

**PROTECTION AGAINST TORTURE IN INTERNATIONAL LAW**

by

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## **Declaration**

I declare that my dissertation titled; '**PROTECTION AGAINST TORTURE IN INTERNATIONAL LAW**' is my own work and that all sources that I used or quoted have been indicated and acknowledged by means of complete references.

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DATE:

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## **Abstract**

This limited scope dissertation deals with the protection against torture in international law. The mechanisms which have been established over the years to protect individuals against torture are analysed. The principles of international customary law dealing with torture and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) have been examined against the failure by States to honour their obligations under the Treaty and other legal normative rules. This required deep exploration of the definition of torture and how States can compromise the rule of law by manipulating the definition of torture as contemplated by the Treaty or other instruments. Examples from the former US government highlight the ways in which domestic laws can be used and are continued to be used to allow the use of torture. Measures by South Africa in joining the international community in the fight against torture are also discussed as a case study. While all efforts have been made by the South African system to adopt desirable frame works on the protection of individuals against torture, the lack of education on torture remains the down fall of the system. The dissertation clearly explains that universal jurisdiction applies in respect of torture and this is recognised by both treaty law and customary law. Indeed despite all the current measures in place the use of torture persists. The research clearly reveals that countries hide behind their own laws to perpetrate acts of torture. It is then recommended that proper implementation of the legal structures, informed of the objectives of the structures, is essential in completely eradicating torture.

## **Key terms**

TORTURE; UNCAT, SA Torture Act, Geneva conventions, criminal tribunals, legislation, international customary law, State party obligations, Jurisdiction on torture, international crimes, and terrorism.

## List of abbreviations

CIA	Central Intelligence Agency
CIDT	Cruel, Inhuman or Degrading Treatment
ECHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IVM	Internatinal Visiting Mechanism
MDC	Movement for Democratic Change
NDPP	National Director of Public Prosecutions
NVM	National visiting Mechanism
OPCAT	Optional Protocol to the Convention Against Torture and other cruel, Inhuman or Degrading Treatment or Punishment.
OAU	Organisation of African Unity.
SA	South Africa
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention Against Torture and other cruel, inhuman or Degrading treatment or punishment
US	United States



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## CHAPTER 1: INTRODUCTION

### 1.1 INTRODUCTION

The protection against torture is compatible with set of norms e.g. the right to physical integrity and human dignity which are legally safeguarded. International human rights instruments have contributed greatly to the prohibition of torture and set out absolute binding prohibitive norms in order to protect persons from “torture or other cruel, inhuman or degrading treatment or punishment.”<sup>1</sup> International human rights have established appropriate, preventative and deterrent mechanisms<sup>2</sup> which restraint torture throughout the world. Majority of the States have approved treaties which contain provisions that prohibit torture.<sup>3</sup>

Torture is recognised as both a war crime and a crime against humanity.<sup>4</sup> It goes without saying that the need for protection against torture led to torture having its own multilateral treaty.<sup>5</sup> The United Nations Convention Against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT)<sup>6</sup> was concluded to make the already existing prohibition under international law more effective.

As concluded in the *Prosecutor v Anto Furundzija*,<sup>7</sup> the prohibition of torture forms part of customary international law as a peremptory norm.<sup>8</sup> Under international customary law, States are required, not only to prohibit acts of torture and other

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<sup>1</sup> Article 7 of the International Covenant on Civil and Political rights of 1966. Hereafter referred to as ICCPR.

<sup>2</sup> Bantekas I *International Criminal Law* (2010) 4<sup>th</sup>ed at 230.

<sup>3</sup> Foley C *Combating Torture: A manual for Judges and Prosecutors* (2003) 1<sup>st</sup>ed at 8.

<sup>4</sup> Slye R and Van Schack B *International Criminal Law and its Enforcement* (2010) at 544.

<sup>5</sup> Harper J “Defining torture: bridging the gap between rhetoric and reality” 2009 (49) *Santa Clara Law Review* 895.

<sup>6</sup> The text of the Convention was adopted by the United Nations General Assembly Resolution 39/46 in 1984 and entered into force in 1987. Hereafter referred to as UNCAT.

<sup>7</sup> IT-95-17/1-T 10 December 1998. <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (accessed 22 January 2015).

<sup>8</sup> *Ibid* para 144 and 153.

forms of ill treatment, but also to prevent individuals from being placed in situations which are likely to result in torture.<sup>9</sup> Customary international law imposes an obligation on States to investigate, prosecute and punish individuals accused of torture who are present in their territory or a territory under their jurisdiction.<sup>10</sup>

The UNCAT criminalises torture as described as follows:

Firstly that the victim must have sustained severe pain and suffering, secondly the pain and suffering must have intentionally inflicted, thirdly must have been inflicted for the purposes spelt out in the definition and fourthly conduct was by someone acting on behalf of a State.<sup>11</sup>

The UNCAT definition of torture accepts, from the onset, that torture is commonly practiced by State agents against a State's nationals. Therefore the UNCAT is intended to protect against torture practiced at national level or tolerated as a matter of internal domestic policy.<sup>12</sup> The latter mentioned practice may involve the torture of war prisoners.

The definition of torture under the UNCAT has its origins in human rights law and it has also been recognised in international criminal law.<sup>13</sup> The criminal tribunals have adopted this definition in several instances and so did the European Court of human rights.<sup>14</sup> Torture is also within the jurisdiction of the International Criminal Court

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<sup>9</sup> De Than C and Shorts E *International Criminal Law and Human Rights* (2003) at 194.

<sup>10</sup> *Prosecutor v Anto Furundzija*, IT-95-17/1-T 10 December 1998 para 156.

<sup>11</sup> See article 10 of the UNCAT. See also, Slye and Van Schack (2010) 2<sup>nd</sup> ed at 547.

<sup>12</sup> Botterud KF "International protection of fundamental freedoms and human rights: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" 1984 (8) *International Law Journal* at 74.

<sup>13</sup> Slye and Van Schack (2010) 2<sup>nd</sup> ed at 548.

<sup>14</sup> Cullen A "Defining torture in international law: a critique of the concept employed by the European Court of Human Rights" 2008 (34) *California Western International Law Journal* 31.

(ICC)<sup>15</sup> if committed under certain conditions.<sup>16</sup>

Article 2 of the UNCAT creates obligations on States to take legislative measures, thereby making torture a criminal offence. These legislative measures intended to function as a deterrence mechanism; thereby torturers refrain from committing torture.<sup>17</sup> The duty to effectively prevent torture through a broad range of measures set forth in article 2 compels States to prohibit torture at national level where the prohibition is likely to be most directly and effectively enforced.<sup>18</sup> The article also clearly states that torture may not be justified under any circumstances.

Articles 2.1 and 4 of the UNCAT articulates the emphasis on the domestication of the provisions of the UNCAT. Under Article 16, other acts of cruel, inhuman or degrading treatment or punishment which do not fall within the definition of torture are also clearly prohibited. This provision leaves open the scope of the UNCAT such that other offensive acts, carried out by the State agents for the same purposes as torture, may fall within the purview of the UNCAT.<sup>19</sup>

This dissertation is structured into three integrated themes dealing with the various frameworks which establish the protection against torture:

1. The protection of torture under international customary law and the practice of State parties.
2. The protection of individuals against torture under treaty law and the application of the provisions of the UNCAT in South Africa as a case study.
3. The manipulation of legal framework governing the protection against

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<sup>15</sup> Hereafter referred to as the ICC.

<sup>16</sup> See article 7.1.f of Rome Statute of the International Criminal Court. See also, Cryer R, Friman H, Robinson D and Wilmhurst E *An Introduction to International Criminal Law and Procedure* (2010) 2<sup>nd</sup> ed at 251.

<sup>17</sup> De Than and Shorts (2003) at 190.

<sup>18</sup> Botterud 1984 (8) 72.

<sup>19</sup> *Ibid* 74.

torture by State parties focusing on the policies employed by the former US government in their war on terror.

## 1.2 RESEARCH PROBLEM

Even though it has been universally accepted that the UNCAT and international customary law provide extensive protection against torture, heated debates persist in an attempt to justify the use of torture. While the UNCAT is said to provide a workable definition of torture, disagreements are prevalent as to whether certain practices satisfy the UNCAT definition of torture.<sup>20</sup> Some State agents practice methods of interrogation which violate the prohibition on torture and then proceed to argue that; such methods of interrogation, despite their force, are effective and may not be deemed as torture.<sup>21</sup> The explanation is simple; while torture is universally prohibited, the definition of what constitutes torture remains very controversial, as some States define torture such its own conduct appears not to violate the internationally recognised ban on torture.<sup>22</sup>

Julia Harper is of the view that the UNCAT definition is blurred.<sup>23</sup> Louis similarly avers that the definition falls short in that the parameters of torture and ill treatment remains open to interpretation.<sup>24</sup> Surely the situation causing confusion is that the definition leaves room for domestication of the UNCAT definition in a way that defeats its purpose. The root cause being that the UNCAT definition itself is easily misinterpreted. For this reason the international community has been triggered to ponder on the morality, legality and utility of torture as a result of

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<sup>20</sup> Slye and Van Schack (2010) 2<sup>nd</sup> ed at 544.

<sup>21</sup> Rouillard F "Misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum" 2005 (1) *American University International Law Review* at 17.

<sup>22</sup> Miller P "Torture approval in comparative Perspective" 2011 (12) *Hum Rights Rev* 441.

<sup>23</sup> Harper J "Defining torture: bridging the gap between rhetoric and reality" 2009 (49) *Santa Clara Law Review* at 895.

<sup>24</sup> Rouillard 2005 (1) 20.

interpretations that seek to justify torture.<sup>25</sup> This research will show that, while a broad definition of torture is provided for by the UNCAT, State parties have taken advantage of some loop holes in the definition and domesticated the UNCAT such that the use of torture appears justified. Thus what has also raised a thorny issues are, acts which on the face of it are recognised as permissible methods of interrogation but under close scrutiny they are acts clearly prohibited by the UNCAT as torture.

In recent times, some situations seem to have somehow invoked the use of torture. For example, the prison in the US naval base at Guantanamo Bay, Cuba, opened on 11 January 2002, exactly four months after 9/11 attacks. Guantanamo Bay is a US military base and it is comprised of a forty-five square miles of land and water along South East Cuba. Guantanamo sets out the problem of disregarding judicial intervention in the name of law.<sup>26</sup> International committee of the Red Cross (ICRC) condemned the military base for the infamous methods of interrogation employed by the officials at the base.<sup>27</sup> ICRC stressed that both physical and psychological treatment of detainees amounted to torture.<sup>28</sup> For this reason, the policy of keeping terrorism suspects at Guantanamo Bay remains questionable.

Additionally, on 7 February 2002 President Bush issued an executive order that the Geneva Conventions do not apply to those who were detained in the in the framework of war on terror, an order which opened floodgates to torture of those imprisoned.<sup>29</sup> A surprising equivalence marks the logic, on the one hand employed by those who would defend democratic life and governments from terrorism by

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<sup>25</sup> Slye and Van Schack (2010) 2<sup>nd</sup>ed at 545.

<sup>26</sup> Lim M "Redefining torture in the age of terrorism: an argument against the dilution of human rights" 2006 (13) *Wash and Lee J. Civ. Rts& Soc. Just* 84.

<sup>27</sup> Lim 2006 (13) 86.

