South Africa has met this obligation, one needs to establish what constitutes as appropriate penalties, which take into account the gravity of the acts. International standards and practices indicate that the penalty should reflect the gravity of the offence and that the gravity of the offence may be regarded as the litmus test in the imposition of an appropriate sentence.<sup>26</sup> Therefore, the more heinous the crime, the higher the sentence to be imposed<sup>27</sup> and matching the penalty to the gravity of the criminal conduct, should be the overriding obligation in determining sentence.<sup>28</sup>

When determining sentencing for an offence of torture under the Torture Act, s 5 of the act would be the governing section. It provides for factors to be considered when a court determines to impose sentence in respect of an offence of torture.

#### **4.1.3 The Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and the Absolute Prohibition of Torture**

Article 2(1) of UNCAT places a duty on States Parties to the Convention to take effective legislative, administrative, judicial or other measures in prevention of torture in any territory under its jurisdiction.

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<sup>19</sup> South African Human Rights Commission *Submission on the Prevention and Combating of torture of persons Bill*, (July 2012 )13.

<sup>20</sup> South African Human Rights (July 2012 )13.

<sup>21</sup> S 4(1) (a).

<sup>22</sup> S 4(1) (b).

<sup>23</sup> S 4(1) (c).

<sup>24</sup> S 4 (1) (c ).

<sup>25</sup> Article 4 (2).

<sup>26</sup> *Prosecutor v. Dragan Nikolic*, (Appeals Chamber), ICTY, Case No. IT-94-2 (2005) para. 18.

<sup>27</sup> *Prosecutor v. Kamuhanda*, (Trial Chamber), ICTR Case No. ICTR-95-54, Judgment (2004) paras. 760, 765.

<sup>28</sup> *Prosecutor v. Predrag Banovic*, (Trial Chamber), ICTY, Case No. IT-02-65 (2003) para. 36.

Furthermore, article 2(2) and (3) excludes all exceptional circumstances in justification of torture. This includes any order from a superior. States Parties are advised to always interpret treaties in accordance with the ordinary meaning of their terms as well as to interpret these terms in good faith and to give effect to the goals and objectives.<sup>29</sup> The ordinary meaning of the duty imposed by article 2 of UNCAT, is to give effect to law reform on all levels, so as to prohibit and prevent torture in the widest sense.<sup>30</sup> Therefore, providing for the rights and freedoms protected by UNCAT in favour of every person within their jurisdiction, if these rights and freedoms have not been provided for in the national law.<sup>31</sup> A States Party's commitment to UNCAT is an indication of consent to the full incorporation of the prohibition against torture and CIDT within the State's legal system.<sup>32</sup> Additionally, as a preventative measure to proper and adequate punishment in its national law, the State Party should provide effective methods of recourse under its civil law.<sup>33</sup> In addition to the duties of a State Party under article 2, Article 10(1) places an obligation on States parties to ensure that all its public functionaries, which includes 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.<sup>34</sup> Thus, as stated by Committee Against Torture:

“[T]he Sate 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 or 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.

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<sup>29</sup> Article 3(1) of the Vienna Convention on the Law of Treaties 1969.

<sup>30</sup> Carver R “Does torture prohibition work?” available on [http://www.apr.ch/content/files/apr%20institutional/Carver%20research%20project%20stage%201\\_report.pdf](http://www.apr.ch/content/files/apr%20institutional/Carver%20research%20project%20stage%201_report.pdf) (accessed on 25 October 2015).

<sup>31</sup> Carver R “Does torture prohibition work?” available on [http://www.apr.ch/content/files/apr%20institutional/Carver%20research%20project%20stage%201\\_report.pdf](http://www.apr.ch/content/files/apr%20institutional/Carver%20research%20project%20stage%201_report.pdf) (accessed on 25 October 2015).

<sup>32</sup> 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 para 4.

<sup>33</sup> 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 para 4.

<sup>34</sup> Article 10(1).

In addition, the State Party should continue to assess the effectiveness and impact of all its training programs on the prevention and protection from torture and ill-treatment.<sup>35</sup>

Article 11 of UNCAT places an obligation on States Parties to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for custody and treatment of persons subjected to any deprivation of liberty, whether by arrest, detention or imprisonment under its jurisdiction, with a view of preventing any cases of torture.

