SOUTH AFRICA

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

South Africa has a population of approximately 38 million people, composed of a large number of ethnic groups.[1] It was under apartheid rule from 1948 to 1994. On 4 February 1997, following the end of apartheid, a new Constitution, Act 108 of 1996, came into force. It describes South Africa as a "sovereign, democratic state founded on the following values: Human Dignity, the achievement of equality and the advancement of human rights and freedoms."[2]

The Constitution is the supreme law of the Republic. It contains a Bill of Rights that recognises a range of civil and political rights, including the right to life and the right to liberty, as well as social, economic and cultural rights.[3] It also guarantees the right of access to courts.[4] The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. In addition, it binds all natural and legal persons, taking into account the nature of the right or duty imposed.

The courts fall into three categories: the Constitutional Court, the superior courts and lower courts. The Constitutional Court decides constitutional questions connected with decisions on constitutional matters.[5] It sits mainly as an appeal court, but occasionally as a court of first instance. The superior courts include the Supreme Court of Appeal and the high courts. The Supreme Court of Appeal hears appeals from the High Court and various special superior courts. It has appellate jurisdiction in all matters including some constitutional ones. The high courts hear appeals from the lower courts and sit as courts of first instance in respect of both civil and criminal matters. The lower courts include the magistrates' courts and the small claims courts. Except for rare exceptions, magistrates' courts sit as courts of first instance and deal with both criminal and civil matters. The civil jurisdiction of the courts is generally determined by the amount and type of the claim. Magistrates' courts hearing criminal cases may be district courts or regional courts. District courts hear minor criminal cases, while regional magistrates may hand down a sentence of up to 15 years imprisonment for a first offence or a fine of up to R300,000. There are other special courts dealing with disputes involving tax, land claims and labour. There are also a number of military courts as provided for in the Military Discipline

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[1] See Core Document forming part of the reports of State Parties: South Africa, UN Doc. HRI/CORE/1/Add.92, 23 September 1998.

[2] See section 1 (a) of the Constitution.

[3] See Chapter 2, Sections 7-39 of the Constitution.

[4] Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[5] See Section 98 of the Constitution.

Supplementary Measures Act.[6] The independence of the judiciary is guaranteed by the Constitution.[7]

1.2. Incorporation and status of international law in domestic law

South Africa has become a party to the following treaties relevant to human rights and humanitarian law:

- Geneva Conventions 1949 (Acceded 31 March 1952; Acceded to Protocol I and II on 21 November 1995);
- Refugee Convention (12 January 1996)
- The African Charter on Human and Peoples Rights (9 July 1996)
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1998)
- International Covenant on Civil and Political Rights (10 December 1998);
- Genocide Convention (10 December 1998)
- The Rome Statute of the International Criminal Court (27 November 2000)
- First Optional Protocol to ICCPR (28 August 2002)
- Second Optional Protocol to ICCPR (28 August 2002)
- Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on Human and Peoples Rights (3 July 2002)[8]

According to Section 231 (4) of the Constitution, any international agreement becomes "law in the Republic when it is enacted into law by national legislation." This general rule is qualified by the self-executing provisions of international agreements. These are law if the agreement has been approved by Parliament "unless it is inconsistent with the Constitution or an act of parliament."[9] According to Section 232, "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." As such, an international agreement or element of customary international law is subordinate to the Constitution or a conflicting Act of Parliament. This subordination is counterbalanced to some extent by the requirement of interpreting legislation, in so far as possible, in conformity with international law.[10] Moreover, Section 39 of the Constitution obliges a court to consider international law as a tool to interpret the Bill of Rights,[11] which has been expressly recognised by South African courts.[12]

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[6] No. 16 of 1999. According to Section 6 (1) of that act, the military court system consists of the Court of Military Appeals, the Court of a Senior Military Judge, the Court of a Military Judge and the commanding officer's disciplinary hearing.

[7] Section 165 (2) of the Constitution provides that the "courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[8] The Protocol has not come into force yet as the number of required ratifications has not been reached. Consequently, to date the African Court on Human and Peoples Rights has not been established.

[9] Section 231 (4) of the Constitution. The notion of "self-executing provisions" has been imported into South African Law, see for possible difficulties of interpretation, Dugard, John, ***International Law from a South African Perspective***, 2nd Ed., Kenwyn, 2000, at p.58.

[10] Section 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[11] Section 39 (1): "When interpreting the Bill of Rights, a court, tribunal or forum ... b) must consider international law; and c) may consider foreign law. 2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See

South Africa has enacted no legislation to implement either the ICCPR or the Convention against Torture. It has however recently enacted the "Implementation of the Rome Statute of the International Criminal Court Act."[13]

2. Practice of torture: Context, Occurrence, Responses

2.1. The practice of torture

The use of torture by organs of the state came to prominence under apartheid, especially from the early 1960s onwards.[14] A review of South African law reports from 1960 until 1994 demonstrates that conduct amounting to torture was also used by the police in investigating allegations of serious crimes not having a political connotation.[15]

Even with the end of the apartheid regime, torture and ill-treatment continues to be widespread. In the wake of a crime wave, members of the South African Police Service (SAPS) have reportedly resorted to police brutality, including torture, in the course of investigations, mainly to extract confessions and obtain information.[16] Perpetrators have included members of the SAPS, in particular specialised police squads and also members of the South African National Defence Force.[17] Those subjected to this treatment are criminal suspects, especially violent ones, and witnesses, particularly when the police believe the witness is not providing full disclosure, or persons whom the police believe may be harbouring a suspect. Victims of torture come from all race groups, as do the perpetrators. Most victims have been young African men. Immigrants from other African countries appear to have been particularly targeted by SAPS members. Generally the victims have a low income and a limited education. There have also been some cases of sexual violence in

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also judgement by South Africa's Constitutional Court in *The Government of the Republic of South Africa v Others, Grootboom & Others*, 2000 (11) BCLR 1169 (CC), para. 26.

[12] *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). ". . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]." (Para. 35) (Footnotes omitted). See for further jurisprudence overview by Dugard, supra, at pp. 61 and 263 et seq.

[13] No. 27 of 2002. Republic of South Africa, Government Gazette, Vol. 445, Cape Town, 18 July 2002, No. 23642.

[14] The Truth and Reconciliation Commission set up after the end of Apartheid received over 21,000 submissions relating to human rights violations. The practice of torture was described in detail by over 300 former members of the security forces in their statements before the Commission's Amnesty Committee. See, Piers Pigou, Monitoring Police Violence & Torture in South Africa, Paper presented at the International Seminar on Indicators and Diagnosis on Human Rights: The Case of Torture in Mexico, convened by the Mexican National Commission for Human Rights, April 2002.

[15] See in this respect cases described infra, III, 3.3.

[16] Torture is usually carried out in South Africa by administering electric shocks to the victim or by smothering him or her (usually using a strip of rubber from the inner tube of a car tire) which is held over the victim's mouth and nose to prevent the victim from breathing. The victim will also be beaten and manhandled prior to the torture, probably to induce the victim to submit to the torture process. Information provided by Professor Jordi, Wits Law Clinic.

[17] See Amnesty International, South Africa, Torture and misuse of lethal force by security forces must end, April 1999, AI Index: AFR 53/05/99.

custody. Children have in some cases also been subjected to torture and various forms of ill-treatment.[18] There is a particularly high number of persons killed by members of the SAPS and about 550 - 700 people die in police custody each year although it is unclear how many of these deaths resulted from torture.[19]

2.2. Domestic Responses

After the end of apartheid, a wide range of measures was taken to promote human rights and curtail torture. The interim Constitution adopted in 1994 and the present Constitution passed in 1996 both contain a comprehensive list of human rights protections. In 1994, a Human Rights Commission was created with a broad mandate to investigate and otherwise address human rights abuses.[20] In 1995, the Truth and Reconciliation Commission (TRC) was set up to deal with human rights violations during the apartheid regime.[21] It has since published a report in five volumes on its findings in 1998 after hearing thousands of accounts of human rights violations, both by victims and perpetrators.[22] Its work officially terminated in December 2001 and the outstanding volumes of the last report were finalised in March 2002. However, the presentation to the President and publication of the final report was delayed after the Inkatha Freedom Party (IFP) obtained an interim court order in August 2002, according to which the TRC had to amend its conclusions in relation to the IFP. The IFP and the TRC came to a settlement of the case in late January 2003.[23] On 21 March 2003, Archbishop Tutu handed the final report to President Thabo Mbeki and called for immediate reparations for about 20,000 victims.[24]

The South African Police Service (SAPS) was established in 1995. Human rights training has become part of the police training curriculum and the SAPS has adopted a "Prevention of Torture Policy."[25] An Independent Complaints Directorate (ICD) was also established, which evolved from the system of independent police reporting

[18] See as to the profiles of victims of torture and individual cases, Pigou, Police Violence, supra, and David Bruce, Police Brutality in South Africa, in: Mwanajiti, N., Mhlanga, P., Sifuniso, M., Nachali-Kambikambi, Y., Muuba, M. and Mwananyanda, M. (eds.), published by Inter-African Network for Human Rights and Development, 2002, available at www.csvr.org.za/papers/papbruc5.htm. Torture has been systematically carried out by the specialised units of the SAPS, including what were known as the Murder & Robbery Units, Firearm Units, Internal Stability Units, Vehicle Theft Units and some Detective Branches. The names by which these units were known may have since changed, but similar units continue to operate from the same locations with the same personnel.

