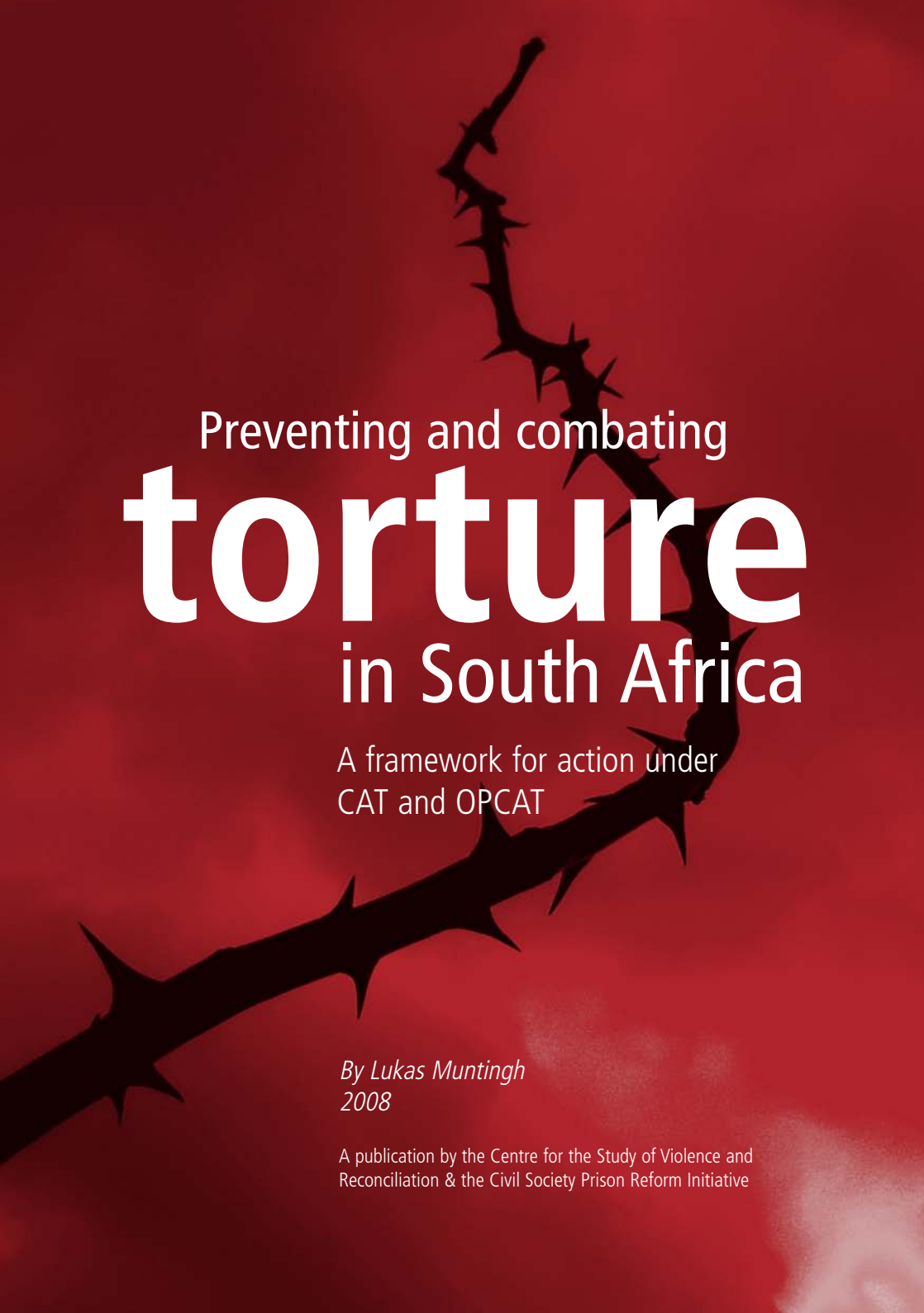

Preventing and combating torture in South Africa

A framework for action under CAT and OPCAT

By Lukas Muntingh
2008

A publication by the Centre for the Study of Violence and Reconciliation & the Civil Society Prison Reform Initiative

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Introduction

Why talk about torture in post-apartheid South Africa? Is torture not something that we have left in the past? Regrettably torture, and cruel, inhuman and degrading treatment or punishment still takes place in South Africa; this reality did not end on 27 April 1994. Official statistics are not kept on the incidence of torture, but from departmental annual reports, research and media reports it is evident that torture remains a problem. No country, regardless of the strength and maturity of its democracy, can afford to become complacent about the issue of torture.

In 1998 South Africa ratified the UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and in 2006 signed the Optional Protocol to CAT (OPCAT). By signing a convention a state expresses, in principle, its intention to become a party to the Convention or Protocol. However, signature does not, in any way, oblige a state to take further action (towards ratification or not). Ratification involves the legal obligation for the ratifying state to apply the Convention or Protocol.[1] These two actions have placed significant obligations on South Africa to take measures to prevent and combat torture and other cruel, inhuman or degrading treatment or punishment.