<sup>28</sup> *Ibid.*

<sup>29</sup> Worthington A "When America changed forever- Guantanamo and torture: human rights ten years after 9/11" 2011(204) *Overland* 85.

using torture in their processes, and on the other hand those who justify terrorism itself as a defence against excessive governmental power. Torture by the counter-terrorist state (the US) was seen as necessary and a convenient way of combating the threat of terrorism.<sup>30</sup> Indeed problems followed that logic. Redefining torture has proved futile in furthering US interests in the war on terrorism and contravenes principles protecting human dignity and respect for racial and cultural differences.<sup>31</sup>

This research will demonstrate that while some States have fulfilled their obligations under Articles 2 and 4 of the UNCAT, they have, through their Executive branch of government, adopted policies that contravene both their own legislation and obviously the UNCAT. The research will make it clear that such policies by the Executive also breach the absolute prohibition of torture provided for under international customary law.

### **1.3 RESEARCH QUESTIONS**

Against what has been outlined above, the following questions are going to be of primary concern in this study:

1. What measures are in place in International law to protect individuals against torture?
2. What is the acceptable legal definition of torture under the UNCAT?
3. What are the consequences of the failure of States to honour their obligations under the UNCAT?
4. How has the former US government's war on terror invoked the use of torture?

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<sup>30</sup> Saul B "The equivalent logic of torture and terrorism: the legal regulation of moral monstrosity" in Lewandowsky S, Denmark D, Clare J, Morgan F, and Werner G. K. Stritzke, *Terrorism and torture and Interdisciplinary Perspective* (2013) 44.

<sup>31</sup> Lim 2006 (13) 84.

#### 1.4 UNDERLYING ASSUMPTIONS

The international community finds torture inexcusable thus it is forbidden under convention law.<sup>32</sup> The view that a general prohibition against torture has grown into a principle of customary international law is sustained.<sup>33</sup> With all these provisions of both treaty law and international customary law, any acts of torture can be deemed to be contrary to the protection bestowed by international law.<sup>34</sup>

National laws that are contrary to the international prohibition of torture create international responsibility for other State Parties.<sup>35</sup> This research will highlight that the fundamental purpose of the UNCAT is that it is a stepping stone for States to draft legislation that enforces the protection.<sup>36</sup> State parties need not take advantage of the loopholes in the UNCAT but move for the protection against torture and promotion of human rights. The interpretation of what constitutes torture must be made in accordance with the times and take into account the techniques used in torture.<sup>37</sup> This research will emphasize that international customary law is an important consideration in the protection against torture because it provides for an absolute prohibition of torture.

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<sup>32</sup> *Prosecutor v Auto Furundzija*, case IT-95-17/1-T Judgment 10 December 1998 para 144.

<sup>33</sup> *Prosecutor v Auto Furundzija* para 138.

<sup>34</sup> Cullen 2008 (34) 30.

<sup>35</sup> *Prosecutor v Auto Furundzija* para 151.

<sup>36</sup> Bantekas(2010) 4<sup>th</sup> ed at 230.

<sup>37</sup> Rouillard 2005 (1) 41.

## CHAPTER 2:

### INTERNATIONAL CUSTOMARY LAW GOVERNING THE PROHIBITION OF TORTURE

#### 2.1 INTRODUCTION

History reveals that the use of torture was once accepted as justifiable and essential in obtaining information in the judicial process.<sup>38</sup> However, the information obtained by means of torture proved to be unreliable therefore the worth of using torture was once again put to question.<sup>39</sup> After the Second World War, the international community became conscious of the atrocities committed in the name of obtaining information. As a result customary norms, human rights and humanitarian instruments all followed in efforts of highlighting the ban on torture and the importance thereof.

#### 2.2 CUSTOMARY NORMS PROHIBITING TORTURE

Torture has been elevated to a status of a norm of *jus cogens* and this has been confirmed by the United Nations Special Rapporteur for Torture.<sup>40</sup> A norm of *jus cogens* is a norm that enjoys a higher rank in the international hierarchy than treaty law and even over what can be termed ordinary customary rules. The *jus cogens* nature of the prohibition of torture eloquently affirms the notion that the prohibition has now become one of the most essential principles in the international community.<sup>41</sup> Consequently the *jus cogens* nature of the prohibition of torture means that States are allowed to investigate, prosecute and punish or extradite individuals accused of torture, who are present under their territory.<sup>42</sup> The

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<sup>38</sup> Mutingh L "Guide to the UN convention against torture in South Africa" 2008 *CSPRI Community Law Centre* 10.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Prosecutor v Delalic and others*, case IT-96-21-T, Judgment, 16 Nov 1998 para 454.

<sup>41</sup> *Prosecutor v Furundzija*, case IT-95-17/I-T Judgment, 10 Dec 1998 para 153.

<sup>42</sup> *Ibid* 156.

prohibition of Torture further creates obligations *erga omnes* on States, that is, obligations owed towards all the other members of the international community, each of which then has a mutual right.<sup>43</sup>

### **2.2.1 International Human Rights Instruments**

The absolute prohibition of torture and cruel, inhuman and degrading treatment or punishment has become a universal norm. Treaties and resolutions of international organisations set up systems intended to guarantee that the prohibition is executed as well as to prevent resort to torture as much as possible.<sup>44</sup> International human rights instruments such as the Universal Declaration of Human Rights (UDHR)<sup>45</sup> and International Covenant on Civil and Political Rights (ICCPR) contains provisions aimed at the prohibition of torture. Article 5 of the UDHR states that; “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 7 of ICCPR also states that “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.

Torture is also prohibited by regional human rights treaties such as; Article 3 of the European Convention on Human Rights, Article 5.2 of the American convention on human Rights, Article 1 of the Inter-American Convention to Prevent and Punish Torture and Article 5 of the African Charter on Human and Peoples’ Rights.<sup>46</sup>

Most important international human rights instruments, which prohibit torture, have been widely ratified. More than eighty States have the prohibition of torture as one of the fundamental rights entrenched in their national constitutions. Because of the foregoing, it can be concluded that the prohibition on torture is indeed a norm of

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<sup>43</sup> *Ibid para 151.*

<sup>44</sup> *Ibid para 143.*

<sup>45</sup> Adopted by the United Nations General Assembly in 1948. Hereafter referred to as the UDHR.

<sup>46</sup> *Prosecutor v Delalic and others para 452.*

customary law.<sup>47</sup>

It is important to note that the prohibition of torture laid down in human rights treaties enshrines an absolute right.<sup>48</sup> The most crucial element of this prohibition on torture is that it is non-derogable. Therefore the use of torture shall not be invoked neither on public emergency situations nor any other extenuating circumstances. In international human rights law, torture is prohibited as a criminal offence to be punished under national law because State responsibility is more of relevance than individual criminal liability.<sup>49</sup> However, the prohibition covers and has a direct bearing on the criminal liability of individuals.<sup>50</sup> The existence of this body of general and treaty rules forbidding torture illustrates that the international community, while aware of outlawing this atrocious phenomenon, has decided to restrain any manifestation of torture by operating both at interstate level and at the level of individuals.<sup>51</sup>

### **2.2.2 International humanitarian instruments**

According to Article 49, 50, 129 and 146 of the Geneva Conventions I, II, III and IV, respectively, all State parties are required to pass satisfactory national laws that make serious violations of the Geneva Conventions a punishable criminal offense; as a result the International Criminal Court was established. More than 180 States have become parties to the 1949 conventions. Approximately 150 States are party to Protocol I; more than 145 States are party to Protocol II. Over 50 States have made declarations accepting the competence of international fact-finding commissions to investigate allegations of grave breaches or other serious violations of the conventions or of Protocol I.

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<sup>47</sup> *Prosecutor v Delalic and others* para 454.

<sup>48</sup> *Prosecutor v Furundzija* para 144.

<sup>49</sup> *Ibid* para145.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid* para 146.

Be that as it may, in 2003 the former US government drafted a report, “The March 6, 2003 Defence department working group paper- A discussion.” The report presented arguments on how a US government official who tortured prisoners could avoid prosecution if caught.<sup>52</sup> The memorandum sought primarily to interpret the requirements of international law as they relate to the Armed forces of the US.<sup>53</sup> In the memorandum it was confirmed that the US government held a firm view that; the provisions of the Geneva Convention pertaining to the treatment of prisoners did not apply to the al Qaeda detainees because al Qaeda is not a party to the Geneva Convention.<sup>54</sup> It further explained that the provisions of the Geneva Convention do apply to Taliban but Taliban detainees do not qualify as prisoners of war under article 4 of the Third Geneva Convention.<sup>55</sup> The Memorandum made it clear that any decision by the president in relation to al Qaeda prisoners would constitute what is termed a controlling executive interest, consequently overriding any international law principles.<sup>56</sup> This was certainly a wrong appreciation of the law by the former US Government.

Surely international customary law prohibits Torture in times of armed conflict such as the Geneva Conventions of 1949 and the additional protocols of 1977.<sup>57</sup> Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, where applicable as minimum fundamental guarantees of treaty law.<sup>58</sup> Equally, Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War

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<sup>52</sup> Canfield J “Note: the torture memos: the conflict between a shift in us policy towards condemnation of human rights and international prohibitions against the use of torture” 2005 (33) *Hofstra Law Review* 1071.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* 1072.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* 1073.

<sup>57</sup> *Prosecutor v Furundzija* para 134.

<sup>58</sup> *Ibid* 135.

prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” This has developed to be customary norm and it is accepted State practice. The prohibition of torture is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.<sup>59</sup> Certainly, the former US government laboured under wrong interpretations of the existing frame works which aimed to protect all individuals against torture.

The general and accepted position is that the prohibition of torture has advanced into a principle of customary international law.<sup>60</sup> There are a number of factors which demonstrate that these treaty provisions have definitely become customary rules.<sup>61</sup> Firstly, these treaties and in particular the Geneva conventions have been ratified by virtually all States of the world. Secondly, it is generally admitted that those treaty provisions remain as such and any contradicting party is formally entitled to relieve itself of its obligations by denouncing the treaty, which is highly unlikely.<sup>62</sup>

In the absence of treaty law, and controlling executive or legislative acts or judicial decisions, customs and usages of civilised nations must then become applicable.<sup>63</sup> Consequently, courts are required to interpret international law as it has progressed over the years and exists among the nations of the world today.<sup>64</sup>

Most States have consented to be bound by humanitarian principles contained in the Geneva Conventions. These significant conventions oversee treatment of detainees in times of war and contain many provisions prohibiting torture and cruel, inhuman, or degrading treatment. In view of the repudiation of torture as an instrument of

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<sup>59</sup> *Filartiga v Pena-irala* 2<sup>nd</sup> Cir, 1980 Kaufman J.

<sup>60</sup> *Prosecutor v Furundzija* par 138

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Filartiga v Pena-irala* 2<sup>nd</sup> Cir, 1980 Kaufman J.

<sup>64</sup> *Filartiga v Pena-irala.*

official policy by nearly all States in the world, we find that an act of torture committed by a State official against one held in detention violates established norms of international law on human rights, and consequently the law of nations.

It should be emphasised that in international humanitarian law, in addition to individual criminal liability, State responsibility may follow where State officials fail to prevent torture or to punish torturers.<sup>65</sup> If torture is imposed as a wide practice of State officials, it amounts to breach of an international obligation to safeguard the human being, thus it constitutes a grave wrongful act generating State responsibility.<sup>66</sup> In the field of international humanitarian law, particularly in the context of international prosecutions, the role of the State is, when it comes to accountability, marginal.<sup>67</sup> Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the State and, conversely, its participation in the commission of the offence is no defence for the perpetrator.<sup>68</sup> Humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict.<sup>69</sup>

### **2.3 PROHIBITION OF TORTURE UNDER INTERNATIONAL CRIMINAL LAW**

States highly value the abolition of torture therefore as a result; the collection of treaty and customary rules on torture has attained a predominantly high status in the international legal system.<sup>70</sup> States are obliged to not only prohibit torture, but also to avert its occurrence.<sup>71</sup> Thus, States must establish processes which will prevent the perpetration of torture.<sup>72</sup> It is also clear that International rules do not

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<sup>65</sup> *Prosecutor v Furundzija* para 141.

