



POLICY BRIEF

ADVOCACY PROGRAMME

NO.1 | DECEMBER 2014

When There Is a Gap in Law: Bridging Gaps through Implementation of the Prevention and Combating of Torture of Persons Act 13 of 2013

Prepared by Annah Y. Moyo

INTRODUCTION

After 16 years of delays, South Africa finally enacted the Prevention and Combating of Torture of Persons Act (“the Act”) in July 2013. The Act domesticates the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and fulfils South Africa’s international law obligation to pass anti-torture legislation after signing and ratifying UNCAT in 1997. The question remains, however, whether the Act is a true reflection of UNCAT as an empowering instrument or whether gaps exist when it comes to its substantive provisions. Article 14 of UNCAT, which guarantees redress for victims of torture, in particular, is noticeably frugal in the Act. This omission presents a rather gloomy outlook, unless the implementation phase of the Act takes a positive turn. In the application of the Act, there is an opportunity for the various implementers – specifically the legal profession – to look to international law in order to bridge the gap created by the Act when it comes to providing effective and adequate redress for victims.

COMBATING TORTURE IN INTERNATIONAL, REGIONAL AND DOMESTIC LAW

Freedom from torture is a non-derogable right which must be respected and protected under all circumstances in international law. The protection against torture and the prohibition thereof is so fundamental that even if a State has not ratified UNCAT, that State is bound by it on the basis of customary international law.¹

The prohibition of torture is found in a number of international human rights and humanitarian law treaties and is also regarded as a principle of general international law. Article 5 of the Universal Declaration of Human Rights prohibits torture. The United Nations Covenant on Civil and Political Rights, the Covenant on Economic, Social and Political Rights and the Convention on the Rights of the Child, among others, are international human rights instruments prohibiting torture. UNCAT gives effect to the crime of torture and defines what this crime entails.² The Rome Statute of the International Criminal Court lists torture as a crime against humanity when it is perpetrated as part of a widespread or systematic attack on civilian populations. Article 7 of the Rome Statute includes the crime of torture within the International Criminal Court's jurisdiction.

At the regional level, the African Charter on Human and Peoples' Rights prohibits torture and the Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa outlines measures to prevent and

prohibit torture in the region. At the national level, the South African Constitution provides for "freedom of the person and the right not to be tortured in any way."³ South Africa therefore follows a number of precedents in adopting the Prevention and Combating of Torture of Persons Act.

NOTABLE GAPS IN SOUTH AFRICA'S ANTI-TORTURE LEGISLATION

Although the passing of anti-torture legislation after such a long time calls for jubilation, the task of scrutinizing the Act's effectiveness and shortcomings is an urgent one, if the needs of victims are to be met. For organizations working with victims and survivors of torture, including the Centre for the Study of Violence and Reconciliation (CSV), the elation is marred by the silence of the Act on redress.

The Act does not provide for redress for torture victims and survivors, save for prosecution of perpetrators of torture and the common law civil claims for damages available to victims of torture.⁴ The Act should have taken into account the existing jurisprudence on torture and the needs of victims. To this end, Article 14 of UNCAT, General Comment No. 3 of the Committee against Torture and the recent United Nations Human Rights Council Resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should have also been considered.

ARTICLE 14 OF UNCAT AS EXPUNDED IN GENERAL COMMENT NO. 3 AND THE HUMAN RIGHTS COUNCIL

RESOLUTION ON TORTURE

Article 14 of UNCAT requires every State party “to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”

General Comment No. 3 clarifies the content and scope of redress in Article 14, stating that redress includes the concepts of effective remedy and reparation for victims of torture, which entail five elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition of torture.⁵

The Human Rights Council in its 22nd session⁶ called for States to provide adequate redress to victims of torture, with a specific focus on rehabilitation.⁷ The State is called upon to recognize the importance of full, holistic and specialized rehabilitation services, which “include any necessary coordinated combination of medical and psychological care, as well as legal, social, community and family based” services and interim economic support, performed by specialists.⁸ The landmark resolution puts the responsibility of ensuring redress, and especially rehabilitation, for torture victims squarely on the State.