Apart from obligations under international law, the South African Constitution places the obligation on the state to protect and promote the dignity of all people and, derived from this obligation, protect them from torture and cruel, inhuman or degrading treatment or punishment.

In recent years the debate on torture in Europe, North America and the Middle East has focused on the 'war on terror', giving it a particular political context. The situation in South Africa is different; here the debate focuses on the treatment of prisoners, detainees in police custody, undocumented foreigners, children in secure care facilities, and patients in psychiatric hospitals. In post-1994 South Africa it has become evident that transformation is far more demanding than writing new laws, and that many attitudes, practices and habits from the previous regime have survived, especially in places where people are deprived of their liberty. Furthermore, it is important to note that torture does not happen in a vacuum – it scales up from other abuses. When there is no effective outside monitoring, abuses of various kinds, including torture, are more likely. [2]

This booklet aims to provide more information to decision-makers and stakeholders

on the challenges relating to preventing and combating torture; and also outlines South Africa's obligations under CAT and OPCAT. These two instruments are valuable resources in the quest to prevent and combat torture. This booklet is a rough guide to this task. It should be kept in mind that over the past 50 years there has been much research and writing produced on this subject, and for more detailed information there are many sources to consult; some of which are listed at the end of the booklet.

The style of the booklet is one of question-and-answer; hopefully this will make what are often complicated issues more understandable and accessible.

The first part of the booklet deals with torture and CAT, focusing on the definition of torture, the crime of torture, the obligations under CAT and the role of civil society in the work of the UN Committee against Torture.

In CAT the emphasis is on criminalisation, prosecution and punishment of perpetrators. OPCAT on the other hand, which is dealt with in the second part of the booklet, places emphasis on prevention. The importance of visits as a preventive measure, obligations under OPCAT and possible steps to take OPCAT forward are dealt with.

To prevent and combat torture effectively, South Africa needs to:

- Implement effective legal and other measures, such as the criminalisation of torture in domestic law;
- Investigate all allegations of torture and prosecute perpetrators without exception;
- Educate and train officials about their duties in upholding the absolute prohibition of torture, cruel, inhuman or degrading treatment;
- Implement effective and independent oversight structures that conduct regular visits to all places of detention;
- Educate people, free and detained, about their rights and specifically the right not to be tortured.

What is the link between dignity and torture?

Dignity is a founding value of the South African Constitution and therefore has particular significance in our jurisprudence. Dignity, as a constitutional value, has been discussed at length in a number of Constitutional Court cases.[3] It has been concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.[4]

The right to dignity exists not only to protect individuals against conditions adversely affecting them, but it also places a positive obligation on the state. The state is obliged to act proactively to prevent people's dignity from being negatively affected.

The right to dignity gives rise, amongst other rights, to the freedom and security of the person, and specifically the right not to be tortured in any way, and the right not to be treated or punished in a cruel, inhuman or degrading way. Torture is a direct and an inexcusable assault on the dignity of any person under all circumstances.

What is torture and does it happen in South Africa?

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

Based on this definition, three conditions and one exception are specified for an act to qualify as torture:

- It must result in severe mental and/or physical suffering;
- It must be inflicted intentionally;

- It must be committed by or with the consent or acquiescence of a public official;
- It excludes pain and suffering as a result of lawful actions.

Many South Africans suffered at the hands of the security forces of the apartheid regime. They were tortured for their political beliefs and their efforts to bring about a democratic society. Our understanding of the concept 'torture' is therefore often linked narrowly to this history. Despite the transition to a democratic society, torture still occurs. The following are three examples.

Case 1: Six police officers from the North East Rand Dog Unit were charged in 2000 with assault with intent to do grievous bodily harm. The charges arose from an incident that occurred in Gauteng in January 1998 where the six police members filmed themselves in an incident where dogs were set upon three illegal immigrants as part of a training exercise.[5]

Case 2: In April 2007 the Department of Correctional Services confirmed the deaths of three prisoners at the Krugersdorp prison. The inmates were allegedly assaulted by six prison warders. The police are investigating a murder case while the Department is planning disciplinary action.[6]

Case 3: In 2005 numerous rights violations and other inappropriate practices were reported from the George Hofmeyer School of Industries (for female children) in Standerton, Mpumalanga. The children were denied telephone calls and visits to family on the basis of the privilege level at which they had been placed. Restraint may only be used in extreme situations where a child may be a danger to themselves and/or others and no restraint technique in child and youth care or education practice exists where either staff or children are permitted to sit on a child. Unfortunately such restraint measures had been employed by both the principal and certain of the teachers in the recent past, resulting in serious injury to at least one child and humiliation to others.[7]

Given such examples, it becomes important to understand 'torture' not only in the historical South African sense, but also to understand it in the much broader contemporary sense that is envisaged in the definition set out in Article 1 of CAT. Not only is it political prisoners who are at risk of torture, but also common law prisoners, children in secure care facilities and those in a host of other situations where people are deprived of their liberty and at the mercy of officials of the state.