<sup>66</sup> *Ibid* para 142.

<sup>67</sup> *Ibid* para 470.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Prosecutor v Kunarac, case IT-96-23, Judgement, 22 Feb 2001, para 470.*

<sup>70</sup> *Prosecutor v Furundzija* para 147.

<sup>71</sup> *Ibid* para 148.

<sup>72</sup> *Ibid* para 148.

only prohibit torture. They also compel States to adopt national measures which are necessary for implementing the prohibition of torture and not to pass laws which are contrary to the prohibition.<sup>73</sup> The requirement that State promptly set up national measures which implement the prohibition of torture is a fundamental part of the international obligation to prohibit torture.<sup>74</sup> The mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility.<sup>75</sup> The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or at any rate capable of bringing about any torture practice.<sup>76</sup>

Over the years, several efforts have been made in an endeavour to define torture under customary international law.<sup>77</sup> In the *Kunarac* case the Trial Chamber turned to human rights law to determine the definition of torture under customary international law. They concluded that the definition of an offence is principally determined by the environment in which it develops.<sup>78</sup> Primary definitions are found in the Declaration on the Protection from Torture and in the UNCAT. These definitions differ in two ways; there is no reference to torture as an aggravated form of ill-treatment in the UNCAT, the examples of prohibited purposes in the UNCAT clearly include “any reason based on discrimination of any kind whereas this is not the case in the declaration on torture.”<sup>79</sup>

On the other hand, the Inter-American Convention in defining torture avoids specifying a threshold level of pain or suffering which is necessary for ill-treatment to

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid* para 149.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* para 150

<sup>77</sup> *Prosecutor v Delalic and Others* para 455.

<sup>78</sup> *Prosecutor v Kunarac* para 469.

<sup>79</sup> *Prosecutor v Delalic* pars 457.

qualify as torture.<sup>80</sup> It may, therefore, be concluded that; torture as defined in the UNCAT incorporates the definitions contained in both the Declaration on Torture and Inter-American Convention and thus reflects a compromise which the trial chamber considers to be representative of customary international law.<sup>81</sup>

## 2.4 CONCLUSION

There can be no doubt that torture is prohibited under customary law.<sup>82</sup> Regardless of the apparent differences in political ideas, social policies as well as religious traditions, the international community point towards an almost universal approval to importance of the prohibitions on torture and other cruel, inhuman, or degrading treatment, in times of war as well as peace. The international community is aware of the value of prohibiting torture. This is evidenced by the existence of a body of general rules and treaties forbidding torture, which restrains even any signs of torture at the inter-State level and at the level of individual.<sup>83</sup> Therefore one would imagine that with such extensive protection against torture under international customary law, there would no legal loopholes leaving room for the use of torture. Regrettably, while on paper States do oblige to the absolute prohibition of torture as recognised by international customary law, in practice they undermine such obligations.

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<sup>80</sup> *Ibid* para 458.

<sup>81</sup> *Ibid*. Contrary to this position, in the *Prosecutor v Kunarac* case, in which the court held that; *Article 1 of the Torture convention makes it abundantly clear that its definition of torture is limited in scope and was meant to apply only "for the purposes of this convention". The definition of torture contained in the torture convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied. See, para482.*

<sup>82</sup> *Prosecutor v Delalic* para 452.

<sup>83</sup> *Prosecutor v Furundzija* pars 134-164.

## CHAPTER 3: LEGAL FRAMEWORK PROTECTING INDIVIDUALS AGAINST TORTURE UNDER THE UNCAT

### 3.1 INTRODUCTION

The use of torture was long met with disapproval in a plethora of treaties, declarations and resolutions.<sup>84</sup> These instruments did not contain an appropriate definition of torture.<sup>85</sup> Nevertheless, the adoption of the UNCAT<sup>86</sup> in 1984 was prompted by the prevalence of the use of torture in Latin America and other regions of the world.<sup>87</sup> It is clear from the preamble of the UNCAT that its object and purpose as aspired by the drafters is, to make the struggle against torture and cruel, inhuman or degrading treatment or punishment more effective.<sup>88</sup>

The underlying philosophy of the UNCAT is the prevention of torture and protection of all against torture.<sup>89</sup> The UNCAT concentrates on advancing the interests of those who may become victims by influencing the conduct of perpetrators.<sup>90</sup> The UNCAT like any other treaty envisages the application of criminal laws against the perpetrator, however its most important purpose is to form a platform for the adoption of implementing legislation and engaging the responsibility of State parties.<sup>91</sup> This purpose is clearly outlined in article 2 of the UNCAT and further buttressed under article 4. The UNCAT was drafted in such a manner that makes it

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<sup>84</sup> De Than and Shorts (2003) at 181.

<sup>85</sup> *Ibid* at 186.

<sup>86</sup> The UNCAT came into force in 1987

<sup>87</sup> Nowak M and McArthur E *Oxford Commentaries on international law; The United nations Convention Against Torture, A Commentary* (2008) at 8.

<sup>88</sup> *Ibid* at 12.

<sup>89</sup> De Than and Shorts (2003) at 186.

<sup>90</sup> Burgers JH and Danelius H *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment Or Punishment* (1988) at 1.

<sup>91</sup> Bantekas(2010) 4<sup>th</sup> ed at 230.

necessary for State parties to take required steps to make torture a crime in their domestic laws and to further ensure punishment of those who contravene such laws.<sup>92</sup> Most importantly, the UNCAT aspires to reinforce the already existing prohibition.<sup>93</sup> The protection bestowed by the UNCAT cannot be limited by other international instruments or national law.<sup>94</sup> This notion is highlighted in Article 16.

## **3.2 CRIMINALISING TORTURE UNDER THE UNCAT**

### **3.2.1 Defining the Crime of Torture**

The UNCAT was the first treaty to define torture. Paragraph 1 of article 1 of the UNCAT does not exactly refer to a definition of torture in the sense of penal law.<sup>95</sup> For that reason, paragraph 1 must be understood as an explanation of torture for the purpose of domesticating the UNCAT and not a legal definition in terms of national criminal law and procedure.<sup>96</sup> The UNCAT definition of torture does appear all-inclusive in scope; it is certainly intended to avert acts of torture which may not be dealt with appropriately at the national level.<sup>97</sup>

The UNCAT was designed to provide guiding authority in the international case against torture.<sup>98</sup> Many States have come up with definitions which are significantly different from the UNCAT definition, consequently while they publicly condemned torture, they defined torture in ways that permitted perpetrators to engage in conduct that defies the UNCAT's aim.<sup>99</sup>

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<sup>92</sup> De Than and Shorts (2003) at 186.

<sup>93</sup> Burgers and Danelius (1988) at 1.

<sup>94</sup> *Ibid* at 122.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

<sup>97</sup> Botterud 1984 (8) 72.

<sup>98</sup> Harper J "Defining torture: Bridging the gap between Rhetoric and Reality" 2009 (49) *Santa Clara Law Review* 895.

<sup>99</sup> Harper 2009 (49) 896.

For example, in ratifying the UNCAT on 21 October 1994, the United States of America (USA) made some declarations, reservations, and understandings.<sup>100</sup> Some of these reservations were based on the argument that the UNCAT was not legally effective without intervention. There is no doubt that, the ever growing fear of terrorist attacks by the USA Government resulted in the said government narrowly interpreting the UNCAT definition of torture thus leading to increased flexibility in the interrogation techniques applied to terrorism suspects.<sup>101</sup>

The former USA Government through the Bybee Memorandum<sup>102</sup> set out the elements of torture as follows: a person will be convicted of torture where;

1. The torture happened outside the USA or any area within USA jurisdiction.
2. The defendant acted under the colour of law.
3. The victim suffering the torture was under the complete physical control of the defendant.
4. The defendant specifically intended to cause severe pain and suffering (either physical or mental); and
5. Severe pain or suffering was endured as a result of the defendant's act.<sup>103</sup>

The above elements demonstrate that the office of legal counsel held the view that the text UNCAT definition of torture only prohibits acts of the most extreme nature. The office also made it clear that the better interpretation of the element of intention in the UNCAT definition is that specific intent is the required standard.<sup>104</sup> In

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<sup>100</sup> Canfield J "Note: The torture memos: The conflict between a shift in US policy towards condemnation of human rights and international prohibitions against the use of torture" 2005 (33) *Hofstra Law Rev.* 1057.

<sup>101</sup> Lim 2006 (13) 84.

<sup>102</sup> This is a memorandum drafted by the Office of Legal Counsel (OLC) on 1 August 2002 for Department of Justice and signed by Jay S Bybee who was in charge of the OCL in 2002. See Canfield 2005 (33) 1061.

<sup>103</sup> Canfield 2005 (33) 1062.

<sup>104</sup> Canfield 2005 (33) 1063.

situations where the government is defined as the offender, the additional requirement that the offender must have custody or complete physical control of the victim may require a closer nexus between the public official and the victim. As a result, this element also narrows the UNCAT definition of torture by adding another burden of proof for an alleged victim to prove against the offender.<sup>105</sup>

However the US failed to appreciate that, the drafters of the UNCAT aimed for a uniform appreciation of the concept of torture throughout the State parties.<sup>106</sup> Definitions that are different undermine the enforcement of the prohibition and regrettably open doors for the continued practice of torture.<sup>107</sup> In States where the domestic laws do not define torture, torture cannot be distinguished from other acts thus the special status of torture is diminished.<sup>108</sup> The UNCAT definition of torture is widely used in international conventions and treaties, as well as laws at the national and local levels.<sup>109</sup>

### **3.2.1.1 THE ELEMENTS OF TORTURE UNDER THE UNCAT**

Article 1 of the UNCAT contains the essential elements of torture which are; the act, the intention of the offender, the purpose of the conduct and the identity of the offender.<sup>110</sup> Parties to the UNCAT have developed the elements more fully in an effort to implement the UNCAT's aim into their domestic laws.<sup>111</sup> Omission of any of the elements can be a positive development only where torture has no doubt been properly defined.<sup>112</sup> The UNCAT definition of torture is detailed enough to

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<sup>105</sup> Lim 2006 (13) 99.

<sup>106</sup> Burgers and Danelius (1988) at 123.

<sup>107</sup> Harper J "Defining torture: Bridging the gap between rhetoric and reality" 2009 (49) *Santa Clara Law Review* 927.

<sup>108</sup> *Ibid.*

<sup>109</sup> Miller G *Defining Torture* (2005) at 2.

<sup>110</sup> Boulesbaa A *The UN Convention on Torture and The Prospects of Enforcement* (1999) at 9.

<sup>111</sup> Harper 2009 (49) 898.