Under the Torture Act, s 9 illustrates South Africa's attempt to meet and address its obligations under article 2, in addition 10(1) and 11 of UNCAT. However, s 9 takes a general approach and fails to address the aspects of torture prevention as required under UNCAT. First, s 9 does not address South Africa's obligations of ensuring that it has taken administrative, legislative or judicial measures. There are no provisions under s 9 which give effect to article 11 of UNCAT or indicate that State institutions, government departments and private sector facilities, should create, maintain and continuously update policies on torture prevention<sup>36</sup>, especially regarding circumstances where people have been deprived of their liberty. S 9 does not impose an obligation on these State institutions to ensure that claims of torture or incidents of torture should be reported to relevant oversight bodies, such as Parliament.<sup>37</sup> Secondly, there is no obligation that policies designed to ensure humane conditions need to and will be maintained.

#### **4.1.4 Extra-territorial Jurisdiction**

Extra-territorial jurisdiction, is an obligation created under article 5 of UNCAT. Article 5 concerns the obligation on States Parties to the Convention to establish universal jurisdiction over the crime of torture in cases where the alleged perpetrator has not been extradited to face torture charges in another State.<sup>38</sup> States therefore have a duty under article 5 of UNCAT to, establish extra-territorial jurisdiction in three ways.

First, the State Party has to exercise jurisdiction where an offence has been committed in any territory under its jurisdiction. Such territory includes torture committed on board a ship or aircraft registered in the State Party, torture committed in its territorial sea or in the airspace above its territory.<sup>39</sup>

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<sup>35</sup> *Committee against Torture, Concluding Observations, New Zealand*, CAT/C/NZL/CO/5(2009) para, 7.

<sup>36</sup> Muntingh L & Ballard C [B21 of 2012] (2012) 9.

<sup>37</sup> Muntingh L & Ballard C [B21 of 2012] (2012) 17.

<sup>38</sup> Wendland L *A Handbook on State Obligations under the UN Convention against Torture* (2002) 16.

<sup>39</sup> Wendland L (2002) 37.

Secondly, jurisdiction also exists where the offence is committed anywhere in the world if the alleged perpetrator is a subject of the State.<sup>40</sup> Lastly, jurisdiction is also established, where the victim of torture is a national of the State Party and the State party may establish jurisdiction of the crime of torture against its national if it deems this to be appropriate.<sup>41</sup>

S 6 of the Torture Act allows for South African courts to have jurisdiction over acts that constitute torture even if they are committed outside the borders of South Africa. South Africa's jurisdiction as provided for in S 9 exists even if these offences are not considered to be an offence at the place of its commission. However this jurisdiction only applies if of one of three circumstances or factors are present. First, if the alleged perpetrator is a South African citizen<sup>42</sup> or even ordinarily resident in South Africa;<sup>43</sup> if the alleged perpetrator is found in a territory under South African jurisdiction, such as on board a vessel, a ship, a fixed platform or aircraft that is registered in South Africa or required to be registered by South Africa;<sup>44</sup> and if the alleged offender has committed acts of torture against a South African citizen or against a person ordinarily resident in South Africa<sup>45</sup>.

The above discussion shows that South Africa has fulfilled most of its obligations under article 5 of UNCAT. However, s 9 does not indicate whether it has jurisdiction over acts of committed in any territory over which it has factual control, such as on board ships, vessels, aircraft as obligated under article 5(1)(a) of UNCAT and this therefore creates a shortfall and creates a gap.

#### **4.1.5 Implementation of the 'Non-refoulement' Principle**

Article 3 of UNCAT prohibits the expulsion of individuals to a State where there are substantial grounds for believing that they would be in danger of being subjected to torture.<sup>46</sup> This prohibition forms an essential part of the general and absolute prohibition against torture and the duty to prevent such conduct.<sup>47</sup>

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<sup>40</sup> Article 5(1)(b).

<sup>41</sup> Article 5(1)(c).

<sup>42</sup> S 6(1)(a).

<sup>43</sup> S 6(1)(b).

<sup>44</sup> S 6(1)(c).

<sup>45</sup> S 6(1)(d).

<sup>46</sup> Wendland L (2002) 33.

<sup>47</sup> Feller E Turk V & Nicholson F *Refugee Protection in International Law: The UNHCR's global consultations on international protection* (2005) 158.