What is cruel, inhuman and degrading treatment or punishment?

Article 1 of CAT provides the current definition of torture under international law and this should be the basis for adoption in domestic law. The Convention does not, however, provide a definition of cruel, inhuman, and degrading treatment or punishment. Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment are left up to the courts to decide.[8] There is growing international case law on this issue as well.[9] Scholars have also spent many hours questioning the relationship between torture, on the one hand, and cruel, inhuman or degrading treatment or punishment on the other. There have also been a number of South African decisions on this issue, such as *Whittaker and Morant v Roos and Bateman*[10], *Stanfield v Minister of Correctional Services*[11] *and Strydom v Minister of Correctional Services*[12]. Can acts that do not in themselves constitute torture, amount to torture when applied over a prolonged period? When does cruel, inhuman or degrading treatment become torture? These are vexing questions that will keep courts and scholars occupied for decades to come. Despite these challenges, it should be noted that both torture and cruel, inhuman or degrading treatment or punishment are prohibited under CAT (see Articles 1 and 16), and that protection against cruel, inhuman or degrading treatment or punishment is also guaranteed in Section 12 (e) of the South African Constitution. There is, therefore, an obligation on states parties to prevent both torture and cruel, inhuman or degrading treatment or punishment. Experience has also demonstrated that the conditions that give rise to cruel, inhuman or degrading treatment or punishment, frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment.[13]

What is the status of torture as a crime?

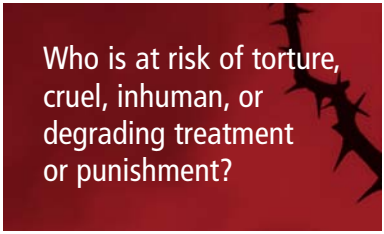
Today, the international ban on the use of torture has the enhanced status of a peremptory norm of general international law.[14] This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated[15] from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[16]

This prohibition of torture imposes on states obligations owed to all other members of the international community, each of which has a correlative right.[17] It signals to all states and people under their authority that, "the prohibition of torture is an absolute value from which nobody must deviate."[18] At the national level it de-legitimates any law, administrative or judicial act authorising torture.[19]

Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. The absoluteness of the ban means that it applies regardless of the status of the victim and the circumstances, be it a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become: "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind"[20]; and torture itself as an act of barbarity which, "no civilized society condones"[21]; "one of the most evil practices known to man"[22]; and "an unqualified evil"[23].

Following on from torture's status as a peremptory norm, it means that any state has the authority to punish perpetrators of the crime of torture as, "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution"[24]. The CAT therefore has the important function of ensuring that under international law the torturer will find no safe haven. Applying the principle of universal jurisdiction, CAT places the obligation on states to **either prosecute or extradite** any person suspected of committing a single act of torture. Doing nothing is not an option.

Although South Africa does not have the crime of torture defined on the statutes, common law crimes such as assault and attempted murder have been used to prosecute officials. The use of common law crimes is, according to the Committee against Torture, inadequate to prosecute perpetrators of torture.



People deprived of their liberty are vulnerable and particularly at risk of human rights violations. It is therefore with good reason that the Constitution, in section 35, spells out the rights of arrested, detained and accused persons in detail. Importantly, the deprivation of liberty should not only be thought of as arrest by the South Africa Police Service (SAPS) or imprisonment by the

Department of Correctional Services. Other government departments and even the private sector, deprive people of their liberty. The following are some examples: the Department of Home Affairs detain and transport undocumented foreigners; the SA National Defence Force has military detention barracks for personnel convicted of offences under the military justice system; the Department of Education is responsible for child and youth care centres (formerly reformatories); the Department of Social Development oversees secure care facilities for unsentenced children; the Department of Health is responsible for a number of substance abuse treatment centres and psychiatric hospitals, and there are also privately operated substance abuse treatment centres and two privately operated prisons.

The Constitutional Court has been very firm in its pronouncements on the rights of people deprived of their liberty. Referring to prisoners in *S v Makwanyane* the Court stated that, prisoners "retain all the rights to which every person is entitled under [the Bill of Rights] subject only to limitations imposed by the prison regime that are justifiable under [the limitations clause]".

What is the Convention against Torture (CAT)?

Torture dates back many centuries and was at one stage considered a legitimate and necessary method of obtaining information, for example by the Spanish Inquisition. Adopted in 1948 by the newly established United Nations after the Second World War, the Universal Declaration of Human Rights (1948) in Article 5 pronounced, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". It would, however, take another three decades for the UN to adopt the Declaration Against Torture (1975), asserting that no exceptional circumstances could justify torture and thus establishing the prohibition of torture as a rule of international law.

It took, however, the torture and subsequent death of Steve Biko to move the UN General Assembly to draft and adopt the CAT in 1984, which came into force three years later. States that are a party to the CAT submit themselves to binding international law and undertake to implement measures giving effect to the objectives of the Convention in their jurisdictions.

