SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE ON THE PREVENTION AND ERADICATION OF TORTURE IN SOUTH AFRICAN PRISONS

A. Introduction

1. CSPRI would like to express its sincere appreciation to the Portfolio Committee on Correctional Services for its willingness to engage in the important issue of torture in South Africa's prisons. Since 2006 CSPRI has been consulting with a range of stakeholders on the prevention and eradication of torture in South Africa, encountering often, resistance and a lack of focus. The willingness of the Portfolio Committee on Correctional Services to focus on torture is therefore deeply appreciated and it will hopefully lay the foundations for rapid progress in preventing and eradicating torture in the prison system.
2. Torture in all its forms is a grave rights violation and an affront to human dignity and is acknowledged as such in the *UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1975.[1] Article 3 of the Declaration states that "no state may permit or tolerate torture" and that "exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency" may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

3. According to international law the prohibition of torture has the enhanced status of a peremptory norm of general international law.[2] This means that it "enjoys a higher

[1] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975

[2] See the House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate*, *Ex parte* Pinochet Ugarte (No 3) [2000] 1 AC

rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated[3] from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[4]

4. Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. It therefore applies regardless of the status of the victim and the circumstances, whether they be a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind",[5] and torture itself as an act of barbarity which "no civilized society condones,"[6] "one of the most evil practices known to man"[7] and "an unqualified evil".[8]

5. Following from the status of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution".[9] The UN Convention against Torture (UNCAT) therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT places the obligation on states to

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147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at Paras 147-157.

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

[4] *Prosecutor v Furundzija* op cit Para 153.

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

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

[7] Ibid at Para 101.

[8] Ibid at Para 160.

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

either prosecute or extradite any person suspected of committing a single act of torture. Doing nothing is not an option.

6. It is against this background that this submission will focus on the UNCAT and the obligations emanating from South Africa's ratification of the Convention in 1998. The submission will deal with a number of specific articles of the Convention, namely:
   - Article 1 – the definition of torture
   - Article 2 – the general obligation of states to give effect to the obligations under the Convention
   - Article 10 - the training of personnel on the absolute prohibition of torture
   - Article 11 - the regular review of practices and procedures
   - Article 12 and 13 - the investigation of allegations of torture and ill treatment

   The submission concludes with a number of recommendations

B. The scope of the problem

7. It is difficult to assess accurately the prevalence of torture in South Africa's prison system. Governments do not readily admit that their officials have committed torture. The Department of Correctional Services (DCS) does not present statistics on allegations of torture or even confirmed cases in its annual reports; neither does the Judicial Inspectorate for Correctional Services (JICS). Part of the problem is that South Africa has not yet criminalised torture as required by Article 4 of the UNCAT and in the absence of the statutory crime of torture, no perpetrator can be prosecuted for having committed it In the absence of the statutory offence of torture, therefore, other information must be relied upon to provide a situational analysis. In this regard, attention will be paid to deaths in custody, reported assaults and a number of specific incidents.

Unnatural deaths in custody

8. The 2009/10 annual report of the JICS lists XX cases implicating officials of the DCS in the unnatural deaths of inmates. Table 1 below provides a summary.

Table 1

Prison	Date	Description	Status
George	8 Jan 2009	Homicide – officials. Officials assaulted deceased (and others) after he assaulted and official. Mass assault of inmates by officials. Deceased denied adequate and timeous medical treatment and segregated. Batons, teargas used in the assault	Various officials charged for various breaches. 1 guilty and dismissed. 28 official's cases in progress. 4 – charges withdrawn. Advised SAPS investigation not finalised.
Ncome Med B	21 Jan 2009	Homicide – inmates / officials. Inmate involved in gang related fracas where-after officials subjected deceased to continuous assault even when no threat posed. Post-mortem records cause of deaths as blunt force soft tissue injury and notes multiple injuries.	Various charges against various officials, including assault and dereliction of duty. Due to commence on 9 September 2010. Previous Chairperson replaced. Docket to prosecutor on 10 August 2010 for decision.
Ncome Med B	21 Jan 2009	Same as above	Same as above
Bizana	13 Mar 2009	Homicide – officials. Deceased attempted to escape during transfer and transportation. Inmate assaulted by bystanders and officials even when no threat and over a period of time. Multiple injuries.	Various officials charged. 5 officials received 1 month's suspension without pay. 2 officials received final written warnings, 2 written warnings. 1 demoted. 2 acquitted. No indication of criminal prosecution or inquest.
Durban Med A	22 Mar 2009	Homicide – inmates/officials. Deceased with 5 fellow gang members used "isijumbane" (slings made from sheets filled with heavy objects, including, broken floor tiles, bone and a radio transformer) to assault non-gang members. Officials then used excessive "force to subdue the attackers. Post-mortem	3 officials found guilty of excessive use of force and each received a penalty of one month without pay. SAPS docket opened, outcome of criminal charges not provided.