[19] Pigou, Police Violence, supra. According to Bruce, Police Brutality, supra, 2174 people died in the period April 1997- March 2000 as a result of police action (1548 people) or in police custody (626 people). 70% of the deaths (95% of deaths as a result of police action and 12-16% of death in custody) are the result of the (lawful and unlawful) use of force by the police.

[20] See Sections 115-118 of the Constitution, 1993, The Human Rights Commission Act, No. 54 of 1994 and section 184 of the 1996 Constitution. See for further information the homepage of the Commissionwww.sahrc.org.za.

[21] See Promotion of Nationality and Reconciliation Act, No.34 of 1995.

[22] See the TRC homepage www.doj.gov.za/trc/ for further information. See also the website of the NGO: Centre for Study of Violence and Reconciliation which has published numerous books and articles on the TRC and the process of truth and reconciliation, see www.csvr.org.za.

[23] See Amnesty International/Human Rights Watch, Truth and Justice: Unfinished Business in South Africa, February 2003, AI Index: AFR 53/001/2003.

[24] See Rory Carrol, De Klerk "lied to cover human rights abuses", Apartheid era president condemned by report", Guardian, 22 March 2003.

[25] South African Police Service Act, No .68 of 1995. See for further information the website of the SAPS www.saps.org.za.

established by the National Peace Accord signed on 14 September 1991.[26] By section 53 of that Act, the ICD investigates any death in police custody or resulting from police action and may investigate other complaints of police misconduct. There can be no doubt that the Independent Complaints Directorate is a significant improvement over the previous system by which the police were free to investigate complaints of police misconduct without supervision. However, the ICD has struggled to obtain sufficient funds to perform its functions and has often only a limited supervisory role as it leaves some investigations of police misconduct up to the police.[27]

Since 1994, several international treaties have been ratified or acceded to and laws have been adopted or amended to bring domestic law into line with human rights requirements. Various aspects of the law are currently under review in the work of the South African Law Commission.[28] There are however indications that the progressive human rights policy pursued in the immediate years after 1994 might become lost in the "war against crime."[29]

2.3. International Responses

South Africa has yet to submit its first report to the Committee against Torture, which was due on 8 January 2000. Nonetheless, there have been several pronouncements by international bodies expressing their concern about reports relating to torture and ill-treatment in South Africa. Particular concern relating to the effects of torture has been raised in the concluding observations of the Committee on the Rights of the Child after the submission by South Africa of its initial report. Its concern was drawn to "the high incidence of police brutality and the inadequate enforcement of existing legislation to ensure that children are treated with respect for their physical and mental integrity and their inherent dignity."[30]

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The Constitution provides for the right to be free from torture and ill-treatment. Section 12(1) stipulates that: "c) Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources; d) not to be tortured in any way; and e) not to be treated or punished in a cruel, inhuman or degrading way." Section 12(1) (d) and (e) are non-derogable rights.[31]

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[26] Section 222 of the interim Constitution of 1993 provided for an independent civilian mechanism to be established to ensure that complaints in respect of police misconduct were effectively investigated. This was given effect by Chapter 10 of the South African Police Service Act, No 68 of 1995, which established the Independent Complaints Directorate.According to Section 50(2) of the South African Police Service Act, No 68 of 1995, the Independent Complaints Directorate functions independently from the South African Police Service. The Act prescribes that an organ of state and its personnel are not entitled to interfere should an officer of the ICD be performing his duties. The ICD is funded by Parliament.

[27] See Chapter 10 of the SAPS, Act. See for further information the website of the ICD www.icd.gov.za.

[28] See South African Law Commission website www.salc.co.za for details.

[29] See Amnesty International, South Africa, Preserving the gains for human rights in the 'war against crimes': Memorandum to the South African Government and South African Law Commission on the draft Anti-Terrorism Bill, 2000, November 2000, AI Index: AFR 53/04/00.

[30] Concluding Observations of the Committee on the Rights of the Child: South Africa, UN Doc. CRC/C/15/Add.122, 23 February 2002, para. 21

[31] Section 37(5)(c) of the Constitution: Table of Non-Derogable Rights.

Torture is not specifically prohibited in South African legislation, the new Rome Statute Act being the only exception. Item 2(e) of the First Schedule to the Implementation of the Rome Statute of the International Criminal Court Act defines torture as "the infliction of severe pain and suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain arising only from, inherent in or incidental to, lawful sanctions." Torture at least in its more physical manifestations is clearly prohibited under the common law. Insofar as the common law may not have prohibited the infliction of suffering generally, section 8(3) of the Constitution requires a court to develop the common law to give effect to a right guaranteed by the Constitution.[32]

A definition of torture in line with Article 1 of the Convention against Torture can be found in the policy on the prevention of torture and the treatment of persons in custody, adopted by the SAPS.[33] The Supreme Court has defined cruel and inhuman treatment and punishment in its jurisprudence.[34]

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The substantive law: Criminal Offences and Punishment

There is no specific offence of torture in South African criminal law. Several common law offences may however be applied to prosecute and punish torture, such as assault,[35] assault with intent to commit grievous bodily harm,[36] rape,[37] murder[38] and

[32] This may follow from what was stated by Ackermann J in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC) at 1014C, that there are indications in the Constitution that the "right to freedom is to be extensively interpreted." See also, Hoexter J.A. in *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 145I who stated that "one of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus* but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or a right against false imprisonment. It comprehends also a mental element. .... In my view the evidence to which reference has earlier been made amply demonstrates that the detention to which the plaintiff was subjected during his detention constituted an infraction of his basic rights. Such segregation involved an aggression upon his absolute right to bodily integrity; and in particular it represented a trespass upon and violation of the plaintiff's right to mental and intellectual well-being." In that case, which was decided before the introduction of a Bill of Rights, the claimant was detained in conditions amounting to solitary confinement with limited exercise, access to printed matter, newspapers, correspondence or the radio and television. The court went on to say at 153D-E that the "plain and fundamental law is that every individual's person is inviolable and that infractions of that right are *prima facie* illegal."

[33] SAPS: Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service, 1998/1999. According to the policy: "torture may include, but is not limited to, any cruel, inhuman or degrading treatment or punishment, as referred to in section 12(1)(e) of the Constitution of the Republic of South Africa ... or any act by which severe pain, suffering or humiliation, whether physical or mental, is intentionally inflicted on a person for purposes of obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating him or her or a third person, when such pain, suffering or humiliation is inflicted by or at the instigation of or with the consent or acquiescence of a member (of the SAPS) or any other person acting under the authority or protection of the Service (SAPS)."

[34] S v Makwanyane, supra.

[35] Assault consists in unlawfully and intentionally applying force to the person of another or inspiring a belief in that other that force is immediately to be applied to him. See Hunt, P.M.A.; Milton, J.R.L., South African Criminal Law and Procedure, Vol.II, Common-Law Crimes, 2nd. Ed., Juta & Co., 1982, at pp.467 et seq.