VICTIMS’ NEEDS

In addition to the provisions of Article 14, General Comment No. 3 and the Human Rights Council Resolution, the needs of victims of torture, as highlighted by victims and based on long-standing observations from experts in the field,

should have been pivotal in the wording and substance of the Act insofar as redress is concerned.

THE IMPACT OF TORTURE

The impact of torture is complex as it affects the torture victim, his or her family and the community where torture occurs. The impact on the torture victim can be broadly placed in three categories: psychological, physical and social. CSVR has found that the main psychological factors victims present with are mood disturbances (such as depression), helplessness, anxiety, fear, frustration and traumatic responses (such as Post-Traumatic Stress Disorder), among others. Physical complaints include health-related problems (either linked to or exacerbated by torture), difficulties accessing necessary medications, pain and reduced physical health due to torture. Social factors include, among others, difficulties with the community (stigma), family breakdown and relationship difficulties.

VICTIMS’ EXPERIENCES

Victims and survivors of torture tend to be a traumatized group with special needs. Their traumatic experiences often leave them with psychological and physical impairments that can result in the need for special medical and psychosocial attention. Victims of torture may also be unable to attain livelihoods, have positive interactions or lead normal lives. They may be vulnerable to life stressors and are in most cases rendered unable to manage daily tasks and family interactions and to solve complex problems.

CSVR OBSERVATIONS

Based on its established work with torture victims, CSVr has observed that for victims and survivors to recover from torture and regain their lives, all components of redress must be met. The Act should have provided for all five components of redress, namely restitution, rehabilitation (both medical and psychosocial), compensation, satisfaction and guarantees of non-repetition of torture.⁹

General Comment No. 3 makes remarkable recommendations on how State parties can articulate Article 14 of UNCAT in their anti-torture legislation and ensure that:

- There is **restitution** for losses suffered by victims and that such restitution is aimed at restoring the individual to his or her original state before torture occurred.
- There is guaranteed access to medical and psychological **rehabilitation** to enable the tortured person to function normally again in society after torture.
- There is **compensation** for victims. Although compensation is provided for in common law through civil claims of damages in South African courts – an argument made by the Department of Justice before parliamentarians – this process is dependent on the courts' findings and judgments and the award of damages for compensation is not automatic. There is therefore a need for mechanisms that ensure torture survivors receive compensation without having to go through rigorous and lengthy civil claims procedures which can result in their secondary traumatization.
- There is **satisfaction** – in the form of public acknowledgement, public apology and memorialization – which is vital for victims, their families and their communities, enforcing their right to know the truth and to find closure.
- There is public accountability and the state providing **guarantees of non-repetition** of torture – through promoting awareness about torture – and bringing identified perpetrators of torture to book.

BRIDGING THE GAP THROUGH IMPLEMENTATION

The purpose of the Prevention and Combating of Torture of Persons Act is clearly outlined in its opening statement: “To give effect to the Republic’s obligations in terms of United Nations Convention against Torture.”¹⁰

When there is a gap in law, the first place to look for solutions is the empowering instrument. The Act is a product of South Africa’s commitment and obligations under UNCAT. Where the Act is silent on important aspects of the Convention – in this case, redress for torture victims – we can only revert to UNCAT as the empowering instrument for implementation. Article 14 of UNCAT is crucial in the promotion of victims’ right to adequate and effective redress. General Comment No. 3 is also a fundamental source as it expounds on Article 14 and gives flesh to the skeletal framework of adequate redress therein.

Furthermore, Section 39(1)(b) of the Constitution obligates South African courts to consider international law when

interpreting the Bill of Rights. This is particularly important given that the Preamble of the Act cites Section 12(1)(d) on the prohibition of torture in the South African Bill of Rights as one of the influencing guidelines for the implementation of the Act.¹¹ It follows therefore that the Act gives effect to the Bill of Rights and that the implementation thereof is an interpretation of Section 12.

Finally, proper implementation requires that the procedural aspect of the Act, in the form of Regulations, be effected urgently. The Regulations can inform how redress for victims of torture is to be implemented.