The Convention, importantly, defined torture in a manner that is now accepted by nearly all members of the UN. The definition in Article 1 should be regarded as the minimum and states are free to augment the definition as long as the core elements

are retained. CAT also established the UN Committee against Torture to monitor the compliance of states parties with the Convention (Article 17). The Committee, consisting of ten experts in the field, is mandated to receive complaints from individuals and other states, and it can investigate allegations of torture made against states parties. The Committee also assesses the initial and periodic reports of countries that have signed and ratified the Convention.

CAT requires states to:

- Adopt effective legislative, administrative, judicial and other measures to prevent acts of torture (Art 2);
- Not expel, return or extradite persons to another country where they may be tortured (Art 3);
- Enact legislation criminalising torture (Art 4);
- Extradite or prosecute perpetrators of torture (Art 7);
- Assist other states to bring perpetrators of torture to book (Arts 8 and 9);
- Educate its officials on the absolute prohibition of torture (Art 10);
- Regularly review interrogation rules, instructions, methods, practices and arrangements of people deprived of their liberty (Art 11);
- Promptly investigate, by impartial authorities, any cases where there are reasonable grounds to suspect that torture may have taken place (Art 12);
- Ensure that any individual who alleges to have been tortured has a right to complain and that such allegations will be promptly and impartially examined (Art 13);
- Protect witnesses and victims of torture (Art 13);
- Enable redress for victims of torture (Art 14);
- Enact legislation prohibiting the use of statements obtained under torture as evidence unless such statements are to be used against the torturer (Art 15);
- Prevent cruel, inhuman, and degrading treatment or punishment with reference to Articles 10-13 (Art 16);
- Submit a progress report to the Committee against Torture every four years after ratification (Art 19).

Despite many shortcomings and challenges faced in enforcing compliance with CAT, it remains the most comprehensive piece of binding international law in the fight to eradicate torture.

What are South Africa's obligations under CAT?

South Africa ratified CAT on 10 December 1998 committing itself to implementing measures giving effect to the objectives of CAT. The list above describes in broad terms what South Africa's obligations are. Following South Africa's *Initial Report*[29] to the Committee against Torture in 2006, the Committee's *Concluding Remarks*[30] on the *Initial Report* requires the South African government to urgently action the following:

- Enact legislation criminalizing torture based at minimum on the definition in Article 1. Further, such legislation must provide for penalties giving recognition to the seriousness of the crime of torture.
- Enact legislation implementing the principle of the absolute prohibition of torture, prohibiting the use of any statement obtained under torture and establishing that orders from a superior may not be invoked as a justification of torture.
- South Africa must ensure that under no circumstances are persons expelled, extradited or returned to a state where they may be subject to torture.
- All necessary measures should be taken to prevent and combat the ill-treatment of non-citizens detained in repatriation centres, especially in the Lindela Repatriation Centre. Non-citizens must be provided with adequate information about their rights. An effective monitoring mechanism should be established for these centres and all allegations of ill-treatment should be thoroughly investigated.
- The necessary measures should be taken by South Africa to establish its jurisdiction over acts of torture in cases where the alleged offender is present in any territory under its jurisdiction, either to extradite or prosecute him or her.
- Consideration must be given to bringing to justice persons responsible for the institutionalisation of torture as an instrument of oppression under apartheid and grant adequate compensation to all victims.
- All deaths in detention and all allegations of acts of torture or cruel, inhuman or degrading treatment committed by law enforcement personnel must be promptly, thoroughly and impartially investigated to bring the perpetrators to justice.
- Strengthen legal aid to assist victims of torture, cruel, inhuman or degrading treatment or punishment to seek redress.

- Translate and disseminate CAT in all appropriate languages, and disseminate in particular to vulnerable groups.
- Implement measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of all those deprived of their liberty, in particular regarding health care.
- Children must at all times be detained separately from adults.
- Establish an effective monitoring mechanism for persons in police custody.
- Adopt legislation and other effective measures to prevent, combat and punish human trafficking, especially that of women and children.
- Ensure that legislation banning corporal punishment is strictly implemented, in particular in schools and other welfare institutions for children, and establish a monitoring mechanism for such facilities.
- Submit statistics to the Committee on the prevalence of torture and the prosecution of perpetrators
- Distribute the Committee's *Concluding Remarks* widely in the appropriate languages.

What can be done to prevent and combat torture in South Africa under CAT?

The Committee's *Concluding Remarks* provide substantial guidance on what can be done to prevent and combat torture. Most of the recommendations are very specific and clearly set out what needs to be done. In this regard it is important for government to demonstrate political leadership on these issues. It should also be kept in mind that there is no expectation that all these recommendations should be implemented immediately. However, since periodic reports are submitted every four years it will be desirable to, firstly, have an implementation strategy in place, and secondly, to ensure that milestones coincide with the four-year cycle of reporting.

How can government and civil society cooperate on CAT?

The CAT and the procedures and guidelines of the Committee against Torture encourage cooperation between government, civil society and the National Human Rights Institutions (NHRI).