<sup>112</sup> Harper 2009 (49) 898.

encompass any possible act of torture.<sup>113</sup>

### **3.2.1.1.1 Victim sustained severe pain and suffering**

One would imagine that by using the term ‘any act’, the drafters might have invited a rather constricted understanding which excludes omissions.<sup>114</sup> However, nothing in the *travaux preparatoire* of the UNCAT suggests that.<sup>115</sup> Boulesbaa illustrates his view by stating that: the failure to provide food and medical care to the general population, aiming to cause pain and suffering meets the criteria set out in article 1 of the UNCAT, but failure to do so due to negligence or corruption of government involved would not satisfy the requirement of the said article.<sup>116</sup> It is a settled principle of law that an omission is an act where there is a legal obligation to act. The legal duty of States to act has been recognised in a number of earlier international conventions. Therefore the only logical conclusion that follows is that the prohibition of torture in the context of article 1 does extend to omissions.<sup>117</sup> Therefore if torture is defined and interpreted in a way such that omissions are excluded, then such an approach can be deemed to be adversative to the purpose of the UNCAT.<sup>118</sup> The United Kingdom in domesticating the UNCAT rightly drafted a definition that clearly includes both positive conduct and omissions which leaves room for no doubt.<sup>119</sup>

The harm caused must reach a high level of severity.<sup>120</sup> The severity under

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<sup>113</sup> Botterud 1984 (8) 72.

<sup>114</sup> Nowak and McArthur (2008) at 66.

<sup>115</sup> *Ibid.*

<sup>116</sup> Boulesbaa (1999) at 14.

<sup>117</sup> *Ibid* at 15.

<sup>118</sup> Miller (2005) at 2.

<sup>119</sup> *Ibid* at 7.

<sup>120</sup> De Than and Shorts (2003) at 187.

discussion covers long lasting use of force and violent conduct which if not severe at the specific time, ordinarily becomes severe over a period of time.<sup>121</sup> Even though, other words were suggested in substitute of the word 'severe', words such as extreme or extremely painful, the drafters concluded that; 'severe pain' was sufficient to portray only acts of a certain degree of harm that constitute torture.<sup>122</sup> The former USA Government through the Bybee Memorandum attempted to interpret the UNCAT, 18 US.C ss2340-2340A, and the Torture Victims Protection Act of 1991.<sup>123</sup> The documents were interpreted as prohibiting only extreme acts and this resulted in serious violations of human rights and the use of torture thrived.<sup>124</sup>

Torture ranks highest in the hierarchy of harms.<sup>125</sup> The term severe may appear unclear and open to interpretation because a specific threshold is not prescribed but if a specific threshold had been required, the term would be quiet limited in application.<sup>126</sup> It is unwarranted to endeavour to list conduct amounting to torture.<sup>127</sup> The experiences of the victim are more relevant, than the techniques used or the effects thereof, in an enquiry of severe pain or suffering.<sup>128</sup> For certain types of conduct, the level of pain or suffering need not be proved simply because such conduct, per se, cause severe pain suffering of the required level for torture.<sup>129</sup> The severity of the harm is what separates torture from other offences which may appear to have the same elements as torture.<sup>130</sup> The distinction between torture and Cruel, Inhuman or Degrading Treatment (CIDT) stems predominantly from a

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<sup>121</sup> Boulesbaa (1999) at 18.

<sup>122</sup> Burgers and Danelius (1988)at 117.

<sup>123</sup> Lim 2006 (13) 94.

<sup>124</sup> *Ibid.*

<sup>125</sup> Miller (2005) at 9.

<sup>126</sup> Cullen 2008 (34) 33.

<sup>127</sup> Cryeret *al* (2010) 2<sup>nd</sup>ed at 355.

<sup>128</sup> Luban D and Shue H "Mental torture: A critique of Erasures in US Law" 2011 (100) *Georgetown Law Journal* 7.

<sup>129</sup> Cryeret *al* (2010) 2<sup>nd</sup>ed at 355.

<sup>130</sup> Cullen 2008 (34) 32.

difference in intensity of the pain and suffering inflicted.<sup>131</sup> The European Court of Human Rights (ECHR) rightfully held that torture can be categorised as the extreme end of a wide spectrum pain inducing acts.<sup>132</sup> The International Criminal Tribunal for Yugoslavia (ICTY) held that permanent injury is not a requirement.<sup>133</sup> States differ in their approach of defining the severe pain suffering element in their domestic laws therefore narrow interpretations of the element are apparent in their definitions.<sup>134</sup>

For example, in Egypt, the definition of torture does not set out the degree of pain and suffering required thus leaving the element open to broad interpretations.<sup>135</sup> Whereas in Croatia, harm is limited to only the physical harm and the mental harm is not clearly prohibited however this is obviously a narrow approach that does not uphold the UNCAT.<sup>136</sup> In Latvia, they have chosen to use the word 'particular' instead of 'severe' and that has blurred the definition.<sup>137</sup> Others opted for a vague definition which in the end offer no protection against torture, for example in Latvia the relevant provision states that; 'the act must cause particular pain or suffering to victims'.<sup>138</sup> In their attempt to domesticate the UNCAT, the US has adopted a definition of mental suffering that is so narrow that a lot of techniques of mental torment do not qualify as torture under their law, further limiting the prohibition subscribed to under the UNCAT.<sup>139</sup> All these examples, in one way or another, broaden the severity requirement which in turn limits the protection against torture as envisaged by the UNCAT drafters.<sup>140</sup>

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<sup>131</sup> Harper 2009 (49) 901.

<sup>132</sup> *Ibid.*

<sup>133</sup> Slye and Van Schack (2010) 2<sup>nd</sup> ed at 570.

<sup>134</sup> Miller (2005) at 10.

<sup>135</sup> *Ibid* at 11.

<sup>136</sup> *Ibid* at 12.

<sup>137</sup> Harper 2009 (49) 916.

<sup>138</sup> *Ibid.*

<sup>139</sup> Luban and Shue 2011 (100) 3.

<sup>140</sup> Harper 2009 (49) 827.

### 3.2.1.1.2 The severe pain and suffering was intentionally inflicted

The *mens rea* required is the intentional inflicting of harm upon a person. For that reason, merely disregarding prescribed procedural interrogation methods will not result in torture.<sup>141</sup> The UNCAT clearly and simply excludes negligent conduct.<sup>142</sup> Nevertheless, the intention by the perpetrator must be to cause a particular harm.<sup>143</sup> It is important to note that the UNCAT does not expressly require neither general nor specific intent, it is thus basic that is to be proved.<sup>144</sup>

On the one hand, both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) maintain that the UNCAT requires general intent.<sup>145</sup> The USA, on the other hand, is of the view that the UNCAT requires specific intent.<sup>146</sup> They made this clear at the time they were ratifying the UNCAT by stating that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.<sup>147</sup> This specific intent approach is narrower than intention as clearly required by article 1 and may surely exonerate other forms of torture.<sup>148</sup> Requiring specific intent imposes an impossible obstacle causing the UNCAT to be hopeless.<sup>149</sup>

In a report concluded after observing Colombia in 2009, the Committee Against raised a concern about incorrect definitions that incorporate the crime of torture into other less serious crimes to which intent is not a requirement.<sup>150</sup> The concern

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<sup>141</sup> De Than and Shorts (2003) at 187.

<sup>142</sup> Nowak and McArthur (2008) at 73.

<sup>143</sup> Miller (2005) at 12.

<sup>144</sup> *Ibid* at 14.

<sup>145</sup> Harper 2009 (49)899.

<sup>146</sup> *Ibid*.

<sup>147</sup> Nowak and McArthur (2008) at 74.

<sup>148</sup> *Ibid*.

<sup>149</sup> Miller (2005) at 15.

<sup>150</sup> Hathaway A O, Nowlan A and Spiege J "Tortured reasoning: The Intent to torture under International and Domestic Law" 2012 (52) *Virginia Journal of International Law* 827.

was raised because the perpetrator's intention is important for distinguishing torture from these other less serious offences such as personal injury.<sup>151</sup>

### **3.2.1.1.3 Severe pain and suffering was inflicted for purposes spelt out in the definition**

This requirement of a specific purpose also appears to be the most critical element in differentiating torture from cruel or inhuman treatment.<sup>152</sup> During the drafting of the UNCAT, it was not in dispute that only conduct that serves a certain purpose can be deemed as torture hence the inclusion of this element in the drafting of article 1.<sup>153</sup>

The list of acts embodied in article 1 of the UNCAT constitute the definition of torture. It is clear that article 1 does not represent an exhaustive list, but purposes which are not listed must have something in common with the listed ones.<sup>154</sup> The ICTY held that the purposes listed in the convention are representative and further that there is no requirement that the conduct must be solely perpetrated for a prohibited purpose.<sup>155</sup> The act must not be an end in itself.<sup>156</sup> The purposes need not necessarily be illegal.<sup>157</sup> Purposes that do not have any similarities with the ones listed in the definition, have the likelihood of narrowing the definition, thereby creating inconsistencies with the UNCAT.<sup>158</sup> The phrase for 'such purposes' must be understood in the restricted sense.<sup>159</sup> The general element of the purposes should be their connection with the furtherance of State interests or policies regardless of

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<sup>151</sup> *Ibid.*

<sup>152</sup> Nowak and McArthur (2008) at 74.

<sup>153</sup> *Ibid.*

<sup>154</sup> Miller (2005) at 16.

<sup>155</sup> Harper 2009 (49) 905.

<sup>156</sup> Miller (2005) at 16.

<sup>157</sup> Burgers and Danelius (1988) at 118.

<sup>158</sup> Miller (2005) at 19.

<sup>159</sup> Nowak and McArthur (2008) at 75.

how remote this connection may be.<sup>160</sup> The purposes in question must be the driving forces behind the conduct. However, it need not be the only or principal purpose.<sup>161</sup> Therefore, when States adopt the UNCAT into their national laws; they should not restrict themselves to acts committed only with listed purposes.<sup>162</sup>

#### **3.2.1.1.4 Severe pain or suffering was inflicted by a public official or those acting in an official capacity**

The definition of torture embodied in article 1 of the UNCAT provides for direct or indirect involvement of a public official. The public official who commits torture by himself, or who order his/ her subordinates to commit it, or fails to prevent it is guilty. The official capacity or acting under orders cannot be invoked as a defence.<sup>163</sup> This implies that, only torture for which authorities can be held responsible should fall within the UNCAT's definition.<sup>164</sup> However, the Special Rapporteur has since recommended that where there is State inaction in the case of violence by a private body, this may amount to torture under the UNCAT.<sup>165</sup> The UNCAT endeavours to remedy the situation where the authorities themselves are involved in the torture activities and in turn compromise the investigation and prosecution of the direct perpetrators.<sup>166</sup> The ECHR has held that States must further take steps to ensure that individuals within their jurisdiction are not tortured.<sup>167</sup> The perpetrator can only be a public official, or at least those persons acting in an official capacity but determining who is a public official can get a little convoluted.<sup>168</sup> The terms 'consent or acquiescence' are, however, wide enough to be interpreted to cover a broad

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<sup>160</sup> Burgers and Danelius (1988)at 119.

<sup>161</sup> Cryeret *al* (2010) 2<sup>nd</sup>ed at 252.

<sup>162</sup> *Ibid* at 356.

<sup>163</sup> Bantekas(2010) 4<sup>th</sup>ed at 234.

<sup>164</sup> Burgers and Danelius (1988)at 119.

<sup>165</sup> Harper 2009 (49) 893-928.

<sup>166</sup> Burgers and Danelius (1988)at 120.

<sup>167</sup> Z and Others v. United Kingdom, App No 29392/95, 34 Eur. H.R Rep.97, 131 (2002).