RECOMMENDATIONS FOR EFFECTIVE IMPLEMENTATION OF THE ACT

CONSIDER INTERNATIONAL LAW AND IMPLEMENT ARTICLE 14 OF UNCAT IN TORTURE JUDGMENTS

In the absence of articulate provisions regarding adequate redress for victims of torture in the Act, Section 39(1)(b) of the Constitution should be applied to implement Article 14 of UNCAT. CSVr recommends that the courts revert to Article 14 of UNCAT, as well as General Comment No. 3 of the Committee against Torture, to afford victims their right to full and adequate redress in their decisions. The gap in the Act can be easily bridged in its implementation by going back to the empowering instrument for much-needed answers.

This calls for the legal profession, including attorneys, advocates, magistrates and high court judges, to fall back

on UNCAT and soft law jurisprudence on torture in order to fully cater for victims' need for adequate and effective redress.

ENACT REGULATIONS TO COVER PROCEDURAL AND OTHER ASPECTS OF THE ACT, FOR SPEEDY IMPLEMENTATION

The passing of the Prevention and Combating of Torture of Persons Act alone is not adequate for immediate and effective implementation of the Act. The Act is still in need of accompanying procedural measures, in the form of Regulations, for its full implementation. CSVr therefore recommends that the Regulations to the Act be drafted urgently to ensure its speedy enforceability.

ENSURE CAPACITY BUILDING AND EDUCATIONAL TRAINING OF RELEVANT ACTORS INCLUDING THE POLICE AND JUDICIAL OFFICERS ON THE PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT

Article 9 of the Act only provides for education and training for public officials involved in custody, interrogation or treatment of arrested, imprisoned or detained persons on the prevention and combating of torture. There is a gap when it comes to training and capacity building for officers in the criminal and civil justice system on the same. The criminalization of torture calls for the officials in the criminal justice system, specifically the police officers, prosecutors, legal practitioners, magistrates and judges to be trained on the new Act, which training will guarantee effective application, interpretation and enforcement of its provisions.

REFERENCES

1. See Erika de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implication for National and Customary Law" EJIL, <http://www.ejil.org/article.php?article=349&issue=19> (accessed 10 October 2014). See also Conor Foley, "Combating Torture: A Manual for Judges and Prosecutors," University of Essex, http://www.essex.ac.uk/combatingtorturehandbook/manual/1_content.htm (accessed 14 August 2013). Also see Article 38 of the Statute of the International Court of Justice, which lists the means of determining the principles of international law as "international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations and judicial decisions and the teaching of eminent publicists."
2. Article 1 of UNCAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person 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."
3. Article 12(1)(d) of the Constitution.
4. Section 4 of the Act lists offences constituting torture and their penalties while Section 7 indirectly provides for the victim's common law claim for damages for any physical and/or psychological suffering suffered from torture through a civil lawsuit.
5. General Comment No. 3 expounds the five elements and recommends what each element must look like.
6. A/HRC/RES/22/21.
7. See paras. 12-19 of the Human Rights Council Resolution.
8. See para. 13 of the Human Rights Council Resolution.
9. CAT/C/GC/3.
10. See the opening statement of the Act.
11. See the Preamble: "Since section 12(1)(d) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to freedom and security of person which includes the right not to be tortured in any way ... Parliament of the Republic of South Africa therefore enacts as follows."

ABOUT THE AUTHOR

Text to follow...



CSVV

The Centre for the Study of
Violence and Reconciliation

ABOUT CSVV

CSVV is a multi-disciplinary institute involved in research, policy formation, community interventions, service delivery, education and training, as well as providing consultancy services. The primary goal of CSVV is to use its expertise in building reconciliation, democracy and a human rights culture and in preventing violence in South Africa and in other countries in Africa.

Johannesburg Office

4th Floor
Braamfontein Centre
23 Jorissen Street
Braamfontein
Johannesburg
South Africa

Tel: +27 (11) 403-5650
Fax: +27 (11) 339-6785
e-mail: info@csvv.org.za

P O Box 30778
Braamfontein
Johannesburg
2017

Cape Town Office

501 Premier Centre
451 Main Road
Observatory
7925

Tel: +27 (21) 447-2470 or
Tel +27 (21) 447-3661