For this principle to find application there are factors that would need to exist, such as, the existence of a pattern of consistent, flagrant or mass violations human rights, however, these factors do not constitute a closed list.<sup>48</sup>

The Committee against Torture is of the view that the principle of non-refoulement is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture.<sup>49</sup> In its General Comment 20, the HRC states that under certain circumstances, refoulement can constitute torture or CIDT.<sup>50</sup> Therefore, it is not the act of expulsion that constitutes torture or CIDT but the effects and implications thereof that is material in determining whether the prohibition against non-refoulement has been violated and constitutes torture or CIDT.<sup>51</sup> The African Commission, based on a broad interpretation of the definition of torture and ill-treatment, held in *Modise v Botswana*, that the deportation of the complainant and its effects constituted inhuman and degrading treatment and offended his dignity and contrary to the African Charter.<sup>52</sup>

S 8 of the Torture Act provides for the protection of expulsion, return or extradition of an individual to another country where there is a believe that substantial grounds for believing that the person concerned would be in danger of being subjected to torture exists.

S 8 includes the non-surrender of a subject of an extradition request, if the subject is at risk of being executed or of being subjected to torture or CIDT.<sup>53</sup> Therefore, if any official without the required assurance, hands over anyone from within South Africa or under the control of South African officials to another State to stand trial or for any other purpose, with the knowledge that such person runs the risk of a violation of his right to life<sup>54</sup>, right to human dignity<sup>55</sup> and right not to be punished in a cruel, inhuman or degrading way<sup>56</sup> violates the protection guaranteed under s 8 of the Torture Act.

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<sup>48</sup> Wendland L (2002) 35.

<sup>49</sup> See *Agiza v Sweden* (2005) CAT Communication No 233/2003, CAT/C/34/D/233/2003, para 11.5; *Tapia Paez v Sweden*, CAT Communication No 30/1996, CAT/C/18/D/39/1996, para 14.5. See also 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 para 31.

<sup>50</sup> CPR General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), 10 March 1992, para 9.

<sup>51</sup> Feller E Turk V & Nicholson F (2005) 186.

<sup>52</sup> *Modise v Botswana*, African Commission Communication No. 79/1993, (2000), para 32.

<sup>53</sup> See *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC); *Tsebe and Another v Minister of Home Affairs and Others*, *Phale v Minister of Home Affairs and Others* [2012] 1 All SA 83 (GSJ).

<sup>54</sup> S 11.

<sup>55</sup> S 10.

<sup>56</sup> *Tsebe and Another v Minister of Home Affairs and Others*, *Phale v Minister of Home Affairs and Others* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ) (22 September 2011), para 40.

#### 4.1.6 Application of the Exclusionary Rule

The exclusionary rule under article 15 of UNCAT prohibits the use of evidence obtained through torture and therefore, forms an integral part of the general prohibition of torture and other forms of CIDT.<sup>57</sup> The exclusionary rule is based on two considerations. First, all statements made are under circumstances of torture are inherently unreliable and admission of such information in proceedings where the proceedings involve consequences for individuals as a result of such statements may be contrary to principles of the right to a fair trial. Second, since the use of information obtained from torture in proceedings is often the reason why torture is applied in the first place, prohibiting its use removes any incentive to torture.<sup>58</sup>

Although the exclusionary rule is not expressly described as absolute<sup>59</sup>, it is considered to be fundamental in upholding the absolute nature of the prohibition against torture and also plays a significant role in the prevention of torture because any information and statement obtained through the use of torture can never be of any value in the courts of a States Party.<sup>60</sup> The nature of the exclusionary rule is that it applies to evidence obtained under torture, no matter where in the world the torture was perpetrated. It also applies in instances where the State seeking to rely on the information or statement had no involvement in or in connection to the acts of torture or other ill-treatment.<sup>61</sup> The exclusionary rule not only excludes evidence obtained through torture, it also excludes evidence obtained by any form of coercion.<sup>62</sup> The exclusionary rule has frequently been extended to CIDT by international monitoring bodies. For example, the Committee Against Torture,<sup>63</sup> and the Human Rights Committee.<sup>64</sup> The UN Body of Principles on Detention also provides that evidence that has been obtained in violation of other principles of detention, as well as torture be excluded.

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<sup>57</sup> Association for the prevention of torture “The exclusionary rule: International law prohibits the use of evidence obtained through torture” (2012) 1.

<sup>58</sup> Association for the prevention of torture “The exclusionary rule: International law prohibits the use of evidence obtained through torture” (2012) 2.

<sup>59</sup> Joseph S Mitchell K & Gyorki L refers to the ability of countries to make reservations on article 15(2006) 34.

<sup>60</sup> The Atlas on Torture Non-admissibility of evidence extracted by torture: “The tainted fruit of the poisonous tree” (2009) available at <http://www.univie.ac.at/bimtor/nonadmissibilityofevidenceextractedbytorture/166> (accessed on 25 October 2014).