[36] "You must be satisfied that the ... had the intent to do grievous bodily harm. It is not necessary that such harm has actually been done or that it should be either permanent or dangerous. If it be such as seriously to interfere with comfort or health it is sufficient." *R v Matzukis* 1940 SR 76, 78 and 79, quoted in *S v Madikane,* 1990 (1) SACR 377 (N), at 385, 386.

attempted murder. In the case of *S v Madikane,*[39] for example, the court held that an act of torture, here the application of electric shocks, constituted assault with intent to commit grievous bodily harm.[40] The appropriate sentence for assault or assault with intent to commit grievous bodily harm is left to the discretion of the court.[41] The Criminal Law Amendment Act No. 105 of 1997 has however introduced minimum sentences for certain serious offences. Murder and rape carry a sentence of imprisonment for life if aggravating circumstances are present.[42] For all other cases of rape, the minimum sentence is imprisonment for a period not less than 10 years in the case of a first offender.[43] The same applies to the offence of assault with intent to commit grievous bodily harm on a child under the age of 16 years.[44]

An example of a statutory prohibition which could be interpreted as prohibiting torture is section 50(1) of the Child Care Act, No 74 of 1983, which provides that "any... person having the custody of a child who - (a) ill-treats that child or allows it to be ill-treated; or .... any other person who ill-treats a child shall be guilty of an offence." A person convicted of this offence may be liable to a fine or imprisonment. The Intimidation Act, No 72 of 1982, in section 1 outlaws conduct by any person who without a lawful reason and so as to induce "any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint ... assaults, injures ... any [other] person."

Criminal liability may arise from an omission to perform a legal duty.[45] In the context of torture this might arise when a policeman on duty fails to come to the assistance of a person being assaulted.[46] It is conceivable that the defence of necessity, private defence (self-defence) and consent could be used.

At the same time or following a criminal prosecution, disciplinary sanctions can be taken against an official who has allegedly committed torture or other misconduct. The SAPS Commissioner can impose sanctions according to the SAPS Discipline Regulations, either on his/her own motion or upon the recommendation of the ICD.

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[37] Rape consists in intentional unlawful sexual intercourse with a woman without her consent. See ibid, at pp.435 et seq. A lesser charge is the one of indecent assault which consists in an assault which is itself of an indecent character. See ibid., at pp.494 et seq.

[38] Murder is defined as the unlawful and intentional killing of another person. See ibid., at pp.340 et seq. Culpable homicide consists in the unlawful negligent killing of another person, ibid., at pp.401 et seq.

[39] 1990 (1) SACR 377 (N).

[40] Broome J., ibid.: "The Court held that despite the fact that the purpose of these assaults was to obtain admissions without causing observable or permanent physical injuries, these assaults constituted assaults with intent to do grievous bodily harm. Furthermore K had also, by the nature of the assault on him, suffered grievous bodily harm, despite the absence of observable physical injury."

[41] The sentencing powers of the courts are currently under review by the Law Commission with the aim of passing a sentencing act. Project No. 82. See Discussion Paper 91 (A new sentencing framework) and the Draft Sentencing Framework Bill 2000.

[42] See Section 51(1) (a) in conjunction with Schedule 2 (Section 51) Part I, Criminal Law Amendment Act No. 105 of 1997. Rape in custody is not mentioned as such an aggravating circumstance.

[43] This is subject to change as a new Sexual Offences Bill and a Children's Rights bill are being considered for adoption this year. This will influence the way rape is defined and punished. See South African Law Commission website www.salc.co.za for details and updates.

[44] See Section 51 (1) b) and Schedule 2 (Section 51) Part III, Criminal Law Amendment Act No. 105 of 1997.

[45] CR Snyman, ***Criminal Law***, 4th Ed., Butterworths, 2002, p.59.

[46] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *S v A en 'n Ander* 1991 (2) SACR 257 (N) at 273G-H and 274E.

The Regulations specify that a policeman commits misconduct if he or she uses unlawful force against a prisoner or other person in custody or otherwise ill-treats such person.[47]

2. The procedural law

2.1. Immunities

Aside from the amnesties provided for in the Promotion of National Unity and Reconciliation Act, amnesties for crimes related to torture are generally unavailable.[48] The post-Apartheid amnesties apply to events taking place between 1 March 1960 and 11 May 1994.[49] A Committee on Amnesty[50] could grant an amnesty to perpetrators of crimes with a political objective committed during Apartheid if it satisfied itself that the applicant had made full disclosure of all relevant facts.[51] Once amnesty was granted, the applicant was free of criminal and civil liability for the acts encompassed by the amnesty.[52] Should amnesty be refused,[53] the applicant was able to seek a review of that decision of the Commission by the High Court.[54] Without an amnesty, perpetrators are liable to prosecution in accordance with the criminal law of South Africa.

The constitutionality of the amnesty provisions was unsuccessfully challenged by Apartheid victims in the case of *Azanian Peoples Organization (AZPO) and Others v The President of South Africa and Others*.[55] Judge Mahomed DP upheld the

[47] Regulation 18(23) of the SAPS Discipline Regulations published in *Government Gazette* 16239 GN R2086, 27 December 1996.

[48] Also, according to the Indemnity Act, No.13 of 1977, no civil or criminal proceedings may be instituted or continued against the state or any person in the service of the state or acting by the direction of such person for any act committed in good faith between 16 June 1976 and 16 March 1977 related to the suppression of internal disorder.

[49] Section 22 of the Constitution as amended by the Constitution of Republic of South Africa Amendment Act, No. 35 of 1997.

[50] See Chapter 4, Sections 16 et seq. of Act 34 of 1995.

[51] An application for amnesty could be made within 12 months of the proclamation of the appointment of the Commissioners in respect of any act, omission or offence committed during the period from 1 March 1960 to the cut-off date (10 May 1994) provided that it is an act associated with a political objective. Such an application is followed by an investigation of the Committee, see sections 18 and 19 of Act 34 of 1995.

[52] Section 20(7) (a): "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence; c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date (10 May 1994) by a person who is deceased, unless amnesty could not have been granted in term of this Act in respect of such an act, omission or offence."

[53] Section 21 of Act 34 of 1995.

[54] Nieuwoudt v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission; Du Toit v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission; Ras v Chiarman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission, 2002 (1) SACR 299.

[55] *Azanian Peoples Organization (AZPO) and Others v The President of South Africa and Others*, Constitutional Court of South Africa, Case CCT 17/96, 25 July 1996. The applicants claimed that they had a clear right to insist that the perpetrators of gross human rights violations "should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further require the state to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the state." Moreover, the applicants contended that section 20(7) of the Act was inconsistent with section 22 of the Constitution ("every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum").

constitutionality of the section 20(7) of the Act, holding that Parliament had the power to make a law providing for amnesty on the basis of the epilogue concerning National Unity and Reconciliation contained in the 1993 Constitution.[56] The Court dismissed the contention that "the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provision of section 20 (7) which authorised amnesty for such offenders constituted a breach of international law."[57] The Court reasoned that, in the absence of an act incorporating an international agreement into municipal law, "an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution" as well as obligations deriving from customary international law.[58]

2.2. Statutes of Limitation

The right to institute criminal proceedings shall, according to Section 18 of the Criminal Procedure Act, 1977, as amended, lapse after the expiration of 20 years from the time when the offence was committed. Murder, kidnapping and rape are exceptions to this rule and are not subject to any statute of limitations.

2.3. Investigations into torture

2.3.1. Criminal investigations

Complaints about torture can be lodged with the police, the ICD[59] if the complaint relates to an incident which occurred on or after 1 April 1997, the Human Rights Commission or the Public Protector. Complaints against members of the police may be lodged at any ICD office, using the Complaint Reporting Form of the ICD. Complaints can also be made by telephone or anonymously.[60] Complaints to the police, which are made by way of sworn statement, would normally be made at the charge office of a police station. According to the SAPS Prevention of Torture Policy, if a person in custody complains of torture, the complaint must immediately be conveyed to the station commissioner or the area commissioner who shall immediately take steps to ensure investigation.[61] A person in custody must also be

[56] He could not find that "the lawmaker, in section 20(7) has offended any express or implied limitations on its powers in terms of the Constitution." See para. 21 of judgment.

[57] The applicants argued that such a duty under international law followed from the articles of the Geneva Conventions obliging High Contracting Parties to enact legislation necessary to provide effective penal sanctions for persons committing any of the grave breaches. Para.25. See for the courts reasoning which questioned the applicability of the Geneva Conventions and found that "there no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights" if those acts take place in a conflict which does not qualify as war. See paras.29-31.

[58] Para.27. In para.32, the Court noted that "The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purpose of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20 (3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued."

[59] See supra, I, 2.2.