Prison	Date	Description	Status
		records cause of death as blunt force soft tissue injury from extensive injuries.	
Mthatha Max	27 Mar 2009	Homicide – officials. Deceased assaulted by officials after assault on officials. Multiple injuries. Medical treatment delayed.	Various officials (11) charged with various offences, including, misconduct, disregarding security rules, excessive force, negligence, falsifying registers and altering the crime scene 9 acquitted, 2 received final written warnings. SAPS docket opened, outcome of criminal charges not provided.
Mthatha Med	12 Apr 2009	Homicide – officials. Attempted escape by inmates re-arrested and assaulted by officials.	Regional report does not recommend disciplinary action. Departmental Investigation Unit enquiry. Findings not provided by region. SAPS docket opened, outcome of criminal charges or inquest not provided
Johannesburg Med A	5 May 2009	Homicide – officials. Official assaulted deceased with a baton on his head. Denied by official alleging an alibi. Post-mortem records cause of death intracranial haemorrhage. Cerebral contusion.	Criminal prosecution not finalised.
Pietermaritzburg	24 Jun 2009	Homicide – officials. Officials assaulted deceased after he stabbed a fellow inmate. Officials used batons, crutches and an electric shield even when mechanically restrained and the deceased's knife was broken. Officials claim that deceased had to be disarmed and restrained. Medical report records multiple injuries, including, to his back, limbs and chest.	3 officials implicated. Disciplinary process pending. SAPS docket opened, outcome of criminal charges not provided.

Prison	Date	Description	Status
Ebongweni Kokstad	9 Aug 2009	Deceased brutally assaulted by officials with batons, electric shields and booted feet and then failed to provide adequate and timeous medical attention. Independent pathologist found death consistent with smothering, i.e. obstruction of mouth and nose.	Various charges against various officials not finalised. SAPS docket opened, outcome of criminal charges or inquest not provided.
Glencoe	15 Sep 2009	Homicide – officials. Deceased and another inmate attacked another inmate with a knife. Officials intervened to disarm to the deceased, allegedly using 'necessary force'. Witnesses aver that officials attacked deceased even when disarmed or no threat with batons and kicking him.	Recommendation to charge officials with assault. Decision to charge or findings not provided. SAPS docket opened, outcome of criminal charges or inquest not provided.

9. Even though the information presented in the JICS 2009/10 annual report is scant, a number of extremely worrying observations can be made based on this.
    - The deaths were the result of aggravated assaults inflicted either as punishment or in retaliation. In these situations, it is concluded, that the officials regarded themselves above the law and inflicted severe physical injuries that ultimately led to the prisoners' deaths.
    - It also appears that these assaults are committed by groups of officials on single prisoners.
    - In a number of the cases it was noted by the JICS that the assaults continued after the prisoner was subdued and/or the situation stabilised. This type of action goes well beyond what can be regarded as the lawful use of minimum force regulated by the Correctional Services Act.
    - The most common weapon used by officials was a baton, but prisoners were also subjected to kicks, teargas and electroshock equipment.