Periodic Reports: It is not necessary to describe the requirements for Periodic Reports here in detail and it suffices to note that the Committee requests information that would provide it with a well-informed view of the current situation with reference to the state party's obligations under CAT. To facilitate such a report, the Committee recommends that there should be broad-based consultations with stakeholders in the preparation of the report, particularly with national institutions promoting and protecting human rights, as well as non-governmental organisations.[31]

List of issues: In an effort to streamline and focus its discussions in respect of *Periodic Reports*, the Committee amended its procedures in 2004 to provide for 'a list of issues' to be communicated to the state party approximately one year in advance of the consideration of the state party's *Periodic Report*.[32] The intention is that the state party concerned should distribute the list of issues widely, including to civil society organisations. The lists of issues are also made available on the Committee's website and thus accessible to civil society organisations. Civil society organisations may also make submissions to the Committee in respect of issues that it would like to see included in the list of issues communicated to the state party in preparation of the *Periodic Report*.

Shadow reports: Once a state party has submitted its *Periodic Report*, civil society organisations have the opportunity to submit written information in the form of shadow reports. Shadow reports are distributed to the state party (unless there is a specific objection from the authors) and are also available on the Committee's website in advance of the Committee session dealing with the state party's *Periodic Report*. This is probably the most frequently used and most accessible avenue for civil society participation in the work of the Committee and is provided for under the Committee's *Rules of Procedure*[33] and *Working Methods of the Committee*[34]. Unless there are exceptional circumstances, only organisations that have made written submissions will be allowed to make an oral submission. Oral submissions are considered confidentially, without state party representatives being present.[35]

Concluding Remarks: Once the Committee has considered the *Periodic Report*, the dialogue with the state party delegation, the submissions and dialogue with civil

society, it will release its *Concluding Remarks* a few days later. The *Concluding Remarks* will reflect on both problem areas and positive developments. The intention is that the *Concluding Remarks* should be distributed widely in government and to non-governmental stakeholders and, more importantly, that it should form the basis for dialogue between government and other stakeholders. The *Concluding Remarks* therefore set the agenda for the next four years until the next *Periodic Report* is due.

Places of detention, such as prisons and police cells, are usually not open to public scrutiny and what happens there remains hidden from the public eye. The public also often chooses not to know what is happening in these places. In such situations, people deprived of their liberty are extremely vulnerable to human rights violations and ill-treatment as they have no voice. To prevent violations it is of critical importance that places of detention function in a transparent manner. This means that officials have a duty to act **visibly, predictably and understandably**.[36] Nothing must be hidden from public scrutiny, especially when human rights concerns are at stake. The actions of officials must be predictable as guided by policy, legislation, regulations, standing orders and good practice. Without transparency there can be no accountability. Regular, announced and unannounced, visits by independent bodies or individuals promote transparency in four ways:

- **Prevention:** The simple fact that an outside person enters a place of detention contributes to the protection of people detained there.
- **Direct protection:** Site visits make it possible to react immediately to problems affecting detainees.
- **Documentation:** Information collected during visits is documented and a historical record is developed based on facts to motivate recommendations for improvement.
- **Basis for dialogue:** Visits make it possible to develop a process of dialogue with authorities and officials in charge. This dialogue is based on mutual respect and aimed at developing a constructive working relationship.[37]

What is OPCAT?

The history of OPCAT spans more than two decades of relentless work by non-governmental organisations and friendly governments, but was the original vision of Swiss banker Jean-Jacques Gautier. It was Gautier, who thirty years ago, after carefully studying the subject, concluded that the method of preventive visits adopted by the International Committee of the Red Cross (ICRC), was the most effective and efficient means of preventing torture.[38] However, the ICRC visits to places of detention are conducted with a strict observance of confidentiality, placing a limitation on transparency. OPCAT, with its emphasis on openness and transparancy, was adopted by the UN General Assembly in 2002 and came into force in June 2006.

OPCAT is, as the name suggests, an optional protocol that states parties to CAT can sign and ratify to further contribute to preventing torture, cruel, inhuman and degrading treatment or punishment in their jurisdictions. Article 1 of OPCAT describes this well: *The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*

OPCAT provides for international and national visiting mechanisms to places of detention. The international visiting mechanism is known as the Sub-Committee on the Prevention of Torture (SPT) and consists of ten experts, elected by states parties to the Protocol (Article 2). The national visiting mechanism, known as the National Preventive Mechanism (NPM), is established and/or designated by the states parties to OPCAT in their jurisdictions (Article 3).

The Protocol grants the SPT and NPM(s) access to all places of detention, people detained there, and documentation at such places. States parties to the Protocol are also required to cooperate with the SPT and NPM, and are obliged to ensure the functional independence of the NPM and, furthermore, that it has sufficient resources to fulfil its mandate.

What are South Africa's obligations under OPCAT?

Since coming into force in June 2006, 61 states have signed the Protocol and 34 have ratified it (as at 31 January 2008). The rapid signing and ratification of such a far-reaching human rights instrument by so many states took many observers by surprise. Continued ratifications and practical implementation of the Protocol remain key priorities.