[60] See for details on their requirements, ICD, Lodging complaint against the SAPS, available at www.icd.gov.za/policies/complaint.htm.

[61] Paragraph 3(3) and (5) Prevention of Torture Policy.

informed of his or her right to complain directly to the ICD.[62] Complaints made to the ICD are divided into several classes. Acts of torture and ill-treatment fall, depending on the circumstances, into class I, II, III or IV.[63] The classification of the complaint informs the subsequent investigation. Class I and II complaints are investigated by the ICD itself, and Class III complaints are investigated by the ICD or referred to the Police for investigation subject to monitoring by the ICD.[64] Class IV complaints are normally referred to the police for investigation and monitored by ICD but may also, depending on the circumstances, be investigated by the ICD.

Generally, the police are in charge of investigating crimes. However, the ICD may investigate certain offences falling within its mandate, either upon complaint or on its own motion, or may supervise police investigations. In so doing, it has the same powers as the police. While the ICD plays a supervisory role in torture cases that come to its attention, the police are not obliged to report all criminal offences, specifically torture, to the ICD and the powers of the ICD to demand collaboration of the police are limited.

In South African law, an initial investigation is mandatory. According to the SAPS Prevention of Torture Policy, the SAPS member in control of a detainee who appears to be ill or injured must immediately call the district surgeon or medical practitioner, or, in urgent cases, send the detainee to the nearest provincial hospital. Section 35(2) of the Constitution provides that a detainee is entitled to free medical treatment and stipulates the right to be visited by a medical practitioner of his or her own choice. In the latter instance the detainee would have to bear the costs of the medical practitioner's visit. All medical consultations are to be conducted out of the sight and hearing of a SAPS member, unless the medical practitioner requests otherwise.[65] Any relevant evidence of a medical practitioner may be admitted as evidence of an expert.

In addition to direct witnesses, evidence of other detainees about torture practice may be collected and used for prosecution. Similar-fact evidence is generally inadmissible, though, often groups of suspects are tortured separately by the same team of investigators. In *Gosschalk v Rossouw,*[66] it was made clear that if detainees are maltreated by the same team of investigators, the evidence of the other detainees can be used to support a claim of abuse made by another of the detainees.

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[62] Paragraph 3(5) ibid.

[63] A Class I complaint is one that alleges that a death occurred while a person was in police custody or as a result of police action; A Class II complaint is one that is referred to the ICD by the Minister or a Provincial Executive; A Class III complaint is one that alleges that a member committed an offence listed below (the list includes, *inter alia*, torture, rape, indecent assault and assault with intent to cause grievous bodily harm or attempted murder) or that serious bodily injury requiring in-patient hospital treatment occurred while a person was in police custody or as a result of alleged police misconduct; A Class IV complaint is one that alleges that a member committed an offence other than those listed above or misconduct that did not result in either death or serious bodily injury to anyone; Class V complaint is a complaint outside the scope of mandate or policy of the ICD. See ICD website, supra.

[64] The decision whether to investigate itself or delegate Class III investigations to the police is either based on directives or standard operational procedures or on a list of criteria, which include the nature of the injuries sustained by the victim, the economic impact upon any and all persons including the victim, the scope of the alleged wrongful conduct in terms of prospective victims, the national implications of or public interest in the incident, the capacity of the ICD to investigate the matter and the extent to which the conduct complained of illustrates a disregard for the law, an attitude of unaccountability and/or an abuse of trust or authority, on the part of the perpetrator.

[65] Paragraph 6.

[66] 1966 (2) SA 476 (C).

In cases of unnatural death, an inquiry will be opened to establish the cause of death and whether any offence was committed.[67] A docket containing statements, photographs, a post-mortem report and other relevant information will be compiled and submitted to a public prosecutor. When there is no criminal prosecution, an inquest will be held usually by a magistrate, but exceptionally at the request of the Minister of Justice, by a judge. Usually, the inquest will be conducted in public, but occasionally it is held by a magistrate in chambers.[68] The presiding officer of the inquest is required to make a finding regarding the identity of the deceased person, the likely cause of death, the date of death and whether the death was brought about by any act or omission apparently amounting to an offence on the part of any other person. If the presiding officer is unable to record a finding, this fact must also be recorded. If appropriate, the record is referred to the Director of Public Prosecutions and a criminal prosecution may then follow. If a criminal prosecution is instituted in respect of the death, the inquest proceedings are stayed.

Upon completion of an investigation by the police or the ICD, the Director of Public Prosecution has the discretion to bring charges against the accused.[69] If the police or the ICD takes a decision to discontinue investigations or not to request prosecution or if the prosecutor refuses to bring charges,[70] the victim or his or her relatives in case of death, may challenge this decision by referring to the hierarchically superior prosecutor.[71]

If the latter rejects the complaint, the complainant may demand a certificate of *nolle prosequi* from the Director of Public Prosecution and institute a private prosecution.[72] The private prosecution must be instituted within three months from the date of the certificate of *nolle prosequi*. The private prosecutor must lodge with the court a deposit of a certain sum and an amount equivalent to the costs which may be incurred by the accused in defending the charge. It is possible for the Director of Public Prosecutions to intervene in the proceedings in order to continue the prosecution in the name of the State. If the private prosecution is successful then the court can require the accused to reimburse the private prosecutor for the costs of the prosecution, or even require the state to pay such costs. If the private prosecution is unsuccessful the accused receives the amount secured for his or her costs.[73]

An Office for Witness Protection was established by the Witness Protection Act, 1998.[74] A witness may apply for protection if safety is threatened.[75] Before a decision

[67] Inquests Act, No 58 of 1959.

[68] The Law of South Africa, First Re-issue, part 20, part 2, p. 217.

[69] See North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape), 1999 (2) SACR 669, 680. The powers of the DPP are regulated in the National Prosecuting Authority Act 32 of 1998, empowering him or her to institute, conduct and to discontinue proceedings (Sections 20, 1); 20, 3) and 20,4)). See on the role of the Attorney-General as envisaged by the Constitution, its section 182.

[70] The DPP may even refuse to prosecute when a prima facie case has been made out against the accused person. See North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape), supra, at 681.

[71] The ICD has no power to challenge a decision of the DPP not to prosecute.

[72] Ibid., at 680. Sections 7-17 Criminal Procedure Act.

[73] Sections 15 and 16 Criminal Procedure Act.

[74] Its section 1, (xxiv), defines witnesses as "any person who is or may be required to give evidence, or who has given evidence in any proceedings."

is made, the witness or related person may be placed under temporary protection.[76] If awarded, a protection agreement will be prepared.[77] Acts endangering protected witnesses or obstructing the work of the Office for Witness Protection are offences under the 1998 Act.[78]

2.3.2. Role of the National Human Rights Commission

The National Human Rights Commission has, *inter alia*, pursuant to Section 184 (2) (a) and (b) of the Constitution "the power to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated." The Commission has certain powers of investigation but it does not investigate complaints against members of the SAPS falling within the mandate of the ICD.[79] The NHRC can only make recommendations and does not have the power to prosecute.[80] It has however the general power to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.[81]

2.4. Trials

The Director of Public Prosecutions or a private person may initiate criminal proceedings. The prosecutor has discretion as to where to bring the charges (magistrates, regional or high courts). This will depend on the gravity of the crime and the expected punishment. Offences committed by military personnel subject to military law may be prosecuted by military or civilian courts depending on the charge in question.[82]

Criminal proceedings are adversarial and are derived from British tradition with the exception that there is no jury trial. The burden of proof is on the prosecution, which has to establish the guilt of the accused beyond reasonable doubt. Judges enjoy discretion in sentencing, and may suspend sentences and grant parole as appropriate.[83]

3. The Practice

3.1. Investigations and prosecution of torture committed during apartheid

[75] Sec.7, ibid.

[76] Sec.8, ibid.

[77] Sec.11, ibid.

[78] Sec.22, ibid.

[79] See on its powers of investigation, section 9 of the Human Rights Commission Act, No.54 of 1994.

[80] Sections 9 and 10 ibid.

[81] Section 7(1)(e) ibid.

[82] See section 3 of the Military Discipline Supplementary Measures Act, 1999 and the relevant sections of the Defence Act, 1957. Military and civil courts have concurrent jurisdiction over crimes committed by members of the armed forces but military courts have no jurisdiction to try treason, murder, rape or culpable homicide committed within South Africa, as expressly stipulated in Section 3 (3) ibid.