- In a number of cases the deceased was denied prompt medical attention even though the Correctional Services Act is clear that any prisoner who has been subjected to the use of force must immediately undergo a medical examination.
- It is also apparent that when disciplinary action is taken against officials, this takes extremely long to finalise.
- From the data presented by the JICS it is evident that at the time of publication, not a single criminal prosecution had commenced.
- Even though little information is provided on the charges against implicated DCS officials, it appears that these are lesser charges such as misconduct, disregarding security rules, negligence, falsifying registers and altering the scene of a crime.
- The sanctions imposed appear to be equally light as shown in Table 2 below

Table 2

Sanction	Frequency
1 month suspended without pay	8
Final written warning	4
Written warning	2
Demotion	1
Dismissal	1

10. The overall impression gained is that when officials beat prisoners to death, investigation are slow; disciplinary charges minor; sanctions imposed light; and criminal prosecutions unlikely. The net result is a culture of impunity.

Assaults

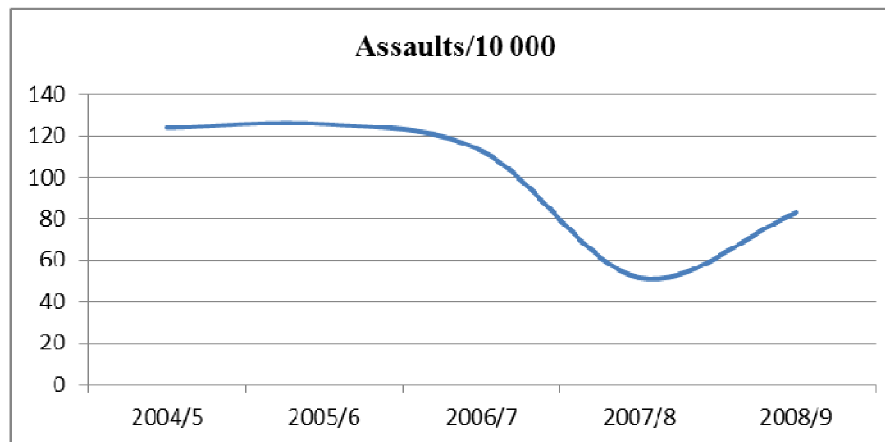
11. The number of assaults reported per year calculated as a per 10 000 ratio is presented in Table 2. The data indicates that the number of reported assaults declined drastically in 2007/8 but increased substantially in the following year; from 52/10 000 to 83/10 000. Assuming that not all assaults are reported, the overall impression gained is that South Africa’s prisons are not safe. The number of assaults recorded by DCS and reflected in the departmental annual reports is by all accounts an undercount and the

Judicial Inspectorate for Correctional Services (JICS) recorded a total of 2189 complaints on assaults of official-on-inmate in 2009.[10]

Table 3

Assaults per 10 000			
Year	**Nr**	**Ratio per 10 000**	**Prison population**
2004/5	2320	123.8	187394
2005/6	2001	125.6	159318
2006/7	1822	112.7	161661
2007/8	855	51.6	165837
2008/9	1372	83.0	165230

Figure 1



12. The figure presented by the JICS of 2189 complaints of assault recorded in 2009/10 unfortunately does not provide more information on the results of investigations into these complaints. If these are accepted at face value, it means that there are on average 6 assaults per day in South Africa's prisons. This is an unacceptably high level of violence directed at prisoners and each of them potentially a violation of the absolute prohibition of torture.

[10] Office of the Inspecting Judge (2010) Annual report of the Judicial Inspectorate for Correctional Services 2009/10. Cape Town.

Specific incidents

13. In recent years a number of specific incidents have come to light and these are described below.

St Alban's

14. In July 2005 a mass assault took place at St Alban's prison in Port Elizabeth. The following excerpt describes in part the incident as reported to the UN Human Rights Committee (HRC): [11]

On 17 July 2005, the author [McCallum], together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author's shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them.
Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them into their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus. As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain.
At some point, Warder P. approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered

[11] CCPR/C/100/D/1818/2008 para 2.2 -2.5

to return to their cells. This however created chaos, as the floor was wet with water, urine, faeces and blood and some inmates fell over each other.

Injured inmates were not allowed to see a doctor until September 2005. Prisoners resorted to treating their wounds themselves with ashes as disinfectant and sand to stop the bleeding. The author was able to obtain medical attention only in late September 2005.