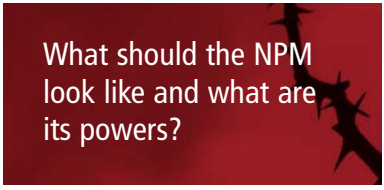
The following provides a summary of key obligations under OPCAT:

- Implement and abide by CAT (Preamble);
- NPM(s) must be maintained, designated or established within one year of ratification (Arts 3 and 17);
- Consider advice from the SPT on the NPM(s) (Art 11);
- Receive the SPT in South Africa and grant it unrestricted access to places of detention, including access to all documents and people detained there and allow interviews in private (Arts 4, 12 and 14);
- Encourage and facilitate contact between the SPT and the NPM (Art 12);
- Examine and consider recommendations of the SPT (Art 12);
- Ensure that no person is victimised in any manner because he/she has communicated with the SPT or NPM (Arts 15 and 21);
- Confidential information collected by the NPM and SPT shall be privileged and no personal information may be published without the consent of the person concerned (Art 21);
- Guarantee the functional independence of the NPM (Art 18);
- Ensure that individuals possessing the necessary expertise are appointed to the NPM(s) (Art 18);
- Ensure that the NPM(s) have the necessary resources to function (Art 18);
- Give due consideration to the Principles relating to the status of NHRI, the Paris Principles, in establishing and/or designating the NPM(s) to ensure that the NPM(s) is competent, independent and representative (Art 18);[39]
- The relevant authorities must examine the recommendations from the NPM(s) and enter into dialogue with it on possible implementation (Art 22);
- The government must publish the annual reports of the NPM(s) (Art 23).

What is needed to take OPCAT forward in South Africa?

- As South Africa has only signed and not yet ratified and implemented OPCAT, ratification would be an important step in demonstrating commitment to the eradication of torture.
- Given South Africa's history and the transition to democracy, it is important for civil society and the media to place torture back on the national agenda.

- In line with Article 17, the NPM(s) must be maintained, designated or established within one year of ratification.
- It is important to use OPCAT to strengthen existing oversight mechanisms, such as the Judicial Inspectorate of Prisons and the Independent Complaints Directorate.
- Appoint people to the NPM(s) who are experts in the applicable fields, independent and of high integrity.
- Government must guarantee the functional and operational independence of the NPM(s).
- Government must make the necessary resources available to ensure that the NPM(s) is able to function properly and fulfil its mandate. (Article 18(3)).
- In order to ensure coherence and consistency, there needs to be minimum standards developed for inspections by the NPM(s).
- Government must create the opportunity for dialogue with the NPM, SPT and civil society to discuss issues of mutual concern and to address issues emanating from visits to places of detention by either body.



There is no blueprint for what an NPM should look like and South Africa may utilise existing structures to fulfil this mandate. It can establish new structures and/or amend the mandates of existing structures to perform the function of an NPM. While OPCAT does not say it explicitly, scholars are in agreement that the NPM(s) must be 'homegrown'; it must be suitable for local conditions, preferably based on what has been proven to work locally, and be acceptable to local stakeholders. Only four requirements are set:

- it must be functionally independent;
- consist of individuals with the necessary capabilities and expertise;
- have access to the necessary resources; and
- be in line with the Paris Principles (Art 18).

Designated or established NPMs will have the following powers:

- To regularly examine the treatment of persons deprived of their liberty with a view, if necessary, to protect them from torture, cruel, inhuman and degrading treatment or punishment (Art 19);
- To make recommendations to the relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty (Art 19);
- To submit proposals and observations concerning existing or draft legislation (Art 19).

The government shall further grant the NPM:

- Access to all information concerning persons deprived of their liberty (Art 20);
- Access to all information referring to the treatment and conditions of persons deprived of their liberty (Art 20);
- Access to all places of detention, their installations and facilities (Art 20);
- The opportunity to have private and confidential interviews with persons deprived of their liberty (Art 20);
- The liberty to choose the places it wants to visit and the persons to be interviewed (Art 20);
- The right to have contact with the SPT, meet with it and send it information (Art 20).

As noted above, there is as yet no NPM designated or structures established for this purpose. Looking at the requirements set in OPCAT and the need for visits, two structures are immediately suited, with minor changes, to fulfil this function. The first is the Judicial Inspectorate of Prisons (JIP), established under the Correctional Services Act (111 of 1998), which already conducts visits to prisons proactively by means of Independent Prison Visitors and Compliance Inspectors. While some functions need to be adjusted and other operational adjustments made, the Inspectorate already has, in respect of prisons, a mandate very close to that of the NPM described in Article 20.

The second structure is the Independent Complaints Directorate (ICD) established under the South African Police Service Act (68 of 1995). The ICD investigates complaints against the South African Police Service (SAPS) but does not proactively visit places of detention falling under SAPS. The importance and desirability of visits to police holding cells was already remarked upon by the ICD in its 2002 Annual Report.