[83] Section 84 (2) (j) of the Constitution.

By the date when the TRC finalised its work, it had granted 1,160 amnesties out of 7,094 applications under Act 34 of 1995.[84] Some trials of perpetrators who had not applied for amnesty have resulted in convictions, notably in the case of Eugene de Kock, a former member of the Apartheid security police. However, other members of the security forces have either not faced any prosecution at all or their trials ended in acquittals.[85] In its 1998 report, the TRC recommended the prosecution of members of the Police accused of serious human rights violations, including torture, who had been refused amnesty. A special unit was established in the office of the National Director of Public Prosecution, which is in the process of examining cases to determine whether to bring prosecutions. However, concerns about the effectiveness of its work have been raised given its limited resources and ability to recover evidence.[86]

3.2. Present torture

There is no overall record of cases of torture. However, a survey by the Institute for Security Studies indicates that the total number of criminal complaints exceeds 10,000 per year, a considerable number of which relate to assaults.[87] While the ICD issues statistics, these are not comprehensive, which is also due to the fact that the definition of torture used by the ICD is narrower than the definition in the CAT or used by the SAPS.[88] The ICD reported 25 deaths in policy custody due to injuries inflicted by the police or fellow inmates and 10 deaths in custody relating to possible negligence, for the period of April 2001 to March 2002, out of a total of 214 deaths.[89] Out of 371 who died as a result of police action, 7 died from beatings and 1 as a result of torture, according to the classification used by the ICD.[90] For the same period, the ICD recorded, out of a total of 531 serious offences committed by members of the police, 255 cases of assault with the intent to commit grievous bodily harm, 16 cases of common assault, 10 cases of harassment, 2 cases of indecent assault, 8 cases of intimidation, 14 cases of rape and 37 cases of torture.[91]

Many victims of torture and other forms of ill-treatment complain about the treatment they endured. However, in spite of the SAPS Policy on Prevention of Torture, the ICD complaints mechanism and the witness protection scheme, intimidation and harassment of complainants, especially when in custody, continue to be reported. Moreover, a considerable number of torture survivors appear to be unaware of their right to complain to the ICD and in these cases investigations are carried out by the police themselves, often apparently with inconclusive results. The

[84] See AI/HRW, Truth and Justice, supra, p.7 and TRC, Summary of Amnesty Decisions, 1 November 2000.

[85] See overview in AI/HRW, Truth and Justice, supra, pp.10-12.

[86] See ibid., p.12.

[87] See Policing the Police: SAPS Members Charged and Convicted of Crime, Nedbank/Institute of Security Studies Crime Index, Volume 5, Number 2, March-April 2001, according to which an average of 13,954 of complaints or charges were brought against SAPS members in each year from 1994 to 1997 and more than 14,600 charges in 2000.

[88] See Pigou, Monitoring Police Violence, supra, who refers to the Report on torture cases investigated by the ICD.

[89] ICD Annual Report 2001/2002, p.41.

[90] Ibid., p.42.

[91] Ibid., p.47.

National Human Rights Commission has not played a major role in investigations into torture since these are largely carried out by or under supervision of the ICD.[92]

ICD investigations into torture have been hampered by a protective police culture, a lack of co-operation and harassment of victims and complainants. This has led to delays which have, either by themselves or together with other factors, resulted in difficulties in securing vital evidence. There is a well-established rule requiring that a presiding officer exercise caution before relying on the evidence of a single witness.[93] It is therefore vital to obtain evidence from a source other than the complainant. In this regard, medical evidence plays a vital role. According to the ICD, independent medical examinations, such as the Independent Medico-Legal Unit have proved to be more effective that those carried out by state agencies. [94]

Even if the ICD finds that torture has been committed and recommends prosecution and/or disciplinary sanctions, it has no powers to ensure that its recommendations are implemented by the DPP or the Commissioner of the SAPS. The DPP has refused to prosecute cases of torture substantiated by the ICD and the Commissioner does not report back on what, if any, disciplinary measures have been taken against police officers. The bringing of a private prosecution by a victim in such a situation is not a genuine alternative, given the considerable costs, and the difficulty of securing sufficient evidence.

If a torture survivor who is accused of a crime alleges that he or she has been tortured, a judge is obliged to hold a *voir dire* to determine the truth of the allegation. A confession obtained through torture is not admissible according to Section 35(5) of the Constitution.[95] Whereas the onus of proving that a confession has been extracted through torture had previously been on the defendant, it has now been established that the State has to prove beyond reasonable doubt that the confession of the accused was taken freely and voluntarily.[96]

While the shortcomings in investigating torture incidents have resulted in impunity for some perpetrators, a considerable number of those responsible for torture and ill-treatment have been prosecuted, tried and sentenced.[97] According to the study

[92] The Human Rights Commission has commented on police conduct during its Roll Back Xenophobia campaign, but does not deal with other questions related to the oversight of the police.

[93] See for example *R v Mokoena* 1932 OPD 79, at 80.

[94] See ICD Paper delivered at workshop for the drafting of a plan of action to prevent torture and ill treatment in Africa, Cape Town, 12 February 2002.

[95] Section 35 (5) of the Constitution provides that '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.' This approach is confirmed by the decision in *S v Zuma & Others* 1995 (2) SA 642 (CC) which held that section 217(1)(b)(ii) of the Criminal Procedure Act, No 51 of 1977, which placed the onus on the accused to show that a confession was extracted from him or her involuntarily, was unconstitutional. The effect of the judgement is that the prosecution has to prove that a confession was obtained from the accused freely and voluntarily. This has had an impact on the admissibility of confessions in criminal cases. Similarly, the law relating to a pointing out was modified to the effect that the fact of a pointing out is rendered inadmissible if it was obtained from the accused by duress: *S v Sheehama* 1991 (2) SA 860 (A). Where an accused contests the admissibility of a confession or pointing out, a trial within a trial will be held in order to determine the admissibility of the confession.

[96] See *S v Zuma* 1995 (2) SA 642 (CC) which concerned the constitutionality of Section 217 of the Criminal Procedure Act. See also, *S v Sheehama* 1991 (2) SA 860 (A).

[97] According to statistics provided by the Minister of Safety and Security for the period 1994-1997, members of the SAPS faced the following charges: 256 charges of murder; 125 of culpable homicide; 630 of attempted murder; 1119 of assault with intent to do grievous bodily harm; 3564 of common assault and 660 charges of point a firearm as quoted in David Bruce, Police Brutality, supra.

mentioned above[98], between 1995 and 1999 an average of 1200 SAPS officers were convicted of criminal offences. 23% of these convictions were for common assault and assault with the intention to cause grievous bodily harm.[99] Punishments of several years imprisonment have been imposed in some cases but as the ICD statistics and other sources show, the practice appears to be piece meal and there are cases where police officers found guilty of electric shock torture have only received fines and been allowed to return to work in the same unit.[100]

Examples of criminal cases dealing with conduct that may amount to torture include:

- ***S v Madikane & Others*** 1990 (1) SACR 377 (N). Decided at 386B-C that the application of electric shocks amounted to grievous bodily harm. Policemen were found guilty of murder and assault with intent to commit grievous bodily harm after two suspects had electric shocks administered to them. Sentences ranged from 1 - 6 years imprisonment;
- ***S v A en 'n Ander*** 1991 (2) SACR 257 (N). The complainant alleged that two police officers ordered him to masturbate. He was also required to lick a few drops of urine from the floor and had electric shocks administered to his genitals. The police officers were found guilty of indecent assault and sentenced to 2.5 years imprisonment. The court commented at 270G that the application of electric shocks to the complainant's genitals clearly constituted assault, although as the shocks had not been inflicted with an indecent intention, this aspect of the case did not amount to indecent assault;
- ***S v Krieling & Another*** 1993 (2) SACR 495 (A). Policemen were convicted of assault with intent to commit grievous bodily harm and sentenced to three years imprisonment, half of which was suspended. The complainant was tied up, his head covered with a sack, a pole pushed between his legs and arms and was then swung around whilst electric shocks were administered to him. He was hit with hands and fists.
- ***S v Moolman*** 1993 (2) SACR 519 (EC). A policeman was found guilty of assault with intent to commit grievous bodily harm after the complainant was assaulted over a number of days by being hit with a belt and kicked, his head covered whilst electric shocks were administered to him until he became unconscious. The accused was sentenced to three years imprisonment, of which one was suspended.
- ***S v Maritz*** 1996 (1) SACR 405 (A). A policeman forced a murder suspect to run in front of a vehicle while tied to it by rope. A wheel of the vehicle caught the rope and pulled him under the vehicle, causing his death. The policeman was found guilty of culpable homicide and sentenced to four years imprisonment, of which two years were suspended.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

[98] See supra, Fn.85.