The prison doctor, however, did not administer any treatment on him, as he considered the author's complaints to be of "internal" nature and therefore not covered by his duties. The author requested HIV testing for fear of having contracted the virus from other inmates' bodily fluids on 17 July 2005. However, he was unable to obtain it. HIV is widespread in South African prisons. In October 2005, the author received treatment for his dislocated jaw and loose teeth. Between March and November 2006, the author's teeth were extracted one by one, adversely affecting his diet and health. On 3 April 2008, the author requested that the prison authorities provide him with a teeth prosthesis, without however receiving any answer to his request.
After the assault, the correctional facility was locked down and, as a result, the author was denied contact with his family and counsel for about a month. His telephone and exercise privileges were also taken away. Thereafter, he was allowed visits of five to ten minutes at a time.

15. Mr. McCallum made numerous attempts to have the case investigated and seek relief. These efforts amounted to nothing and so he directed a complaint to the UN Human Rights Committee (HRC) and lodged an individual communication. The HRC found that his right to be free from torture, protected by Article 7 of the International Covenant on Civil and political Rights, had been violated.[12]

[12] ICCPR Art 7. No 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.

Krugersdorp

16. In 2007 three prison warders stationed at Krugersdorp prison beat three prisoners to death following a fight between rival prison gangs. They were charged, prosecuted and convicted of murder. The three (Regan Radidge, Simphiwe Shabangu and Donald Letsoamotse) were sentenced to 20 years imprisonment for the murder of the inmates. In October 2009 they were granted leave to appeal by the South Gauteng High Court. Further information on the appeal was not available.

Pretoria

17. On 19 July 2011 IOL reported that the DCS and the police had launched investigations into allegations of torture at Pretoria Central Prison. The natures of the allegations were that six warders had used an electric shock shield to shock a prisoner.[13] As far as could be established, there has been no progress reported regarding the investigation.

C. Articles 1 and 16

For an act to meet the requirements of the definition of torture in Article 1 it must:

- Result in severe mental and/or physical suffering
- Be committed intentionally
- Be committed by or with the acquiescence of a public official
- Result in suffering not incidental to a lawful action.

Acts of ill treatment not amounting to torture as defined in Article 1 are equally prohibited under Article 16.

18. Even though the Constitution guarantees the right to freedom from torture and cruel, inhuman or degrading treatment or punishment[14], there is no specific law criminalising torture. The criminalisation of torture is a specific requirement of Article 4 of UNCAT.

[13] "Prison torture claims probed" Reported by IOL, 19 July 2011, http://www.iol.co.za/news/crime-courts/prison-torture-claims-probed-1.1101901

[14] Section 12(e) Act 108 of 1996

19. UNCAT defines torture in Article 1 as follows:

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

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

- **It must result in severe mental and/or physical suffering:** It must be emphasised that torture is not restricted to physical suffering resulting from, for example, beatings or electrical shocks. Mental or emotional pressure applied to a person may also constitute torture; for example, threatening to harm a person's family. The requirement that it must result in 'severe' suffering is not an absolute and objective standard and will depend on the facts of the case and the context in which the acts occurred.
- **It must be inflicted intentionally:** Article 1 requires that such acts must be inflicted intentionally for such purposes as obtaining information, a confession, or punishment, intimidation, or motivated by reasons of discrimination. It is important to note that the definition reads 'for such purposes as' and what follows should be understood to serve as examples and not an exhaustive list of purposes set down by the Convention. An act may therefore still meet the requirement of purpose if the purpose was something other than those listed in Article 1.
- **It must be committed by or with the consent or acquiescence of a public official:** An act of torture may be committed directly by a public official, for example, by assaulting a criminal suspect. It may also be committed by a person who is not a state official, but with the consent of a state official. An act of torture may also occur if a state official omits or fails to do something that could have prevented the infliction of severe mental and/or physical suffering being inflicted upon another person by non-state officials.