<sup>168</sup> De Than and Shorts (2003) at 187.

range of actions committed by private persons if the State in some way or another permits such activities to persist.<sup>169</sup> Purposive interpretation should be preferred such that non-state actors are covered where necessary.<sup>170</sup> State responsibility for the purposes of application of the public official requirement arises where; there is either direct or indirect interest by the State ordinarily because the term instigation means incitement, inducement or solicitation.<sup>171</sup>

Many States have come up with definitions that differ from the UNCAT definition in respect of the public official element.<sup>172</sup> During the drafting phase, the US and the Federal Republic of Germany rightfully suggested that the term 'public official' be defined however such a suggestion was not upheld.<sup>173</sup>

A rather limited approach by the US is that UNCAT only covers conduct by the State and Article 1 is intended to find application where conduct is directed against the perpetrator's custody or control.<sup>174</sup> Variations under the public official element of the definition affect government accountability with regards to individual acts of torture.<sup>175</sup> Many member States fail to include the public official element in their adaptation of the UNCAT and such an approach may result in other perpetrators not being held accountable.<sup>176</sup>

### **3.2.1.1.5 Severe pain and suffering from lawful sanctions is excluded**

This clause originates from the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment

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<sup>169</sup> Nowak and McArthur (2008) at 78.

<sup>170</sup> Bantekas(2010) 4<sup>th</sup>ed at 234.

<sup>171</sup> Boulesbaa (1999) at 26.

<sup>172</sup> Miller (2005) at 19.

<sup>173</sup> Boulesbaa (1999) at 27.

<sup>174</sup> Boulesbaa (1999) at 25.

<sup>175</sup> Miller (2005) at 19.

<sup>176</sup> Harper 2009 (49) 920.

or Punishment, which allows lawful sanctions as an exception to the prevention of torture, only in so far as there is compliance with standard minimum Rules for the treatment of Prisoners as prescribed.<sup>177</sup> The extent of application of this clause is certainly a thorny issue.<sup>178</sup> There is no phrase in the UNCAT more intricate than ‘inherent in or incidental to lawful sanction’, the complication lies in determining what in a particular legal system are lawful sanctions and what are not.<sup>179</sup> Unlike in the declaration, the drafters of the UNCAT did not rely on the application of any international standards to such conduct of State.<sup>180</sup>

This clause is contentious in that it appears to be too extensive an exemption because it may be understood to mean that States can make laws that provide for sanctions which would under normal circumstances be regarded as torture.<sup>181</sup> Some States support the view that any sanction that is passed in terms of the law is covered by this clause.<sup>182</sup> Therefore, by excluding conduct ‘inherent in or incidental to lawful sanctions’ States find an excuse to violate the UNCAT without being found in breach of it.<sup>183</sup> This is surely an unreasonably wide interpretation of this clause which disregards the general international human rights and humanitarian law principles.<sup>184</sup>

In light of this clause, it is safe to state that lawful sanctions would be those sanctions that are meted out in accordance with domestic laws and do not contradict international law.<sup>185</sup> One clear illustration of this exception is

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<sup>177</sup> Article 1 of the Declaration ... United Nations General Assembly resolution 3452 (XXX) (1975). See also, Nowak and McArthur (2008) at 78.

<sup>178</sup> Nowak and McArthur (2008) at 81.

<sup>179</sup> Boulesbaa (1999) at 28.

<sup>180</sup> *Ibid* at 29.

<sup>181</sup> Burgers and Danelius (1988) at 121.

<sup>182</sup> Nowak and McArthur (2008) at 81.

<sup>183</sup> Boulesbaa (1999) at 29.

<sup>184</sup> Nowak and McArthur (2008) at 82.

<sup>185</sup> Cryeret *al* (2010) 2<sup>nd</sup> ed at 253.

imprisonment that follows after a lawful conviction.<sup>186</sup> Therefore, it is clear that lawful sanctions that have all the characteristics of torture *per se* cannot be justified by this paragraph. In essence this paragraph means that the UNCAT definition does not limit any protection that may be offered by another instrument of a much wider application.<sup>187</sup> It is noted though that this provision stands as a potential loophole because a broad interpretation of this provision could easily result in torture. In order to avert this potential loophole, reference to the standard minimum rules for treatment should have been maintained.<sup>188</sup> Indeed, some writers hold the view that the wording of this element is ambiguous because it weakens the non-derogable characteristic of torture.<sup>189</sup>

A rather purposive proposal by Britain, Italy and the Netherlands is that, the phrase 'lawful sanctions' must be understood as indicative of commonly accepted international standards.<sup>190</sup> Surely, that is the approach contemplated by the drafters of the UNCAT and similar to the 1975 Declaration. More often, international instruments offer extensive protection of human rights and then require States not to invoke their national laws in order to breach their international obligations.<sup>191</sup> For example, the Universal Declaration of Human Rights, in so far as it is consistent with international customary law, contains the international standards to be followed by States in this respect.<sup>192</sup> The Vienna Convention on the Law of Treaties<sup>193</sup> bars States from relying on their municipal laws to justify their failure to honor a treaty.<sup>194</sup> The UNCAT should be understood in the same way by State

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<sup>186</sup> Nowak and McArthur (2008) at 83.

<sup>187</sup> Burgers and Danelius (1988) at 122.

<sup>188</sup> Boulesbaa (1999) at 30.

<sup>189</sup> De Than and Shorts (2003) at 188.

<sup>190</sup> Boulesbaa (1999) at 32.

<sup>191</sup> *Ibid* at 33.

<sup>192</sup> *Ibid*.

<sup>193</sup> 1969.

<sup>194</sup> Boulesbaa (1999) at 33.

Parties.

### 3.2.2 The Establishment of Jurisdiction Relating to the Crime of Torture

Jurisdiction means the authority averred by States in an effort to stipulate and impose their municipal laws over persons and property.<sup>195</sup> This power is typically employed in three forms, which correspond to three branches of government.<sup>196</sup> For this reason we have; legislative or prescriptive and judicial jurisdiction.<sup>197</sup> In view of the existing non-intervention principle, States do not normally prosecute common crimes taking place in the territory of other nations, nor do they arrest persons on foreign territory without consent from the relevant State.<sup>198</sup> The authenticity of domestic jurisdiction depends on international law's jurisdictional principles, which were established to advance supportive foreign relations so as to avoid and resolve conflicting assertions of domestic penal authority.<sup>199</sup> Where persons are protected from prosecution by immunity under international law, States cannot investigate or prosecute persons.<sup>200</sup>

The Lotus case<sup>201</sup> held that in the absence of an international rule permitting jurisdiction in a particular case, States are free to exercise jurisdiction as long as a prohibitive rule does not negate such a claim.<sup>202</sup> As a result, a State may unilaterally adopt legislation that allows its courts to investigate a particular criminal conduct without at the same time being entitled to arrest or subject the accused to its

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<sup>195</sup> Randal KC considers that "jurisdiction may also be simply referred to as, a State's legitimate assertion of authority to effect interest." See, Randal KC "universal jurisdiction under international law" 1988 (66) Texas Law Review 785-841. See also, Bantekas (2010) 4<sup>th</sup>ed at 329.

<sup>196</sup> Bantekas(2010) 4<sup>th</sup>ed at 329.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> Randal 1988 (66) 786.

<sup>200</sup> Bantekas(2010) 4<sup>th</sup>ed at 330.

<sup>201</sup> *S.S Lotus (France v Turkey)* (1927) PCIJ series A No.10.

<sup>202</sup> Bantekas(2010) 4<sup>th</sup>ed at 330.

criminal justice system.<sup>203</sup> Domestic law contributes greatly towards the development and enforcement of criminal jurisdiction.<sup>204</sup> During the twentieth century five sources of criminal jurisdiction have been asserted by States: territorial, active personality, passive personality, universal and jurisdiction found on the protective principle.<sup>205</sup>

The application of universal Jurisdiction to a particular offence does not require any connection between the offender and a particular State and all States are allowed to exercise their authority over those offences that are subject to the universality principle.<sup>206</sup> The principle of universal jurisdiction covers broad extraterritorial competence therefore it is logical that it be applicable only to a limited number of offences, serious offences.<sup>207</sup> Crimes under international law have normally concerned universal jurisdiction in two independent ways: on the basis of the repulsive nature and scale of conduct, as is the case with severe breaches of humanitarian law and crimes against humanity; or as a result of the insufficiency of domestic law and enforcement in respect of unlawful conduct committed in locations not subject to the authority of any State, such as the high seas.<sup>208</sup> In the post war decades, States, at least by implication, have accepted that the universal jurisdiction principle also extends to certain acts, including torture.<sup>209</sup> The *erga omnes* and *jus cogens* doctrines also may lend support the view that non-parties to UNCAT have the jurisdictional right to prosecute for torture.<sup>210</sup>

Relevant international treaties encourage parties to claim unrestrained jurisdiction

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<sup>203</sup> Bantekas(2010) 4<sup>th</sup>ed at 330.

<sup>204</sup> *Ibid* at 331.

<sup>205</sup> *Ibid* at 344.

<sup>206</sup> *Ibid*.

<sup>207</sup> *Ibid* at 345.

<sup>208</sup> *Ibid*.

<sup>209</sup> Randal 1988 (66)789.

<sup>210</sup> Randal 1988 (66) 829.

in respect of the offences contemplated therein, very much of the same kind as universal jurisdiction.<sup>211</sup> The parties to various multilateral conventions have agreed to prosecute or extradite the perpetrators of the offences, which are the subject of the particular convention, regardless of the defendant's and victim's nationality.<sup>212</sup> This is clear from the wording of article 5(1) of the UNCAT, which principally establishes territorial, nationality and passive personality jurisdiction.<sup>213</sup> Article 5(2) and 3 indirectly permit the exercise of universal jurisdiction with respect to the incorporated domestic offence of torture by providing as follows:

“(2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

(3) This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

Article 5 outlines a number of bases for jurisdiction over torture such that no offender can get away from prosecution.<sup>214</sup> Article 5(2) was interpreted by working group members as a provision that creates universal jurisdiction over torture.<sup>215</sup>

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<sup>211</sup> Bantekas(2010) 4<sup>th</sup> ed at 347.

<sup>212</sup> Randal 1988 (66) 789.

<sup>213</sup> Article 5 of the UNCAT;

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  - a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - b) When the alleged offender is a national of that State;
  - c) When the victim was a national of that State if that State considers it appropriate.

<sup>214</sup> Randal 1988 (66) 819.

<sup>215</sup> *Ibid.*

Article 5(2) is intended to be read with Article 7(1),<sup>216</sup> which requires a State refusing extradition to prosecute the case itself.<sup>217</sup> One working group noted that; a system of universal or quasi-universal jurisdiction as upheld in the articles 5 and 7 is indispensable in a convention against torture to ensure that there would be no ‘safe havens’ for tortures.<sup>218</sup> There can certainly be no doubt that in accordance with its objectives and purpose, the UNCAT does provide for universal jurisdiction in respect of torture. This position reaffirms the customary law principles supporting State responsibility.

### **3.3 THE OBLIGATION TO ADOPT THE UNCAT INTO MUNICIPAL LAWS**

As previously stated, the principal object and purpose of the UNCAT is to promote the fight against torture by, setting up obligations for States to take legislative measures which aim to punish the perpetrators of torture and to assist victims of torture.<sup>219</sup> Therefore, it necessarily follows that torture must be a punishable offence under the criminal law of each State party to the UNCAT.<sup>220</sup> The UNCAT provides for a duty to prohibit torture and other forms of mistreatment by government officials under articles 2, 4 and 16.

The underlying basis in the interpretation of article 2 should include the obligation of State Parties to respect the human right not to be subjected to torture. State parties can only uphold this obligation by enacting laws wherein they provide an effective

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<sup>216</sup> Article 7(1) of the UNCAT reads as follows:

“1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

<sup>217</sup> Randal 1988 (66) 819.

<sup>218</sup> *Ibid.*

<sup>219</sup> Nowak and McArthur (2008) at 113.

<sup>220</sup> Burgers and Danelius (1988) at 129.

remedy and procedural guarantees.<sup>221</sup> Thus, the obligation is to not only prohibit torture but to come up with effective measures to prevent torture. This understanding reveals the general object and purpose of the UNCAT.