[99] There have also been several hundred convictions for murder, attempted murder and rape. It is however unclear whether these crimes were committed in the course of exercising police duties. See on this point Pigou, Monitoring Police Violence, supra.

[100] See on the latter point, Pigou, ibid. See for individual cases Bruce, Police Brutality, supra.

1.1. Constitution

Section 38 of the Constitution provides that "anyone listed in this section [Chapter 2 on the Bill of Rights] has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." While this provision provides the Constitutional Court with discretionary power to provide relief, the Court has so far refrained from interpreting it as providing a public law remedy. In the case of *Fose v. Minister of Safety and Security*, the plaintiff sought damages for the breach of fundamental rights and punitive damages to prevent future infringements.[101] The Constitutional Court refused leave to appeal, upholding the judgment of the Supreme Court that had ruled that "appropriate relief"[102] did not provide for an action for constitutional damages. Whilst the court accepted that appropriate relief may include an award of damages where the award was necessary to protect and enforce fundamental rights, the facts of the case did not justify such an award. The delictual damages available to the plaintiff were sufficient to vindicate his fundamental rights. The court also rejected the award of punitive damages, stating that this would perpetuate the historical anomaly by which the distinctive functions of the civil and criminal law are not observed. In addition, such an award would not serve as a significant deterrent, and it would be inappropriate to use the country's scarce resources to pay such damages, as funds of this nature could be better employed in structural and systematic ways to eliminate or substantially reduce the causes of infringement.[103] One judge held however that delictual relief compensating a particular plaintiff does not seem adequate as a means of vindicating the Constitution and deterring further violations where there are systematic, pervasive and enduring infringements of constitutional rights.[104]

1.2. Civil Law

A torture survivor can base his or her claims to reparation on the actions provided for under South African common law, which is the Roman-Dutch Law as modified by South African courts. To claim damages, the remedy lies in the law of delict. Like the law of tort, delict is a civil law remedy and aims to rectify harm to the person, property or personality of another, which is caused wrongfully and culpably. In rare cases, the law of delict will provide a remedy without it being necessary to prove fault on the part of the wrongdoer. The protected rights of personality include the right to physical integrity, life, liberty, a good name, dignity, feelings, privacy and identity.[105] There are different remedies for the protection of these rights of personality.[106]

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[101] *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (CC).

[102] As provided for in section 7 (4) a) of the applicable interim constitution.

[103] Per Ackermann, J (others concurring).

[104] Per Kriegler, J.

[105] See Neethling et al, Law of Personality, Butterworths 1996, pp. 27 et seq.

[106] The victim may also obtain an *interdict,* which provides a speedy way to obtain an order of court to protect his or her rights. For a final interdict, the applicant would have to show a clear infringement of rights, and that there is no other satisfactory remedy available. Where an interim interdict is sought the applicant must establish the existence of a right, even if it is open to some doubt; that there is a well-grounded apprehension of irreparable harm; that the balance of convenience is in the applicant's favour and that there is no other satisfactory remedy: *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F. Section 35 of the General Law Amendment Act, No 62 of 1955, provides that when an urgent application for an interim interdict is sought against the state, any minister or other officer of the state, the documents to be used in support of the application must be

The *actio injuriarum* is a general remedy for wilful and unlawful injury to someone's personality.[107] Relevant kinds of "injuria" in relation to torture and ill-treatment are assault and rape.[108] Compensation could be recovered for pain and suffering, disfigurement, loss of amenities of life, loss of life expectancy and psychological harm. In addition one can claim for *contumelia*, which refers to the injury to the victim's dignity and personality rights. Such damages are meant to redress the insult suffered, independent of any actual pecuniary loss. The remedy for these infringements is damages, which are determined by the court exercising judicial discretion. In calculating the quantum of damages, South African courts have taken into account the nature of the assault, the extent of fear and humiliation suffered by the plaintiff, the motive of the attacker, any provocation by the plaintiff, an apology by the defendant, sums awarded in previous cases of a similar nature and other circumstances deemed relevant.[109] Damages having a punitive element may in appropriate circumstances be awarded, resulting in an increased award as a penalty upon the defendant for aggravated and malicious conduct.[110] It was stated in *G Q v Yedwa & Others* 1996 (2) SA 437 (TkGD) at 436G that awards for damages arising from personal injury and *contumelia* in the context of an assault have been very low and should be increased substantially.

The *actio legis aquiliae* is a remedy for the unlawful infringement of a person's right to life, person, or property, caused either intentionally or negligently and resulting in pecuniary loss. This remedy entitles the injured person to claim pecuniary loss, including funeral expenses, medical expenses and other loss suffered as a result of torture as well as prospective expenses and loss of earning capacity.[111]

In a separate third action, compensation might be claimed for physical pain and suffering for an injury to personality or bodily and mental integrity resulting from wrongful negligent (or intentional) conduct. The amount of damages awarded under this heading will depend on the nature, degree and duration of the pain and suffering.[112] Where both pecuniary loss and sentimental damage are suffered, the claims are brought in the same proceedings.

Where a domestic animal caused the harm an appropriate remedy may be the *actio de pauperie* which makes an owner of a domesticated animal liable for the harm caused by the animal, without it being necessary to prove intention or negligence on the part of the owner. Where an animal is used to torture someone then the *actio de pauperie* would be a suitable alternative cause of action to a civil claim for assault.

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served at least 72 hours before the hearing of the application. Where the court considers it appropriate then the court may reduce the notice period, but cannot do away with notice altogether.

[107] Ibid., para.93.

[108] Others are false arrest, false imprisonment and malicious legal proceedings which might, depending on the case, also be applicable in torture cases.

[109] See *Ramakulukusha v Commander, Venda National Force*, 1989 2 SA 813 (V), 847.

[110] Erasmus, HJ and Gauntlett, JJ, Damages, para.62 et seq., in: Joubery, W and Kuehne, Manday (eds), ***The Law of South Africa***, First Reissue, Vol.7, Butterworths, Durban, 1997.Erasmus and Gauntlett, supra, para.19, with overview of jurisprudence.

[111] Ibid., para.19, with overview of jurisprudence.

[112] Ibid., para.83 which qualify such action in the following way: "it is a separate action, but is nevertheless also still correctly regarded as a type of extension of the *acquilian* action.

Section 1 of the State Liability Act No. 20 of 1957 provides for State liability for "any wrong committed by any servant of the State acting in his capacity and within the scope of his authority." It is a well-recognised principle in South African jurisprudence that the State is vicariously and jointly liable for the acts of its employees, i.e. public servants.[113] While there is some disagreement in South African jurisprudence as to whether an employee is also liable for "deviations" of its employees, it is generally understood that this is the case if the wrongdoer was engaged in the affairs or business of his/her employer. Thus, liability for wrongful conduct of police officers is recognised "where the policemen involved were on duty, were proved to have acted within the scope of their employment and were carrying out police functions or genuinely believed themselves to be so engaged."[114] If a policeman commits a wrong during the course and scope of his employment, to avoid liability the state would have to show that the policeman was on a frolic of his own. This would be the case where the police officer was no longer subject to the control of his superiors nor involved in police functions.[115] In this regard the subjective intention of the policeman that he is acting within the course and scope of his employment is important.[116] The scope of employment is determined by whether the acts committed by the policeman fall within the risk created by his employer.[117] The fact that a policeman is off duty does not suspend his statutory powers and the state has been found liable for the wrongs of policemen committed whilst off duty, such as in the *Rabie* case.