- **It excludes pain and suffering as a result of lawful actions:** The fact that something is 'lawful' does not mean that it is necessarily consistent with the objectives of CAT.[15] The legal situation in South Africa in respect of punishment is fortunately clearer since the abolition of both the death penalty and corporal punishment. There are, however, other areas of state operations where force is used, that could fall in the grey area of what is lawful and what is not, for example, whether the use of force in quelling a prison riot exceeded the minimum threshold.

21. Whereas UNCAT defines torture in Article 1, no definition is provided for cruel, inhuman or degrading treatment (CIDT); this has been the subject of much scholarly writing as well as court decisions.[16] The key question is whether something is inherently torture, or, whether it becomes torture when a certain threshold is transgressed and CIDT meets the requirements of the definition of torture? The UN Declaration against Torture, in Article 1.2, refers to aggravation: 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.' The UNCAT definition does not, however, link torture to an aggravated form of CIDT. By contrast, the Committee against Torture, invokes the concept of 'degree of severity' to distinguish torture from CIDT.[17] Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment will ultimately be left to courts to decide.[18]

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[15] For example, punishments such as the death penalty and corporal punishment will inflict severe physical and mental suffering. The Constitution of Botswana allows for corporal punishment to be inflicted as a form of punishment even though Botswana ratified UNCAT in 2000.Upon ratification, Botswana entered the following reservation:"The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana." http://www2.ohchr.org/english/bodies/ratification/9.htm#reservations Accessed 3 July 2008.
The Special Rapporteur on Torture has specifically asked for corporal punishment as a form of punishment to be abolished in all jurisdictions. [UN Special Rapporteur on Torture (undated) *General Recommendations of the Special Rapporteur on Torture*, http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm Accessed 4 July 2008.]

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

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

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

22. Despite the absence of clear definitional lines between torture and CIDT, there is nonetheless an obligation on States Parties to prevent both torture and CIDT. Experience has also demonstrated that the conditions that give rise to CIDT frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent CIDT.[19]

D. Article 10:

> "*1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*
>
> *2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons."*

23. Correctional officials are heavily invested in the care, rehabilitation, management, custody, and treatment of individuals who are being detained in prison, be they remand detainees or sentenced offenders.

24. Article 2 obliges States Parties to take a range of measures to prevent torture. Similarly, Article 16 obliges State Parties to prevent CIDT. Article 10 gives direction to these provisions by requiring that information and education regarding the absolute prohibition of torture and CIDT be communicated to correctional officials as part and parcel of their general training regime.

25. Ensuring that personnel working with people deprived of their liberty are properly trained on a continuous basis, communicates clearly what is expected and what will

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

not be tolerated. It also enables officials to deal with potential problems proactively. The value of these measures should not be underestimated.

26. Ensuring that personnel are properly trained means that they know and understand the Convention, in particular, how torture is defined and the kinds of acts that would fall within this definition. In particular, officials should be trained on how to deal with high-risk situations in a manner that uses only the minimum degree of force. These are crucial steps in preventing and eradicating torture and CIDT. Effective training of this nature is also not to be superficial nor a once-off affair, but should be comprehensive, repeated and updated on a continuous basis.

27. Although the Convention may create the impression that it applies to government officials only, privately run prisons also fall within the scope of the Convention. Accordingly, personnel working at private prisons are subject to the same obligations as government officials.[20]

E. Article 11:

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

28. Currently, the South African Police Services (SAPS) are the only government department that have a policy on the prevention of torture.[21] No other government departments have developed a policy on the prohibition and prevention of torture and

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

[21] 'Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service' http://www.saps.gov.za/docs_publs/legislation/policies/torture.htm Accessed 12 September 2011.

CIDT. The purpose of the systematic review of policies is to ensure that the methods and practices relating to the custody and treatment of prisoners are adequate in their protection from torture and CIDT by identifying gaps in the policies and addressing such shortcomings.