The UNCAT aims to strengthen the already existing prohibition of torture by way of preventative measures of criminal law aimed at deterring torture. Therefore, this all-inclusive clause directs the specific obligations to prevent torture as laid down in various provisions of the UNCAT.<sup>222</sup> The UNCAT does not prescribe the character of the measures so it is upon State Parties to decide.<sup>223</sup> This may appear to some as a loophole in the UNCAT. However, State Parties will be liable where they fail to employ measures in the UNCAT which are seen by the drafters as being reasonably likely to achieve results aimed at the prevention of torture.<sup>224</sup>

Municipal laws may not be invoked, in instances where a State party has failed to adopt the measures called for to implement the UNCAT after its ratification, to justify the use of torture.<sup>225</sup> Article 2 reaffirms absolute and non-derogable prohibition of torture by clearly stating that, torture must not be balanced against any other interest, including national security or the protection of human rights of others.<sup>226</sup>

Torture is prohibited even in exceptional circumstances, therefore States cannot argue that war, internal political instability or any other public emergency they may encounter are beyond normal circumstances such that the use of torture should be permitted.<sup>227</sup> Post the terrorist attacks on New York City and Washington D.C, as well as the frustrated terrorist attempt that led to the destruction of a fourth airplane

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<sup>221</sup> Nowak and McArthur (2008) at 112.

<sup>222</sup> *Ibid* at 113.

<sup>223</sup> Burgers and Danelius (1988) at 123.

<sup>224</sup> Boulesbaa (1999) at 45.

<sup>225</sup> *Ibid* at 50.

<sup>226</sup> Nowak and McArthur (2008) at 119.

<sup>227</sup> Boulesbaa (1999) at 88.

in Pennsylvania, there has been significant international attention on terrorism.<sup>228</sup> A majority of Americans believed, after the September 11 attacks, that the use of some questionable methods of interrogation was a necessity in fighting the war on terrorism.<sup>229</sup> For that reason, immediately after the attacks, congress passed a joint resolution authorising the President to use all necessary and appropriate force against those nations, organisations, or persons who determine planned, authorised, committed, or aided the terrorist attacks, or harboured such organisation or persons. The Central Intelligence Agency (CIA) aided by two outside contractors, decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques,<sup>230</sup> clearly in violation of their UNCAT obligation under Article 2.

This provision further makes it clear that States are also accountable for acts of torture committed in occupied territories, when the acts in question are can be attributed to the conduct of such States. Indeed in making this provision the drafters had foreseen the possibility of States perpetrating torture and averting responsibilities by adopting policies such as renditions.

The policy of rendition is indeed an example of how countries can contravene this obligation. The adoption of this policy by the former US government reflected the former government's resistance to assuming responsibility for their conduct under any law.<sup>231</sup> Rendition<sup>232</sup> is a dangerous interrogation policy because it places detainees in situations where torture, obviously disguised in extreme forms of

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<sup>228</sup> Canfield 2005 (33) 1050.

<sup>229</sup> Scharf MP and Hood RT "The elephant in the room: Foreword: Torture and the war and terror" 2006 (37) *Case Western Reserve Journal of International law* 145.

<sup>230</sup> Senate Select Committee on Intelligence: Committee Study of the CIA's Detention and Interrogation Program, Declassification revisions, 2014 at 2.

<sup>231</sup> Lim 2006 (13) 111.

<sup>232</sup> Rendition to be understood as: a system of sending terrorism suspects to other countries with apparent less progressive human rights standards in order to interrogate them more aggressively, which often results in torture.

interrogation, is tolerated and accepted as effective.<sup>233</sup> The policy of rendition by definition sets up situations in which interrogators are prone to view torture as part of the interrogation process.<sup>234</sup> The interrogation by the US officials, in the case of renditions, remained unknown to outsiders and thus the highest risk of torture for the detainees. With this policy, the US could easily distance itself from the abuses and simply obtained information resulting from such questionable interrogations. Rendition resulted from the wrong interpretation of international law principles and the manipulation of national law principles seeking to prevent the use of torture.<sup>235</sup>

The relevance of article 4 of the UNCAT in domesticating torture cannot be overlooked because, while no provision has been made which evidently describes torture as crime under international law, article 4 requires State parties to criminalise acts of torture in domestic law.<sup>236</sup> Article 4 requires States to adopt the article 1 definition into their domestic laws as it is, but for the sanctions clause, in order to give effect to their obligations under the UNCAT.<sup>237</sup> Such full incorporation of the definition is critical in avoiding problems with interpretation and implementation.<sup>238</sup> In adopting the article 1, definition States must note that an attempt to commit torture is also covered thus criminal responsibility will also arise from such an attempt.<sup>239</sup>

Convicts of torture must be severely punished to reflect the seriousness of the offence and deter potential perpetrators.<sup>240</sup> Therefore the sentence for torture will be deemed severe if it is in line with the sentences passed on commission of the

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<sup>233</sup> Lim 2006 (13) 91.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> Botterud 1984 (8)74.

<sup>237</sup> Nowak and McArthur (2008) at 229.

<sup>238</sup> *Ibid* at 249.

<sup>239</sup> *Ibid* at 248.

<sup>240</sup> Burgers and Danelius (1988) at 129.

most serious offences in that particular State.<sup>241</sup> However, States that enforce the death penalty on commission of what they consider to be serious offences should not find support in the UNCAT in order to impose the death penalty on torture offenders because the UNCAT is after all a human rights instrument.<sup>242</sup> The requirement that torture must be a criminal offence does not entail that torture must be a specific and separate offence.<sup>243</sup> Be that as it may, it is important to note that, the committee against torture has strongly advised States to adopt the torture definition as it is in article 1 into their criminal legislation.<sup>244</sup>

Indeed other offensive acts experienced at the hands of government officials for the same purposes as torture find a place in the UNCAT under this Article. May it be noted though that the drafters of the UNCAT concluded that, unlike torture, it was impossible to include a specific definition of other cruel, inhuman or degrading treatment or punishment.<sup>245</sup> Paragraph 1 of article 16, provides for the obligation to prevent in any territories under their jurisdiction acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, where such are committed by or at the instigation of or with the consent or acquiescence.<sup>246</sup> This obligation is similar to the one provided for torture under article 2.

### **3.4 CONCLUSIONS**

Definitions that are not precise result in a blurred understanding of the mandate of the UNCAT.<sup>247</sup> Agreeing upon a universal definition is important if torture is to be completely eradicated.<sup>248</sup> A clear definition of torture will certainly ensure that

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<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> Nowak and McArthur (2008) at 249.

<sup>245</sup> Burgers and Danelius (1988) at 149.

<sup>246</sup> *Ibid.*

<sup>247</sup> Harper 2009 (49) 911.

<sup>248</sup> Miller (2005) at 1.

problems with establishing universal jurisdiction are averted.<sup>249</sup> Each element of the UNCAT definition represents a fundamental part of the definition of torture that is always developing.<sup>250</sup> The UNCAT provides in clear terms for universal jurisdiction thus no State may distance itself from acts of torture they are aware of by pleading sovereignty of the guilty State. Torture must be domesticated according to the UNCAT and failure to honour obligations has certainly resulted in commission of acts of torture by some States such as the US.

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<sup>249</sup> Nowak and McArthur (2008) at 249.

<sup>250</sup> Harper 2009 (49) 920.

## Chapter 4

### SOUTH AFRICA'S OBLIGATIONS TO COMBAT TORTURE

#### 4.1 INTRODUCTION

South Africa ratified the UNCAT on 10 December 1998. South Africa was then obliged to ensure that the crime of torture was incorporated into its national law as a crime, to confer jurisdiction on the State to try citizens accused of this crime. In an effort to give effect to chapter 12 (1) (d) of the Constitution of South Africa,<sup>251</sup> South Africa passed the Prevention of Combating of and Torture of persons Act 13 of 2013.<sup>252</sup>

#### 4.2 THE DOMESTICATION OF THE UNCAT BY SOUTH AFRICA

##### 4.2.1 Prevention and Combating of Torture of Persons Act

In terms of the Torture Act, South Africa makes its intentions clear under the preamble that; the Act is informed of South Africa's history, it seeks to prevent torture by upholding international law principles and it aims to enforce the State's obligations under the UNCAT. Section 2 highlights the objectives of the Torture Act. This section provides for; the protection of human rights, the importance of prosecuting and punishing torture perpetrators as well as providing measures for the prevention and combating of torture. It is also confirmed that, when interpreting the torture Act, the court must promote the values of the constitution.

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<sup>251</sup> Section 12 of the Constitution states that:

"Everyone has the right to freedom and security of the person, which includes the right-

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- c) To be free from all forms of violence from either the public or private sources;
- d) Not to be tortured in any way;
- e) Not to be treated or punished in a cruel, inhuman or degrading way."

<sup>252</sup> Hereinafter referred to as the Torture Act.

At the centre of the Torture Act is section 3 which defines torture as follows:

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

a) For such purposes as to-

- i) Obtain information or a confession from him or her or any other person;
- ii) Punish him or her for an act he or she or any other has committed, is suspected of having committed or is planning to commit; or
- iii) Intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

b) For any reason based on discrimination of any kind

When such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.<sup>253</sup>

This definition is captured as it is in the UNCAT. Some writers have argued that by adopting the UNCAT definition word for word, South Africa has limited the application of the Rome Statute which South Africa has incorporated into domestic law.<sup>254</sup> Other writers have pointed out that the definition in the Rome Statute covers, conduct of an arbitrary nature and which is not limited to conduct by or at the behest of a public official as required by the UNCAT. Such writers argue that with

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<sup>253</sup> The Torture Act.

<sup>254</sup> Fernandez L “Optional protocol to the convention against torture and other cruel, inhuman or degrading treatment or punishment as adopted in 2002 by the UN General Assembly 57/1999: Implications for SA” 121.

the UNCAT definition; indiscriminate, purposeless and sadistic acts perpetrated without reference official authority are excluded from the definition of the Act.<sup>255</sup>

However, such an argument cannot be sustained because under the preamble of the Torture Act, the drafters have made it clear that; South Africa is committed to preventing and combating torture as required by international law thus, from the onset the Act recognises international law. It goes without saying that this full incorporation is required by the UNCAT to avoid problems with interpretation and the exercise of universal jurisdiction.

Section 4 of the Torture Act is the offence creating section of the Act, it gives full effect to South Africa's obligations under article 4 of the UNCAT. The section recognises both the act and the attempt. The punishment to be meted out is an appropriate one and in line with requirement under the UNCAT. The provision rules out any defences in relation to superior orders and confirms absolute prohibition of torture as set out in Article 2 of the UNCAT.

Section 5 provides for factors to be considered in sentencing a torture convict. Indeed this is a thorough work by the drafters of the Torture Act. It provides for a broad guideline in sentencing.

Section 6, dealing with Extra-territorial, is also critical to the application of the Torture Act. It bestows jurisdiction in South African courts on offences committed outside the territory where such acts are offences in terms of the Torture Act. It sets out this circumstances where this is applicable as:

- “1 If the accused person;
- a) Is a citizen of the Republic;
  - b) Is ordinarily resident in the Republic;
  - c) Is, after the commission of the offence, present in the territory of

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<sup>255</sup> *Ibid.*

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

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

2. If an accused person is alleged to have committed an offence contemplated in section 4(1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of public prosecutions contemplated in section 179(1)(a) of the Constitution, who must also designate the court in which the prosecution must be conducted.”<sup>256</sup>

Furthermore in December 2002, the UN General assembly adopted the Optional Protocol to the convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), entered into force in June 2000. An official protocol is a subsidiary treaty or a kind of appendix to the original convention.<sup>257</sup> The document is only binding to those States that have ratified it. Protocol is more practical than the convention it emanates from.