Research suggests that one route to develop an NPM is to use existing structures and amend their mandates as necessary. Although a technical possibility, it appears less than likely that a separate structure, established only for the purposes of OPCAT, will be acceptable to stakeholders. Three possibilities emerge from this approach:

Model 1: The South African Human Rights Commission (SAHRC) coordinates existing inspectorate bodies with the possibility of extending the mandate of the JIP to cover other places of detention, excluding the mandate of the ICD.

Model 2: The mandate of the JIP is extended to cover all forms of deprivation of liberty.

Model 3: The SAHRC coordinates independent experts to visit places of detention.[40]

The process to decide on one of the three above-mentioned models, or the development of other models, needs to be an inclusive one, relying on the views and participation of government, civil society and the NHRI. Whatever model is agreed upon also need not be cast in stone. Given the flexibility of an NPM provided for under OPCAT, there exists the possibility of designating NPMs on a temporary basis, testing different approaches and basing a final decision on the results achieved.

How must monitoring of places of detention take place?

Monitoring places of detention refers to the process, over time, of regular examinations of all aspects of detention. The scope of monitoring visits would then cover:

- The legal and administrative measures applied in places of detention;
- The living conditions during detention;
- Access to medical care;

- The regime of the detention facility;
- The organisation and management of people deprived of their liberty and of personnel, as well as the relations between personnel and people deprived of their liberty.

Through experience in other countries, 12 principles have been developed to guide monitoring places of detention:[41]

- **Do no harm:** Maintain confidentiality, security and sensitivity. Visits should be properly planned and prepared.
- **Exercise good judgment:** Be aware of and exercise good judgment in respect of the standards against which monitoring is taking place.
- **Respect the authorities and the staff in charge.**
- **Respect the persons deprived of their liberty.**
- **Be credible:** Visitors should explain clearly the purpose and scope of the visits and make no promises or create expectations that cannot be followed through.
- **Respect for confidentiality:** Information provided to visitors must be treated confidentially and detained persons must be made aware of the possible risks involved in providing information.
- **Respect security:** Security refers to the security of visitors, detained persons and staff. Security reasons may sometimes be presented as a reason for not allowing a visit. Accepting this reason will be a judgment call.
- **Be consistent, persistent and patient:** Developing an effective visiting mechanism will take time and it will be important to be consistent in comments and reports. Above all, it requires persistence. Follow-up visits are therefore essential.
- **Be accurate and precise:** Reports and recommendations should only be based on good and reliable information.
- **Be sensitive:** Especially when interviewing detained persons sensitivity must be demonstrated, especially to prevent re-victimisation in the event that allegations of torture are made.
- **Be objective:** Visitors must record facts and deal with staff and detained persons in an objective manner.
- **Behave with integrity:** Visitors must treat staff, detained persons and fellow visitors with decency and respect.

- **Be visible:** Visitors should ensure that the staff and management of the place of detention are well informed of the visitors and their purpose. Visitors should also be clearly identifiable as visitors.

Resources

Books, papers and reports

Fernandez, L. (2004). *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 South Africa.* CSPRI Research Report No. 2, CSPRI, Bellville.

Long, D. & Naumovic, N. (2004). OPCAT – *A Manual for Prevention*. APT and the Inter-American Institute for Human Rights, Geneva.

Muntingh, L. & Fernandez, L. (2008 forthcoming). A review of measures in place to affect the preventing and combating of torture with specific reference to places of detention. In *SA Journal of Human Rights*.

Schaufelberger, E. & Bernath, B. (2004). *Monitoring places of detention.* Association for the Prevention of Torture, Geneva.

Streater, O. (2007). *Review of existing mechanism for the prevention and investigation of torture and cruel inhuman and degrading treatment or punishment in South Africa*. The Centre for the Study of Violence and Reconciliation, Johannesburg.

Websites

Association for the Prevention of Torture (APT)
www.apt.ch

Amnesty International
http://www.amnesty.org/

Centre for the Study of Violence and Reconciliation (CSVR)
www.csvr.org.za

Civil Society Prison Reform Initiative (CSPRI)
http://www.communitylawcentre.org.za/Civil-Society-Prison-Reform

International Council for the Rehabilitation of Torture Victims (ICRT)
http://www.irct.org/

Rehabilitation and Research Centre for Torture Victims (RCT)
http://www.rct.dk/?sc_lang=en