29. "Systematic" implies that the review of policies should be done regularly, consistently and thoroughly. The question on the regularity of a systematic review could, perhaps, be informed by Article 19(1); that there should, at minimum, be a plan for the systematic review coinciding with the four-year cycle of reporting.[22]

30. Article 11's reference to conditions of custody and treatment of persons in detention requires that designated persons visit, investigate, inspect and monitor places where people are deprived of their liberty and report on their findings. Such a system already exists in respect of prisons by virtue of the Judicial Inspectorate for Correctional Services (JICS) and its Independent Correctional Centre Visitors. Although prison visits by ICCV's do occur and reports and complaints are indeed recorded by the JICS, the implementation of recommendations from the JICS by the DCS are crucial to the successful completion of the review process.

F. Articles 12 and 13

Article 12

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

Article 13

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

[22] Muntingh L and Fernandez L (2008) *A review of measures in place to effect the prevention and combating of torture with specific reference to places of detention in South Africa: current developments* South African Journal on Human Rights, Vol. 24 (1), p. 131.

31. In his 2010 report the UN Special Rapporteur identified impunity as one of the main reasons for the persistent perpetration of torture and other ill treatment across the world. This, according to the Special Rapporteur is, by and large, the result of the failure of many states to comply with the obligations under Articles 12 and 13 of UNCAT. When officials who perpetrate the crime of torture and other forms of ill treatment are not held accountable through criminal prosecutions and punishments that reflect the gravity of the crime of torture, efforts to eradicate torture will by and large remain fruitless.

32. Whenever there are 'reasonable grounds' to believe that torture and/or CIDT have occurred, the state has a duty to ensure that this is promptly investigated by competent authorities in an impartial manner.

33. Often, victims do not report incidences of victimisation or assault for fear of reprisals, or they are simply not able to complain. Article 12 does not require that there have been a complaint of torture in order to prompt an investigation. Accordingly, for the purposes of initiating an investigation, it really does not matter where the 'reasonable suspicion' emanates[23]

34. The requirement that investigations into allegations of torture be initiated "promptly" is equally important. There are, however, no international guidelines as to what 'prompt' means.[24] Perhaps the most concrete meaning was given by the European Court of Human Rights (ECtHR) in its decision *Assenov and Others v Bulgaria*, where it suggested that 'prompt' means 'in the immediate aftermath of the incident, when memories are fresh.'[25] The Committee against Torture has found individual

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

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

[25] *Assenov and Others v Bulgaria* (1999) 28 EHRR 652.

breaches of Article 12 due to excessive delay before the commencement of an investigation, in both 15 months[26] and 18 months[27] respectively.

35. The requirement that the investigation be 'impartial' is central to its credibility remaining intact. The term 'impartiality' means free from undue bias and is conceptually different from 'independence', which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The ECtHR has stated that 'independence' not only means a lack of hierarchical or institutional connection, but also practical 'independence.'[28] The ECtHR has also stressed the need for the investigation to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as theory, to maintain public confidence in the adherence to the rule of law by authorities, and to prevent any appearance of collusion on or tolerance of unlawful acts.[29]

Recommendations

Training and Review Mechanisms

36. Given the unlikely awareness of the prevalence of torture and an accurate understanding of what torture and CIDT involves, the DCS, in order to be in compliance with Article 10 of UNCAT, must amend its education and training programmes to include education on the prohibition of torture as well as its definitional parameters.

37. In addition, the DCS's policies regarding the custody, treatment, care and management of prisoners must be re-fashioned so as to best fulfil the state's obligation to prevent torture in such circumstances.

[26] *Halimi-Nedzibi v Austria*, complaint 8/1991, A/49/44, Annex V, p.40, para 15, reported in C Ingelse (2001) *The UN Committee against Torture: An assessment*, p. 356.
[27] *Dragan Dimitrijevic v Serbia and Montenegro* 207/02 CAT/C/33/D/207/2002(2004).
[28] *Finucane vs United Kingdom* (2003) 22 EHRR 29 para 68.
[29] *Assenov and Others v Bulgaria* (1999) 28 EHRR para 140.

The role of the Judicial Inspectorate

38. Section 85 of the Correctional Services Act states that the object of the Judicial Inspectorate is to facilitate the inspection of correctional centres in order that the he or she may report on the treatment of inmates and on conditions of detention in correctional centres. The Department is obliged to report to the JICS deaths in custody and incidence in which prisoners have been segregated, and incidences involving the use of force and the use of mechanical restraints.