The only exception to this general rule concerns civil liability for gross human rights violations during the Apartheid regime in the period covered by Act 34 of 1995. Amnesties granted under that Act relate to the individual perpetrator(s) and those who would be vicariously liable for their acts.[118] The constitutionality of the amnesty provisions were upheld by the Constitutional Court in 1996, where it was held that Parliament was permitted to favour "the reconstruction of society" involving in the process a wider concept of "reparation". This would not only allow the state to take into account competing claims on its resources but, at the same time, to have regard to the "untold suffering" of individuals and families whose fundamental human rights had been invaded during the conflict of the past."[119] In so doing it could legitimately follow a route "through the mechanism of amnesty and nuanced and individualised reparations in the Act"[120] rather than "saddling the state with the formal liability to

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[113] See history of development of state liability for the wrongful acts of civil servants and overview of jurisprudence in *Masuku and Another v Mdlalose and Others*, 1998 (1) SA 1, 14.

[114] Per Kumleben JA, *Minister of Law and Order v. Ngobo*, 1992 (4) SA 822, citing *Mhlongo and Another No v Minister of Police* 1978 (2) SA 551 (A) and *Minister van Polisie en'n Ander v Gamble en'n Ander* 1979 (4) SA 759 (A). The judge also refers to the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733, at 741: "(I)f the servant's acts *in doing his master's work or his activities incidental to or connected with it* are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm." He also refers to the judgement of *Cater & Co (Pty) Ltd v McDonald,*1955 (1) SA 202 (A) at 207 B: "*(I)n order to make the master liable the servant must have committed the delict while engaged upon the master's business*; and that a *principal reason* why the master is held liable may be that he has created the risk for his own ends." (*Feldman (Pty) Ltd v Mall* 1945 AD 733 at 737-741).

[115] ***The Law of South Africa***, First Re-issue, Part 20, part 2, p. 151.

[116] Ibid.

[117] Minister of Police v Rabie 1996 (1) SA 117 (A) and Macala v Maokeng Town Council 1993 (1) SA 434 (A) at 441E.

[118] Section 20 (7) (a), see text of this provision, supra, Fn.51.

[119] See the *Azanian Peoples Organization v South Africa* case, supra Para.45.

[120] Ibid., para.46.

pay, in full, the provable delictual claims of those who have suffered patrimonial loss in consequence of the delicts perpetrated with political objectives by servants of the state during the conflicts of the past."[121]

A survivor of torture or his/her relatives may bring a claim for damages against the agency and/or individual officers involved before the relevant civil court. Delictual claims normally prescribe within three years.[122] The time limit is extended where the claimant is a minor. In these circumstances, the time limit would expire one year from when the minor achieved majority status, which in South Africa would be at the age of 21. Also, prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

It is noteworthy that the liability of the state or its organs is normally subject to shorter prescription periods than those referred to above. Section 57(1) of the South African Police Service Act provides that '[n]o legal proceedings shall be instituted against the service of any body or person in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of the period of twelve calendar months after the date upon which the claimant became aware of the alleged act or omission or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date."[123] Section 57(2) provides that no legal proceedings can be instituted unless the claimant has given one month's written notice to the defendant of his/her intention to institute the proceedings. A court has the power to dispense with the time limit requirements "where the interests of justice so require."[124] The Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002, has, as of 28 November 2002, repealed section 57 of the South African Police Service Act and other similar statutory provisions. Section 2(2) of the Act provides that claims arising before 28 November 2002, but which have not yet been extinguished by prescription and in respect of which no legal proceedings had been instituted, are now subject to the provisions of Chapter III of the Prescription Act.

In civil proceedings, the onus is on the plaintiff to prove the assault and the resulting injuries.[125] The standard of proof is a preponderance of probabilities.[126] While a

[121] Ibid. The court also argued that this course, had it been the only available one, would have excluded those victims against whom prescription of their claims could have been pleaded from obtaining any reparation.

[122] Section 11(d) of the Prescription Act, No 68 of 1969.

[123] Section 57 (1) of the South African Police Service Act, No. 68 of 1995. See for a case concerning the similar Section 32 of the Police Act 7 of 1958, *Masuku and Another v Mdlalose and Others,* 1998 (1) SA 1.

[124] Section 57(5) ibid.

[125] Per Van der Supy, *Ramakulukusha v Commander, Venda National Force*, 1989 (2) SA 813. The same would apply in rape cases.

[126] Although the burden of proof is less in civil litigation, the difficulties of proving torture remain. Importantly, the Anton Piller Order allows a party to obtain a civil search warrant and is used in torture-related litigation to search premises where it is alleged the torture took place to find evidence to substantiate the claim. The key cases in this regard is *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & Another; Maphanga v Officer Commanding, South African Police Murder & Robbery Unit, Pietermaritzburg, & Others* 1995 (4) SA 1 (A) which confirmed the existence of the Anton Piller Order as a general remedy and decided that it should not be confined only to intellectual property cases. The order, which is obtained *in camera* and without notice to the respondent, will be issued if the applicant establishes a *prima facie* case that the applicant has a claim against the respondent which he or she intends to pursue, that the respondent possesses specified things which constitute vital evidence required to substantiate the applicant's claim and that there is a well-founded apprehension that this evidence will be hidden or destroyed by the time the trial takes place or when discovery is called for.

criminal conviction of the alleged perpetrator would certainly strengthen the claim of the plaintiff, it is not a necessary precondition. Should a person be convicted of assault in the context of a torture allegation, the conviction by the Criminal Court would not be admissible in subsequent civil proceedings following the rule in *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35. Nevertheless, the fact of the conviction is likely to lead to the claim being compromised. If an assault is proven, the onus is on the defendant to prove that the injuries were inflicted in self-defence or other defence.[127]

As a general rule, costs are awarded to the successful litigant. They are usually awarded on the party and party scale, i.e. only those costs strictly necessary, which means in practice, including torture cases, that the successful party is unable to recover all the costs of litigation. Legal aid is available through the Legal Aid Board or may be provided on a private basis.[128]

On receipt of the judgment, the rules of court specify a number of measures to ensure satisfaction. In particular, a warrant of execution may be issued by the court for service by the sheriff. According to section 3 of the State Liability Act, No 20 of 1957, execution against the state is prohibited. However, following *Mjeni v Minister of Health and Welfare, Eastern Cape,* 2000 (4) SA 446 (TkHC), which decided that an arrest for contempt of court does not constitute an attachment under section 3 of the aforementioned Act, a minister of state, as the state's representative, is liable to be held in contempt of court for failing to comply with orders for payment of money.[129]

1.3. Criminal Law

There is no procedure for torture survivors to seek compensation for personal injuries in criminal proceedings. Section 300(1) of the Criminal Procedure Act provides that a court may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, award compensation for "damages to, or loss of property... belonging to some other person." The scope of this provision has not been fully clarified in jurisprudence but some courts have interpreted it narrowly, restricting compensation to damage to property and not further damages for personal injuries.[130]

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[127] *Mabaso v Felix* 1981 (3) SA 865 (A).

[128] See on legal aid the report by the NGO Case, Access to Justice in South Africa: legal aid transformation and paralegal movement, http://www.case.org.za/htm/legal3.htm#lab. and David McQuoid-Mason, Legal Aid Services And Human Rights In South Africa http://www.pili.org/library/ which cle/legal_aid_services_and_human_righs_in_south_africa.htm.

[129] *Mjeni v Minister of Health and Welfare, Eastern Cape*, 2000 (4) SA 446. The Court held, at 448, citing Section 173 of the Constitution, that "the Superior Court had the inherent power to protect and regulate their own process and to develop the common law, taking into account the interest of justice: it was certainly not in the interests of justice to deny successful litigants the only option available for enforcing judgments or orders against the State or place public officials above the law."

[130] *S v Liberty Shipping and Forwarding*, 1982 (4) SA 281 (D). According to Section 300, 2) " for the purpose of determining the amount of the compensation or the liability of the convicted person therefore, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or evidence." The amount of damages that a regional or magistrate's court may award is limited to the amount determined by the Minister. An award made under Section 300 has the effect of a civil judgement and, if the person in whose favour the award has been made, does not renounce an award within the period of sixty days, "no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made."

A torture survivor may also obtain compensation as part of the judgment of the court awarded against the convicted perpetrator since the court has, in respect of offences for which no minimum punishment is prescribed, discretion to postpone a sentence on condition that the convicted person pays compensation to the victim.[131]

2. The Practice

No overall statistics as to the number of cases brought by victims of torture and ill-treatment are available. However, observers noted that a considerable number of victims of police abuse refrain from taking legal action. Most torture survivors belong to marginalized groups who face several obstacles when contemplating to pursue a reparation claim. The main obstacle is the difficulty of obtaining evidence to satisfy the burden of proof. As victims are often the single witness, it is vital to obtain medical evidence. This is often not taken promptly as many victims complain late and/or are not familiar with the procedures. In addition, courage and persistence is required to take on legally experienced and aggressive police units they are faced with. Another obstacle is the lack of resources of torture survivors and the relatively small amount of damages awarded. In the absence of an affordable and accessible constitutional remedy or the possibility of obtaining compensation through criminal proceedings, the only course of action is through the civil courts. This is generally costly and many cannot afford to litigate unless they obtain legal aid which might be insufficient.