In September 2006 SA signed the OPCAT. The main objective of the adoption of the OPTCAT is to establish a system of regular visits undertaken by the independent international and national bodies to places where people are deprived of their dignity and freedom.<sup>258</sup> People in prisons are mostly susceptible to torture. This was done in a way that would prevent torture as opposed to just responding to violations after they have occurred.<sup>259</sup> The UNCAT’s aim of preventing torture is at the heart

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<sup>256</sup> The Torture Act.

<sup>257</sup> Fernandez 122.

<sup>258</sup> Olowu D Calibrating the promise of the optional protocol to the convention against torture, and other cruel, inhuman and degrading treatment or punishment 2007 (18) Stellenbosch L.RE 487.

<sup>259</sup> *Ibid* 488.

of this exercise.

Therefore because of its proactive nature, the protocol introduces International Visiting Mechanism (IVM) a sub-committee of the committee against Torture (CAT). The OPCAT obliges each State party to establish one or more National Visiting Mechanism (NVM) to visit places of detention within the State and to enter into co-operative dialogue with the authorities in order to help them ensure that torture does not take place.

Furthermore, South Africa has three bodies set up to progressively monitor violation of human rights; the SA Human Rights Commission (SAHRC), the Independent Complaints Directorate (ICD); and the Judicial Inspectorate. SAHRC mandate is to promote human rights awareness and to take steps against the violation of those rights.<sup>260</sup> The ICD is the central official monitoring and investigative body of police abuses. A practical defect in the operations of the ICD is that the police are obliged to report to it only in case of death that occurred in their custody.<sup>261</sup> Any other injuries which may have resulted from torture may go unreported.

Even with the above measures in place, it is unfortunate that SA is still harbour for torturers as would be clearly demonstrated in the case law discussed below.

### **4.3 The SA courts dealing with cases of torture**

The South African courts have heard and are continuing to hear cases where the minister of Safety and Security is having actions instituted against him for acts of torture.

In a case by one Mr Kutumela<sup>262</sup>, the plaintiff made a claim against the minister of Safety and Security before the Pretoria High Court. The facts of the matter were

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<sup>260</sup> Fernandez 129.

<sup>261</sup> *Ibid* 130.

<sup>262</sup> Madmetja Phineas Kutumela v Minister of Safety and Security ( 36053/2005) [2008]

briefly that; the plaintiff Mr Kutumela was arrested by the SAPS on 21 October 2004 and charged with kidnapping and murder of one Francis Rasuge. There was no reasonable and probable cause for doing so. From the date of his arrest until 29 October 2004, he was assaulted by members of the SAPS. The assaults entailed; being given electric shocks in order that he should suffocate, by covering his head with a wet bag. After a careful analysis of the facts, the court accepted that the plaintiff's testimony as the truth. The court considered the measures in place to protect individuals against torture.<sup>263</sup> It was concluded that; "The police officers who had investigated the cases against the plaintiff and had dealings with him, did not conduct themselves in terms of the law of the Republic of South Africa. Whilst so acting within the course and scope of their employment with the defendant they flouted the law."<sup>264</sup>

Another landmark case which came before the supreme court of appeal was that of National Commissioner of SA Police service and NDPP against SA human rights litigation centre, Zimbabwe Exiles Forum;<sup>265</sup> perhaps also the latest decision in this area. Briefly, the appeal was concerned with the investigative powers and obligations of NPA and the SAPS in relation to alleged crimes against humanity perpetrated by Zimbabweans in Zimbabwe. Put jurisprudentially, this appeal dealt with the exercise of jurisdiction by a domestic court (and the logically forerunner exercise of investigative powers by the relevant authorities) over allegations of crimes against humanity- in particular, the crime of torture committed in another

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<sup>263</sup> The court considered the Constitution Act 108 of 1996 Section 12, Article 1 and Article 4 of the UNCAT, The EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (213 UNTS 221; EUROPEAN TS 5) states in SECTION 1, ARTICLE 3 thereof the following: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

<sup>264</sup> Madmetja Phineas Kutumela v Minister of Safety and Security ( 36053/2005) [2008]

<sup>265</sup> National Commissioner of the South African Police Service v Southern African Human rights Litigation Centre (485/2012) [2013] ZASCA 168 (27 November 2013).

country.

The facts in brief are that; allegations of crimes against humanity involving mainly torture were made against 'Zimbabwean officials'. The memorandum alleged that named members of 'the law and order unit'- in all probability a unit of the Zimbabwean Police Service were involved in acts of torture against mainly members of the official opposition party in Zimbabwe, the Movement for Democratic Change(MDC). It was further alleged that the acts of torture were knowingly perpetrated on a widespread or systematic basis. They described severe physical assaults being perpetrated, which included the use of truncheons, baseball bats, fan-belts and booted feet. There were accounts of victims being suspended by a metal rod between two tables; of being subjected to water boarding; and of electrical shocks being applied to the genitals of some of them. This conduct amounts to torture as defined by both the UNCAT and the Torture Act.

In their response the National Director of Public Prosecutions<sup>266</sup> stated that they were mainly concerned about the impact of envisaged investigation on relations with Zimbabwe. That State's sovereignty was implicated and there was real potential for negative impact on mutual co-operation in related and other matters. The acting NDPP's view was that; matters of national interest and policy involve value judgments that encroach upon decisions to prosecute in cases such as the one under discussion.

The South African Police Service<sup>267</sup> on the other hand was concerned that the docket was not only inadequately investigated but that further investigation would be impractical and virtually impossible. The commissioner adopted the attitude that the SAPS was and still is not under the law 'permitted or entitled to conduct such investigation which would, in any event, have been highly impracticable, if not impossible'. Further that the obligation is limited territorially and cannot extend

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<sup>266</sup> Hereinafter referred to as the NDPP.

<sup>267</sup> Hereinafter referred to as the SAPS.

beyond the borders of South Africa.

In its analysis of the law, the court looked at questions of jurisdiction. Its point of departure was that, a core principle of public international law which has assumed customary status is that of State sovereignty. Reference was made to the Lotus case<sup>268</sup> wherein it was held, among other things that;

“Now the first and foremost restriction imposed by international law upon a State is that- failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”<sup>269</sup>

The court highlighted the distinction between prescriptive jurisdiction, enforcement jurisdiction and adjudicative jurisdiction. The court further noted that the restrictions on jurisdiction are not absolute. It acknowledged though that despite this, a State’s capacity to enforce and adjudicate over its domestic laws is severely restricted to its own territory, save for where there is consent of a foreign State.<sup>270</sup>

The court highlighted that, increased consciousness of human rights and fighting impunity gave rise to an emerging and sometimes contested additional basis for prescriptive jurisdiction. That is, the universality which suggests that; States are empowered to prescribe conduct that is recognised as threatening the good order not only of particular States but of the international community as a whole.

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<sup>268</sup> S.S Lotus (France v Turkey) (1927) PCIJ series A No.10.

<sup>269</sup> S.S Lotus (France v Turkey) (1927) PCIJ series A No.10.

<sup>270</sup> National Commissioner of the South African Police Service v Southern African Human rights Litigation Centre (485/2012) [2013] ZASCA 168 (27 November 2013).

The court considered South Africa's obligations under the Rome statute- thus the interpretation of section 4<sup>271</sup> of the Rome Statute of the International Criminal Court Act.<sup>272</sup> The court concluded that the SAPS had wrongly interpreted section 4 of the ICC Act. That in light of the progressive development of the idea of universality, prescriptive jurisdiction is no longer necessarily limited.

On the question of investigative competence, reference was made to section 205(3)<sup>273</sup> of the constitution as well as section 13(1)<sup>274</sup> of the SAPS Act. Further reference was made to the laws of Canada, Denmark, France, Germany and the UK.

The court further concluded that; the commissioner and his advisors, as well as the Acting NDPP and his advisors misconceived their power under the ICC Act and the related legislation. The SAPS on the other hand appear to recognise that the case they were presented with was not entirely without foundation and was deserving of further and better investigation, thus on the SAPS' own version an investigation is warranted. The SAPS was to consider issues such as the gathering of information in a manner that does not impinge on Zimbabwe's sovereignty.

Finally it was declared that on the facts of this case; the SAPS are empowered to investigate the alleged offences irrespective of whether or not alleged perpetrators are present in SA. The SAPS are required to initiate an investigation under the implementation of the Rome Statute of the International Court Act 27 of 2002 into alleged offences.

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<sup>271</sup> Section 4 deals with jurisdiction of South African courts in respect of crimes.

<sup>272</sup> Hereinafter referred to as the ICC Act.

<sup>273</sup> Section 205(3) of the Constitution provides that: 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of Republic and their property, and to uphold and enforce the law'

<sup>274</sup> Section 13(i) of the SAPS Act provides that: 'Subject to the Constitution and with due regard to the fundamental rights of every person, a member [ of the SAPS] may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.'

Thirdly of note is also the case of *Mthembu v The State*<sup>275</sup> wherein the Supreme Court of Appeal; confirmed the absolute prohibition of torture within the Constitution and that the use of torture by the police, for purposes of obtaining evidence, fell within the ambit of this prohibition. It further stated that torture is one of the most serious human rights violations. The court concluded that there is absolute prohibition of torture in both South African and international law, thus any evidence which is obtained as a result of torture must be excluded in any proceedings.

The above cases indicate that South African courts do opt for a more purposive interpretation of the laws dealing with torture. In spite of the efforts by the courts, there is no doubt the use of torture persists, mostly perpetrated by the police. It is important to note that the Torture Act makes no mention of the relevance of evidence obtained by means of torture.

Be that as it may, one needs to note that South Africa is no stranger to matters of torture. The country's apartheid past bears memories of widespread and institutionalised system of torture. Indeed South Africa comes from a tradition of governance which had a blurred tolerance for public curiosity. Apartheid bred such a tradition and lasted long enough to leave a mark on the minds of those who implemented it.<sup>276</sup> Moving forward, South Africa needs to adopt a culture that respects human rights, especially the right to dignity.

#### **4.4 The African Charter**

Torture continues to cause serious distress in the international community and Africa is by no means an exception.<sup>277</sup> Over the years Africa has had great difficulties with States that continue to practice torture especially in times of war

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<sup>275</sup> (64/2007) [2008]ZASCA51(10 April 2008).

<sup>276</sup> Fernandez 127.

<sup>277</sup> Viljoen F and Ondinkalu C *The Prohibition of Torture and Ill-treatment in the African Human Rights System: A handbook for victims and their advocates* (2006) World Organisation Against Torture at 11.

and armed conflict.<sup>278</sup>

When the OAU was created in 1963, the question of human rights was not considered most important to the agenda of the organisation.<sup>279</sup> However in 1981, the Assembly of heads of States and governments were ready to come up with a human rights document for the region.<sup>280</sup> This very important document was the African Charter on human and People's Rights (The Charter) and it was entered into force in 1986.<sup>281</sup> The coming into force of this document resulted in the reinforcement of the international and regional principles relating to the prohibition of torture at the same time supporting measures in place in the domestic laws.<sup>282</sup>

The African inter-governmental systems developed regional methods applicable to protection against torture.<sup>283</sup> Indeed the Charter's mandate became critical in such efforts.<sup>284</sup> The protection of civil, political, economic, social and cultural rights is incorporated in one document; the charter does not differentiate the way in which of these rights are enforced.<sup>285</sup> No deviation from the charter is permitted thus the rights in the charter are absolute.<sup>286</sup>

Working towards enforcing provisions of the Charter is the African Commission on Human and Peoples' Rights.<sup>287</sup> This body has extensive responsibility including the ability to adopt resolutions, create working groups and special rapporteurs on thematic issues, and adopt decisions on complaints submitted by individuals and

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<sup>278</sup> *Ibid.*

<sup>279</sup> Dugard J International law: A South African Perspective (2005) 3<sup>rd</sup> Juta and Company Ltd at 557

<sup>280</sup> *Ibid*

<sup>281</sup> *Ibid*

<sup>282</sup> Viljoen and Ondinkalu (2006) at 11.