<sup>61</sup> Committee against Torture, Concluding Observations on the Fourth Periodic Report of the United Kingdom, 25 November 2004, UN Doc. CAT/C/CR/33/3 para 4(a)(i).

<sup>62</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “Interim Report to the General Assembly” 1 September 2004, UN Doc. A/59/324 paras 13-16.

<sup>63</sup> See, the CAT report on its Confidential Art.20 inquiry in Turkey, A/48/44/Add.1 para 28.

<sup>64</sup> CCPR, General Comment 20, 10 March 1992, para 12.

These principles include irregularities during arrest, the failure to inform the detainee of reasons for his arrest or his rights, failure to promptly bring the detainee before a judicial authority, and the denial of legal assistance.<sup>65</sup>

Under article 15 of UNCAT, States Parties have a duty to distance themselves from any violation of the exclusionary rule and must therefore refuse to pass as admissible any statements obtained under torture.<sup>66</sup> States also need to expressly provide for the exclusion of evidence obtained by torture and where exclusion is simply a rule developed through case law, this may not provide a secure enough guarantee to satisfy the requirements of article 15 of UNCAT.<sup>67</sup> In addition to the duties of States under article 5 of UNCAT, it has been recommended by members of the Committee Against Torture, that to effectively implement article 15 of UNCAT States Parties need to implement supplementary measures to effectively exclude information obtained by torture, such as by excluding all confessions made in the absence of a lawyer to persons below a certain rank or to a non-judicial officer and by developing a clear procedure to test a confession for signs of torture.<sup>68</sup>

The Torture Act does not include a provision excluding evidence obtained as a result of torture as required under article 15 of UNCAT. However, the exclusionary rule is dealt with under s 35(5) of the Constitution which states that

“[E]vidence 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.”

South African courts have held that evidence obtained through torture is inadmissible as it will always render the trial unfair.<sup>69</sup> However, there is a need for a specific legislative provision barring the admission of such evidence.

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<sup>65</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

<sup>66</sup> Thienel T (2006) ‘The Admissibility of Evidence obtained by Torture under International Law’ (2006) *The European Journal of International Law* 363.

<sup>67</sup> Ingelse C *United Nations Committee Against Torture: An Assessment* (2001) 379-80.

<sup>68</sup> Redress “*Bringing the International Prohibition of Torture Home*” (2006) 63.

<sup>69</sup> *S v Mthembu* (379/07)[2008]ZASCA 51;[2008] 3 All SA 159(SCA); [2008] 4 All SA 517 (SCA);2008(2)SCAR 407 (SCA).

#### 4.1.7 Providing Redress to Victims of Torture

Article 14 of UNCAT provides victims and their dependents the right to redress, protection and compensation and therefore, if the investigation referred to in article 12 and 13 of UNCAT forms the start of possible penal measures. Article 14 of UNCAT provides for civil legal recourse for victims of torture.<sup>70</sup> The term ‘victim’ under article 14 of UNCAT, refers not only to the person subjected to the actual torture but includes affected immediate family or dependents of the victim.<sup>71</sup>

Article 14 of UNCAT creates an obligation on States Parties to ensure in their legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means of full rehabilitation.<sup>72</sup> Redress involves official recognition that harm has been done to the person in question. Compensation generally, but not always, takes the form of an amount of money.<sup>73</sup> The term redress includes the concept of “effective remedy” and reparation. The reparative concept entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>74</sup> To fulfil its obligations under article 14 of UNCAT a State Party should be in a position to offer all five elements of redress.<sup>75</sup> States Parties also have a duty of ensuring that victims of torture not only be entitled to full redress but that they be afforded full redress irrespective of whether an alleged perpetrator has been identified, investigated or tried.<sup>76</sup>

The Committee against Torture considers that the application of article 14 of UNCAT is not to be limited to victims who were harmed in the territory of the State Party or by or against nationals of the State Party. This is of particular importance when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place and therefore State Parties are required to ensure that all victims of torture are able to access remedy and obtain redress.<sup>77</sup>

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<sup>70</sup> Wendland L (2002) 54.

<sup>71</sup> Committee against torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 1.

<sup>72</sup> Committee Against Torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3. Para 1.

<sup>73</sup> Wendland L (2002) 54.

<sup>74</sup> Committee Against Torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 2.

<sup>75</sup> Muntingh L & Ballard C (2012 ) 13.