39. The Inspecting Judge, based on mandatory reports received from the Department and information regarding conditions of detention and prisoners' complaints received from ICCV's, is authorised by the Correctional Services Act to report on and make recommendations on the treatment of inmates and conditions of detention. The findings and recommendations of the Inspecting Judge, although no doubt made impartially and independently, are not binding and the Judge has no disciplinary powers. This means that it is up to the DCS, SAPS and the NPA will need to ensure proper investigation into cases of alleged torture and CIDT.

40. It is worth noting the differences in obligatory mandates between the Independent Police Investigative Directorate Act[30] (IPID) and the Correctional Services Act. The IPID Act states that the Directorate *must* investigate, amongst others:[31]

    a) any deaths in police custody;
    b) deaths as a result of police actions;
    c) any complaint relating to the discharge of an official firearm by any police officers;
    d) rape by a police officer, whether the police officer is on or off duty;
    e) rape of any person while that person is in police custody; and
    f) any complaint of torture or assault against a police officer in the execution of his or her duties.

41. Moreover, an investigator, in terms of the IPID Act, has robust investigative powers, such as, the power of arrest and the execution of arrest warrants.

[30] 1 of 2011
[31] Section 24 IPID Act 1 of 2011.

42. The provisions of the IPID Act go a long way towards fulfilling the Convention's requirement in Articles 12 and 13 that "competent authorities proceed to a prompt and impartial investigation…" The Correctional Services Act, by comparison, requires far less of the Judicial Inspectorate.
43. It is recommended, therefore, that legislative amendments in the form of increased mandatory investigative powers on the part of the JICS be explored, including, at the very least, the power of the Judicial Inspectorate to investigate cases of torture and refer them to the SAPS and the NPA for further investigation and prosecution.
44. It is also recommended, that the Portfolio Committee, based on the information in the JICS Annual Report detailing unnatural deaths and assaults, call upon the Department to report on any progress made into the investigation and prosecutions of the alleged perpetrators of these incidences.

McCallum case

45. The *McCallum* case was submitted to the Human Rights Committee on 16 October 2010, and the HRC handed down its decision on 20 October 2010, which included the direction that "the State party is under an obligation to provide the author with an effective remedy, including thorough and effective investigation of the author's claims….prosecution of those responsible and full reparation, including adequate compensation."
46. To date, however, there has been no indication that this direction has been fulfilled. It is recommended, therefore, that the Portfolio Committee call on the DCS to report back on its progress in this regard.

Combating of Torture Bill

47. The importance of criminalising torture in South Africa has been described and highlighted above. Despite the Bill having initially been scheduled to be tabled before Parliament in September this year, it remains curiously absent from the Parliamentary agenda this term. It is recommended therefore that the Portfolio Committee on Correctional Services encourages the Committee on justice and Constitutional development to expedite the legislative process in respect of this important legislation.

Optional Protocol to the Convention against Torture

48. The OPCAT established an international inspection system for places of detention. The Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), is a treaty body which, in terms of OPCAT, is authorised to visit all places of detention in States parties and provide advice and assistance to them.

49. Under the OPCAT, the SPT has unrestricted access to all places of detention, including prisons and must also be granted access to have private interviews with the persons deprived of their liberty, without witnesses, and to any other person who in the SPT's view may supply relevant information, including Government officials.

50. State parties to OPCAT also have an obligation to establish National Preventive Mechanisms (NPMs), independent national bodies for the prevention of torture and ill-treatment at the domestic level. The OPCAT provides guidance concerning the establishment of those bodies, including their mandate and powers. It is the responsibility of the State to ensure that it has in place a NPM which complies with the requirements of the OPCAT.

51. Although South Africa has signed OPCAT, it has not yet ratified it, which means that it is not yet subject to the SPT. The ratification of OPCAT would go a long way towards the eradication and prevention of torture and CIDT, for, as the European experience indicates, regular visits, reports and recommendations from independent oversight bodies, reduces the potential for acts of torture in places where people are deprived of their liberty.

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