<sup>283</sup> *Ibid* at 20.

<sup>284</sup> *Ibid* at 24.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid* at 25.

<sup>287</sup> Dugard (2005) 3<sup>rd</sup> 561.

others who allege that a State has violated their rights under the charter.<sup>288</sup> Complaints relating to the violation of provisions of the Charter are routed through the commission.<sup>289</sup> This commission is a quasi-judicial body thus has with limited enforcement mechanisms but States have been increasingly willing to engage with the commission's work.<sup>290</sup> The commission is vested with special investigative powers applicable in the case of emergency situations.<sup>291</sup> It remains debatable whether every incident of torture can be termed an emergency situation because according to the Charter emergency situations are understood as those situations that result in a series of massive violations of human rights.<sup>292</sup> Poor treatment in detention, such as failure to provide access to doctors, poor quality of food, overcrowding and solitary confinement are perceived as forms of torture.<sup>293</sup>

In 1998 the OAU adopted a protocol aimed at setting up the African Court on Human and Peoples' Rights.<sup>294</sup> Indeed in 2006 The AU established The African court on Human and people's Rights which aimed at complementing the protective mandate of the African Commission on Human and People's rights.<sup>295</sup> The court is allowed to afford legal assistance to parties where necessary.<sup>296</sup> A judgment of this court is binding on State Parties, who have to guarantee the execution of such a judgment.<sup>297</sup>

In more efforts to combat torture, it is clear that a body of treaty and non-treaty

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<sup>288</sup> <http://thinkafricapress.com/international-law-africa/torture>(accessed on 15 April 2013).

<sup>289</sup> Viljoen and Ondinkalu (2006) at 27.

<sup>290</sup> <http://thinkafricapress.com/international-law-africa/torture>(accessed on 15 April 2013).

<sup>291</sup> Viljoen and Ondinkalu (2006) at 28.

<sup>292</sup> *Ibid.*

<sup>293</sup> <http://thinkafricapress.com/international-law-africa/torture>(accessed on 15 April 2013).

<sup>294</sup> Dugard (2005) 3<sup>rd</sup> at 565.

<sup>295</sup> Viljoen and Ondinkalu (2006) at 31.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

norms, relevant to African countries, is in place.<sup>298</sup> A number of provisions in the charter protect the right to life and human dignity<sup>299</sup>, article 5 is one such important provision and it provides as follows;

*“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”*<sup>300</sup>

Article 5 has a wide application because it brings together issues that are, in other human rights treaties, separated in different articles.<sup>301</sup> Thus it goes without saying that; when the State or its agents violate this prohibition against torture, cruel, inhuman and degrading treatment or punishment is almost invariably also breached.<sup>302</sup>

Under article 5 the right to dignity is upheld, exploitation and degradation are clearly discouraged, therefore both the positive and negative facets of the article are apparent.<sup>303</sup> However, in case of a violation, the commission does not focus on whether the violation was by positive or negative conduct. The narrow investigations present a challenge on efforts to come to a clear understanding of distinct article 5 elements.<sup>304</sup> In *Hun-Laws v Nigeria*, the commission concluded that treatment

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<sup>298</sup> *Ibid* at 36.

<sup>299</sup> *Ibid*.

<sup>300</sup> African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> (accessed on 6 February 2014)

<sup>301</sup> M Evans and R Murry (eds) *The African Charter on Human and people's rights: The System in Practice, 1986-2000*(2002) at 192.

<sup>302</sup> Viljoen and Ondinkalu (2006) at 37.

<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid* at 38.

impugned as torture must attain a minimum level of severity.<sup>305</sup>

In 2003 another important document in the region, the “African Union’s Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa” (now known as the Robben Island Guidelines) was approved. The Robben Island Guidelines highlight importance following procedures so as to maintain the right to be free from torture.<sup>306</sup> They confirm the need to set up a system to regularly visit places where persons are deprived of their liberty. Most importantly advocates for the educational and human rights training of law enforcement officials. Certainly the guidelines are crucial for States in fulfilling their national, regional and international obligations to strengthen and implement the prohibition and prevention of torture.

The prohibition of torture relevant to children in the African Charter on the Rights and welfare of the child (African Children’s Rights Charter) is based on the notion that the development of the child into a balanced adult ‘requires legal protection in conditions of freedom, dignity and security’.<sup>307</sup> The African Children’s Rights Charter recognises the following aspects of the prohibition against torture, namely; traditional practices, protection against child labour, the protection of children from abuse and violence, due process protection and the protection of children in armed conflict or other situations of forced displacement.<sup>308</sup> According to the charter, practices that are in conflict with the generally recognised rights of children are prohibited. The use of capital punishment on children is deemed to be a violation of the African Children’s Charter and is thus prohibited.<sup>309</sup> States are encouraged to observe the prohibition of the use of children in direct hostilities including the

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<sup>305</sup> *Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR) (14<sup>th</sup> Annual report)*. See also Viljoen and Ondinkalu (2006) at 40.

<sup>306</sup> *Ibid* at 48.

<sup>307</sup> *Ibid* at 54.

<sup>308</sup> *Ibid* at 55.

<sup>309</sup> *Ibid* at 56.

recruitment of children as soldiers.<sup>310</sup>

The prohibition of torture in the protocol to the African Charter on Human and People's Rights or the rights of women in Africa complements Article 5 of the Charter on Human and Peoples rights by dealing with features of the prohibition of torture that focus on women, in particular, the right to dignity, the prohibition of harmful traditional practices and violence against women.<sup>311</sup> Violence against women is defined by the Protocol as follows:

"Acts perpetrated against women which cause or could cause physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time during situations or armed conflict or of war".<sup>312</sup> It can be deduced from the above provision that, the prohibition against torture includes conduct by State actors as well as non-State actors.<sup>313</sup>

While efforts have been made by most African States towards the upholding and promotion of human rights, the practice of torture unfortunately exists.<sup>314</sup> Be that as it may, the beginning of the democratisation era has meant that Non-Governmental Organisations find great support in carrying out their tasks in their fight against torture.<sup>315</sup> The African commission has repeatedly stated that African States are required, under the UNCAT, to ensure that all acts of torture and other forms of degrading treatment and punishment are made offences under national laws.

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<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> <http://www.achpr.org/instruments/women-protocol/>(accessed on 6 February 2014)

<sup>313</sup> Viljoen and Ondinkalu (2006) at 56.

<sup>314</sup> *Ibid.* at 11.

<sup>315</sup> *Ibid.*

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions:

The research reviewed measures in place, in both customary and treaty law, to protect individuals against torture. Surely the settled international principle is that there exists an absolute prohibition of torture. The study demonstrated that, for reasons detailed out, the use of torture sadly continues.

Some States have failed to adopt the UNCAT, being the principle treaty dealing with torture, definition of torture as it is and this has created escape clauses in the measures seeking to guard against torture. That is, States define torture such that, interrogation techniques they have in place do not fall within the purview of torture as defined by the UNCAT.

The US, in the war against terrorism and through the CIA, perpetrated acts of torture in the colour of enhanced interrogation techniques. In the case of the US, the relevant US law and treaty obligations, while properly in place, failed to prevent abuses and mistakes made by the CIA. The CIA's use of its enhanced interrogation techniques relied upon the misguided assertions that such techniques were useful.<sup>316</sup> Be that as it may, in 2009 President Obama signed Executive order 13491, which order aimed to bar the CIA from holding detainees other than on a short term, transitory basis and to limit interrogation techniques to those included in the army field Manual.<sup>317</sup>

A case study on SA has revealed that there are indeed measures in place and

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<sup>316</sup> Senate Select Committee on Intelligence: Committee Study of the CIA's Detention and Interrogation Program, Declassification revisions, 2014 at 2.

<sup>317</sup> *Ibid* at 4.

adaptation of the UNCAT is in line of the objectives. However torture is used by law enforcement officers in an endeavour to extract evidence. The prosecuting authority is also failed to honour their obligations in prosecuting alleged torture perpetrators.

### **Recommendations:**

The UNCAT is an important tool which if used effectively can end the use of torture. The redrafting of another document is unnecessary, instead States must move towards a more purposive interpretation of the UNCAT.<sup>318</sup> The object and purpose of the UNCAT are the regulation and prohibition of all governmental conduct that inflicts pain or suffering for ends stated in Article 1, regardless of whether such conduct is affirmative or negative.<sup>319</sup> For that reason, States should domesticate the UNCAT definition of torture into their law as it. States must acknowledge the universal jurisdiction applicable to torture such that torture perpetrators are left no room to escape liability. No State should find itself a safe haven for torture perpetrators through the use of rendition policies and no State should avert responsibility under the same policy. Consistence application of the UNCAT is critical in winning the war on torture.

There is no doubt that the world has learned the hard way as evident from the examples of the former US government.<sup>320</sup> The US must consider establishment of a clear definition of what constitutes torture, and this definition must be consistent with international law treaties and international customary law. Ultimately, the war on terrorism is fought on the international level; therefore US national security depends on multilateral cooperation and the willingness of other nations to conform their conduct to the requirement of international law.<sup>321</sup> Domestication of a clear

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<sup>318</sup> Treaties are to be interpreted in light of their object and purpose.

<sup>319</sup> Boulesbaa (1999) at 15.

<sup>320</sup> The redefinition of torture caused three problems: abuse of prisoners in Abu Ghraib, indefinite detention with little protection against torture in Guantanamo Bay, and the risky policy of rendition.

<sup>321</sup> Lim 2006 (13) 112.

and broad definition of torture as well as faithful adherence to international norms and values, not the manipulation thereof, will help the United States fight terrorism with effectiveness and success.<sup>322</sup> It is to be noted that terrorism is not to be condoned under any circumstances and on the same reasoning criminal conduct engaged in an attempt to combat terrorism should not be legalised; thus members of the CIA must be held accountable for acts of torture they perpetrate. The 2009 Executive order by President Obama is not incorporated in legislation as part of US law and as a result it can easily be set aside by a future president.<sup>323</sup> Therefore such critical limitations in the Executive order should be safe guarded in a Statute.<sup>324</sup>

South Africa's efforts in combating torture are quiet commendable, supposedly because of the country's Apartheid history. It is however regrettable that the use of torture in South Africa is still apparent. Perhaps what is now required is extensive education on torture. Many South Africans have suffered torture at the hands of members of the SAPS and further the NPA has been selective in prosecuting torture cases by misinterpreting the law on jurisdiction in relation to torture. Therefore it is important that potential torture perpetrators as well as members of the prosecuting authority, are taught extensively about torture as well as the obligations of South Africa under the UNCAT and the requirements of international norms. This is also vital, as stated by the former president Thabo Mbeki because, South Africa has one of the largest private security industries in the world and issues of accountability of these actors have often been raised.

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<sup>322</sup> *Ibid* 114.

<sup>323</sup> Senate Select Committee on Intelligence: Committee Study of the CIA's Detention and Interrogation Program, Declassification revisions, 2014 at 4.

<sup>324</sup> *Ibid*.



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