<sup>76</sup> Muntingh L & Ballard C (2012 ) 13.

<sup>77</sup> Committee against torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 22.

S 7 of the Prevention and Combating of Torture Act, states that

“[n]othing contained in this Act affects any liability which a person may incur under the common law or any other law”.

This therefore means that victims of torture are allowed to sue perpetrators of torture for damages under relevant provisions of common law or any other law. When compared to article 14 of UNCAT and the obligations of state Parties to UNCAT, s 7 does not comply with the discussed obligations under article 14 of UNCAT. First, the Act does not make it clear whom the term victim refers to. Under article 14 of UNCAT, a victim refers not only to the person subjected to the actual torture but includes affected immediate family or dependents of the victim.<sup>78</sup> Secondly, the Act makes reference to damages under the common law. Under the common law, a victim may only sue for damages sustained as a result of torture and ill-treatment. For the victim to be able to sue a perpetrator, he needs to be investigated and tried, which does not create the idea as envisioned in article 14, which is that the States be primarily responsible for providing redress to victims of torture.<sup>79</sup> Thirdly, if a victim were to hold a State liable for acts of torture by public officials who committed the torture, he would, in terms of common law, be required to follow a long and expensive court proceeding and once again, the perpetrator would need to be identified and the victim would need to prove on a balance of probabilities that torture occurred.<sup>80</sup> This is not what is envisaged under article 14 of UNCAT. Under article 14, states are obliged to ensure that their national laws provide that a victim who has suffered violence or trauma should benefit from adequate care and protection to avoid his re-traumatisation in the course of legal administrative procedures designed to provide justice and reparation.<sup>81</sup> Furthermore, monetary compensation as a form of redress should be available independent of the victim having to prove that he has been tortured.<sup>82</sup>

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<sup>78</sup> Committee Against Torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 1.

<sup>79</sup> Wendland L (2002) 56.

<sup>80</sup> Muntingh L & Ballard C (2012) 14.

<sup>81</sup> Committee Against Torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 5.

<sup>82</sup> Committee Against Torture General Comment No.3 of the Committee Against torture implementation of article 14 by States Parties (2012) CAT/c/GC/ 3 para 5.

## **4.2 Conclusion**

The UNCAT constitutes a framework according to which States Parties are to mould their national laws. It is therefore important for a State to address the issues relative to the particular field and to then provide practical guidelines for implementation. The Prevention and Combating of Torture Act provides for some guidelines and has definitely strengthened the South African framework relating to torture. However, although the Prevention and Combating of Torture Act is definitely an improvement, in some respects it does not comply with some of the minimum standards set by UNCAT. The final Chapter provides a conclusion as a whole and makes recommendations.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

Torture is one of the most widely prohibited human rights violations. The prohibition against torture in international law is absolute and has developed as a norm of customary international with a peremptory status. As discussed in chapter 2 of this mini-thesis, during the last the international community has increased its efforts to combat torture and other forms of cruel, inhuman and degrading treatment and punishment through the introduction of special mechanisms. This has been achieved through the creation and development of the four regional systems for the protection of human rights. These systems include, the European system, American system, African system and the Arab league, these are all in addition to a number of international instruments and mechanisms.

As shown in chapter 2, there are mechanisms and treaties developed to combat torture and cruel, inhuman and degrading treatment and punishment. The discussion in chapter 2 highlights the treaty bodies developed for the prevention and prohibition of torture and cruel, inhuman and degrading treatment and punishment and their relationship with the monitoring bodies developed to oversee the implementation of these Covenants by State Parties to it. The research has shown that the monitoring bodies developed in all regions all follow a similar, if not, the same model. For example, all require states to submit reports on measures they have adopted to give effect to the relevant instrument, they all have the power to entertain complaints of violations by individuals against state Parties, they all receive and investigate individual complaints and lastly, all have the jurisdiction to consider complaints made by a State Party that another State Party is not abiding to the obligations under the relevant treaty. Although the establishment of these international standards of monitoring and inquiry procedures relating to torture exists, they are not in themselves sufficient to guarantee observance of human rights. Chapter 3 discusses the protection of an accused's fair trial rights and the safeguards in place to protect these rights under both international and South African domestic legislation and how they contribute to the protection of an accused's right to freedom from torture. Furthermore, the research under chapter 3 shows that States have a duty to protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. Governments are required by international human rights standards to adhere to certain key universal principles that impose a level of discipline and rigour upon government agencies.