UN Committee against Torture
http://www2.ohchr.org/english/bodies/cat/index.htm

Endnotes

1. "Frequently asked Questions on the Hague Convention". www.hcch.net.
2. Worden, M. (2005). Torture spoken here. In Roth, K., Worden, M. & Bernstein, A.D. (eds). *Torture – A Human Rights Perspective*. The New Press & Human Rights Watch, New York, p.98.
3. *S v Williams* 1995 (3) SA 632 (CC); *Minister of Home Affairs v Nicro* 2004 (5) BCLR (CC); *S v Makwanyane* 1995 (3) SA 391 (CC).
4. Chaskalson, A. (2002). Human dignity as a Constitutional Value. In Kretzmer, D. & Klien, E. (eds). *The Concept of Human Dignity in the Human Right Discourse*. Kluwer Law International, The Hague, p.134.
5. Presentation to the Parliamentary Portfolio Committee on Safety and Security, 7 March 2001. www.icd.gov.za/reports/port2001b.htm.
6. Sapa, 16 April 2007. Deaths of 3 prisoners confirmed. *The Cape Argus*. www.capeargus.co.za/index.php?fArticleId=3783581
7. Initial Report of the *curator ad litem* in the application of *The Centre for Child Law and Eleven Others v The Minister of Justice and Ten Others*, Transvaal Provincial Division of the High Court, Case no. 8523/2005.
8. See *Ireland v UK* 1976 2 EHRR 25; Rodley N.S. (2002). The Definition of Torture under International Law. *Current Legal Problems*. Oxford University Press, pp. 467-493.
9. See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002.
10. 1912 AD 92.
11. 2003 (12) BCLR 1384 (C).
12. 1999 (3) BCLR 342 (W).
13. UN Committee Against Torture (2007). *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, Implementation of Article 2 by States Parties*. Thirty-eighth session, 30 April – 18 May 2007, para 3.
14. See the House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte* Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at paras 147-157.
15. When states become parties to international human rights treaties, they are allowed to 'suspend' some of the rights under those treaties in certain situations or circumstances until the situation or circumstance that gave rise to the 'suspension' has come to an end. This is called derogation. For example, a state may ban people from travelling to some parts of the country during an outbreak of an epidemic. This may be interpreted by some people to mean that their right to freedom of movement has been infringed. International and national human rights law permit such derogations.
16. *Prosecutor v Furundzija* op cit para 153.

17. Ibid at para 151. In other words, all countries of the world are 'hurt' when a person is subjected to torture by another country. It does not matter whether the person tortured is a citizen of country A or B. All countries have a duty to ensure that torture is not committed by its' own officials and also that it is not committed by officials in other countries.

18. Ibid at para 154.

19. Ibid at para 155.

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

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

22. Ibid at para 101.

23. Ibid at para 160.

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

25. *S v Makwanyane* 1995 (3) SA 391 (CC) paras 142-3.

26. Robertson, G. (2006). *Crimes against Humanity – the struggle for global Justice*. London: Penguin, p. 265.

27. CAT Status of Ratifications www2.ohchr.org/english/bodies/ratification/9.htm. Should countries wish to adopt a definition of torture that is slightly different from that under Article 1 of CAT, the Committee against Torture has warned that such a definition should not aim at perpetuating impunity. See paragraph 9 of the Committee's General Comment No. 2 of 23 November 2007.

28. In the three regional human rights systems of Africa, Europe and Inter-American there are torture specific instruments. These only bind states in those regions. CAT binds all states parties irrespective of which region they fall in.

29. Government of the Republic of South Africa (2005). *Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005.

30. Committee against Torture (2006). *Consideration of reports submitted by states parties under article 19 of the convention - Conclusions and Recommendations of the Committee Against Torture – South Africa* (Advanced Unedited Version) CAT/C/ZAF/CO/1, 37th Session, 6 – 24 November 2006, 23 November 2006, Geneva.

31. UN Committee against Torture (2005). *Guidelines on the form and content of initial reports under Article 19 to be submitted by states parties to the Convention against Torture*, CAT/C/4/Rev.3, 18 July 2005, para 4.

32. Committee Against Torture, *Working Methods*, paragraph III(A). www.ohchr.org/english/bodies/cat/workingmethods.htm.

33. Committee Against Torture (2002). *Rules of Procedure*, CAT/C/3/Rev. 4, 9 August 2002, Rule 62(1). www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/1447cc84665815d5c1256c4700309a65/$FILE/G0244257.pdf.

34. Committee Against Torture (2002). *Rules of Procedure*, CAT/C/3/Rev. 4, 9 August 2002, Rule 62.

35. Committee Against Torture, *Working Methods*, paragraph VIII.

36. Transparency International *"What is transparency?"*. www.transparency.org/news_room/faq/corruption_faq.

37. Schaufelberger, E. & Bernath, B. (2004). *Monitoring places of detention*. Association for the Prevention of Torture, Geneva, p. 26.

38. Ludwidge, F. (2006). The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture. *Helsinki Monitor*, 1, p.70.

39. Commonly known as the 'Paris Principles' the Principles for National Institutions for the Promotion and Protection of Human Rights were adopted by the UN General Assembly on 20 December 1993(A/RES/48/134 85th plenary meeting). The Paris Principles are aimed at strengthening national institutions aimed at promoting and protecting human rights. It pays particular attention to competence and responsibility, composition and representivity, methods of operation, and principles concerning the status of commissions with quasi-judicial competence.

40. Streater, O. (2007). *Review of existing mechanism for the prevention and investigation of torture and cruel inhuman and degrading treatment or punishment in South Africa*. The Centre for the Study of Violence and Reconciliation, Johannesburg, pp. 90-92.

41. Schaufelberger, E. & Bernath, B. (2004). *Monitoring places of detention*. Association for the Prevention of Torture, Geneva, pp. 29-31.

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