As shown in chapter 3, individual rights may in some instances be limited or qualified. However, international law recognizes that when limiting an individual's right to liberty, those in detention require special protection and due to their vulnerable position, they are at a higher risk of abuse. Under the South African Constitution, fundamental rights are considered to be basic and inalienable to every person. When comparing the Bill of Rights to international community standards, it is evident that the Bill of Rights is modelled on international human rights conventions. Under South African law, the rights in the Bill of Rights can be limited in certain instances in terms of s 36 of the Constitution. However, the right to freedom from torture is absolute and non-derogable.

Chapter 3 has shown that the fair trial rights of an accused under both international law and South African domestic legislation are essential in the protection of an accused's right to freedom from torture and that most of the rights which make up the right to a fair trial, protect an accused's right to freedom from torture both individually and collectively. These rights are therefore interrelated and the safeguards, which are in place to protect an accused from the abuse of fair trial rights, can be used as safeguards to protect an accused from torture. Chapter 4 examines whether South Africa has complied with its obligations under the UNCAT. The UNCAT has five main objectives, such as the prevention of torture, the implementation of the non-refoulement principle, the application of the exclusionary rule, criminalisation of torture and lastly, the providing of redress to victims are all obligations placed on State Parties to the Convention.

Under the UNCAT, the criminalisation of torture is regarded as the first step towards the successful prevention and combating of torture, and State Parties including South Africa have an obligation under this Convention to ensure that all acts of torture are acknowledged as offence under its criminal law. As discussed in chapter 4, the criminalisation of torture fulfils two important functions, a deterring function, which is aimed at prevention, secondly, the function of punishment. Furthermore, it is highlighted that the introduction of distinct offences of torture is the most effective way of implementing the obligations under article 4 of UNCAT States also need to adopt the necessary measures to ensure the immediate and impartial investigation of complaints of torture and to make the results of the investigations public and most importantly to prosecute offenders before a competent, independent and impartial tribunal.

South Africa recently enacted the Torture Act, which, inter alia, defines and criminalises acts of torture. However, in some respects the Act falls short of international standards, for example, on the issue of penalties that should be reflective of the gravity of the offence of torture.

States also have an obligation under article 10 to ensure that their public functionaries, which include law enforcement officials, be educated and informed on the prohibition against torture. Chapter 4 highlights South Africa's attempt to meet its obligations under article 2, 10(1) and 11 of the UNCAT, however its s 9 takes a general approach and fails to address the aspects of torture prevention as required by the Convention. Chapter 4 shows that the Act does not address South Africa's obligations of ensuring that it has taken administrative, legislative or judicial measures. There are no provisions that give effect to article 11 of the Convention. S 9 does not create an obligation on State institutions that claims and incidents of torture should be reported to relevant oversight bodies, for example Parliament. In terms of its obligations to create extra-territorial jurisdiction, under s 9 of its Act, South Africa has fulfilled most of its obligations. It has established universal jurisdiction over alleged perpetrators of torture found within its territory. However, its s 9 does fail to give a clear indication of whether its jurisdiction extends to acts committed in any the territories over which it has factual control, such as on board ships, vessels and aircraft. Another obvious gap is that the Torture Act does not expressly provide for the exclusion of evidence obtained through torture. However, this is remedied by s 35(5) of the Constitution and how courts have interpreted it.

#### **a. Recommendations**

As discussed in chapter 4, although South Africa has enacted legislation which criminalises torture and has met part of its obligations under the UNCAT, some obligations still have not been met. It is proposed by CSPRI that in term of the penalties and sentencing section of the Act, that the listed factors should give a clear indication of how they can be used to determine an appropriate term of imprisonment that reflects the gravity of the crime of torture and that holds a strong deterrent value and communicates to the nation that torture is a practice that will not be tolerated.<sup>83</sup> Secondly, in attempt to address the issue of extra-territorial jurisdiction, it is recommended that the Act be amended to clearly indicate that South Africa's jurisdiction is not only over perpetrators of torture found within the territories over which South Africa has factual control over but that the jurisdiction extends to the acts committed on those very territories as well.<sup>84</sup> As discussed in Chapter 4, the Prevention and Combating of Torture Act does not provide for a clause excluding evidence obtained as a means of torture. It is recommended that the Act be amended to include a section governing the exclusion of evidence obtained through torture.

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<sup>83</sup> Muntingh L, Ballard C [B21 of 2012](2012 ) 8.

<sup>84</sup> Muntingh L, Ballard C [B21 of 2012](2012 ) 8.

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