In spite of these obstacles, there have been a number of successful cases against SAPS members relating to torture and ill-treatment. For the period 1995 to 1998, there were 1489 civil claims against the SAPS and its members relating to the use of force for which the SAPS paid out around R 50,316,000 in total. No breakdown is available as to how many of these cases concerned torture or ill-treatment.[132] While the SAPS may reclaim money paid out for wrongful conduct from its members, this is rarely done.[133] The damages awarded for torture tend to be relatively low, a general feature of awards for damages in personal injury cases.[134]

Regarding awards for general damages in the context of torture, the following cases are instructive:

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[131] Section 297 Criminal Procedure Act, No. 51 of 1977. See also Section 25 of "Implementation of the Rome Statute of the International Criminal Court Act", No. 27 of 2002.

[132] See Bruce, Police Brutality, supra. Given the considerable number of assault charges against SAPS members, a conservative estimate would be that at least a fifth to a quarter of these cases related to some form of torture or ill-treatment.

[133] See ibid.: " As soon as a civil claim is settled and the compensation paid out the state attorney has to determine whether the SAPS members whose actions were the subject of the claim should enjoy state protection (ESP) or forfeit it (FSP). The guidelines are set out in treasury instructions and address issues such as whether the person acted within his or her duties and acted in good faith (bona fide). If it is decided that the member acted outside of these standards he or she forfeits state protection and the state may exercise its right to recover the amount paid from him or her. As is indicated ... in 96% of the cases of common assault and 98% of the shooting incidents for which the SAPS was held liable it was decided that the SAPS members concerned should enjoy state protection (ESP)."

[134] In the *Ramukukukusha* case in 1989, damages awarded were R 20,000. In the case of *Molefi v Minister van Wet en Order,* Judgement of 27 August 1992, Corbett & Honey, Quantum of Damages, Vol.4, 1993, at G3-10, R 15,000 was awarded. Finally, the Witswaterand Local Division of the Surpreme Court, awarded R 30 000 for personal injuries in *Maphalala, Japie v Minister of Law and Order,* 10 February 1995. In 1999, Thabani Ndoldlo, a Zimbabwean citizen who had been assaulted, shot in the leg and wrongfully detained for 446 days after the police tried to extort a bribe from him, was awarded R 170,000 for malicious prosecution, wrongful imprisonment and assault.

- ***Dladla v Minister of Police*** 1973 (2) C&B 321 (W). R750 was awarded, today equivalent to R21 000. The claimant suffered a prolonged assault by policemen investigating an armed robbery. The claim included pain and suffering of a few days duration and *contumelia*. The claimant suffered a hernia that was repaired shortly after the incident. Costs were awarded on the High Court scale;
- ***Ramakulakusha v The Commander, Venda National Force*** 1989 (2) SA 813 (V). R15,000 (today R54,423) was awarded. Here, torture involved submersion in soapy water;
- ***Molefi v Minister van Wet en Orde*** 1992 (4) CB G3-10 (0). R15,000 (R36,000) was awarded. The plaintiff suffered electric shock torture;
- ***Maphalala v Minister of Law & Order*** (unreported WLD 93/29537 Coetzee J, 10 February 1995). R35,000 (R77,138) was awarded. The torture involved electric shocks being administered to various parts of the body, intense pressure being applied to the testicles, being threatened with a firearm and having gun shots fired in the victim's vicinity, being tied in a painful position and generally being threatened and beaten;
- ***Themba & Pharamela v Minister of Safety and Security*** (unreported WLD 97/14698 Marais J, 8 March 2000). R47,000 (R75,690) was awarded. The two plaintiffs had been tortured at the Brixton Murder and Robbery Unit, Johannesburg. After being hit a few times to secure their submission, the plaintiffs were taken to the unit where they were subjected to electric shocks and smothered to restrict their breathing.

V. GOVERNMENT REPARATION MEASURES

Act 34 of 1995 provides the legal basis for bringing justice to victims of apartheid, including reparation and rehabilitation, to be administered by the Truth and Reconciliation Commission. The act defines victims as follows: "persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights- as a result of a gross violation of human rights;[135] or as a result of an act associated with a political objective for which amnesty has been granted."[136] Reparation in the meaning of the Act "includes any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition.[137]"

The Truth and Reconciliation Commission was entrusted with making recommendations to the President with regard to "the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; [and] measures which should be taken to grant urgent interim reparation to victims."[138] To this end, a Committee on

[135] Defined in Section 1 (ix) as "the violation of human rights through the killing, abduction, torture or severe ill-treatment of any person."

[136] Section 1 xix). It also includes "persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph a) who were in distress or to prevent victimization of such persons; and such relatives or dependants of victims as may be prescribed."

[137] Section 1 (xiv).

[138] Section 4 (f) (i), (ii) Act 34 of 1995.

Reparation and Rehabilitation was established under the Act.[139] Victims of torture and other gross human rights violations could apply to the Committee for reparation.[140]

The reparation policy of the TRC is outlined in Volume V of its final report submitted to President Mandela in October 1998. The policy differentiates between urgent interim reparations and final reparation measures.[141] Urgent Interim Reparation (UIR) is defined as "the delivery of reparative measures to victims who are in urgent need." [142] Accordingly, "victims or their relatives and dependants who have urgent medical, emotional, educational, material and symbolic needs will be entitled to UIR." [143] Upon application for reparation and rehabilitation, the Committee will consider whether the applicant is a victim, whether he or she is in urgent need and what the nature of that urgency is. If it makes a positive finding, the victim is referred to appropriate services and payments are made from the President's Fund.

According to TRC recommendations, the final reparation measures should consist of individual reparations grants to be made available to each victim or equally divided amongst relatives and/or dependants who have applied for reparation if the victim is deceased. The amount of the grant would be based on a formula which rests on three criteria: an acknowledgment of the suffering caused by the violation (50% of total amount); enabling access to service and facilities (25%) and subsidising daily living costs (25%). As the benchmark amount of 21,700 Rands was used, which is derived from the median annual household income in South Africa in 1997, no individual will receive more than the maximum grant of 23,023 Rands. As the TRC estimated that 22,000 victims would be eligible, the implementation of this policy would require a total of R 2,864,400,000 ($588,837,490).

Symbolic Reparation includes individual benefits,[144] community benefits[145] and national benefits.[146] These measures are according to the TRC aimed at restoring the dignity of victims and survivors of gross human rights violations and facilitating the communal process of commemorating the victories and conflicts of the past. Community rehabilitation programmes are aimed at addressing the suffering of communities and promoting reconciliation within communities. Such programmes comprise health and social services,[147] education[148] and housing.[149] Institutional

[139] Sections 23 et seq., ibid.

[140] Section 26 (1):"Any person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights may apply to the Committee for reparation in the prescribed form."

[141] See on the reparation policy also the various articles in Brandon Hamber & Tlhoki Mofokeng, ***From Rhetoric to Responsibility, Making reparations to the survivors of past political violence in South Africa***, Centre for the Study of Violence and Reconciliation, 2000.

[142] TRC, Final Report, Volume V, Chapter V, para.54.

[143] Ibid., para.56.

[144] Services mentioned are: Issuing death certificates; exhumations, reburials and ceremonies; headstones and tombstones; declarations of death; expunging of criminal records expediting outstanding legal matters related to the violations.

[145] Measures listed are: Renaming of the Streets and Facilities; Memorials/Monuments and culturally appropriate ceremonies.

[146] Renaming of public facilities, monuments and memorials, a day of remembrance and reconciliation.

[147] National demilitarisation, dislocation and displacement, appropriate local treatment centres, rehabilitation for perpetrators and their families, community based interventions, skills training, specialised trauma counselling services and family based therapy.

reform refers to recommendations regarding administrative, legal and institutional steps designed to prevent the recurrence of human rights abuses in the future. The reparation and rehabilitation policy is administered by the President's Fund.

As of December 2002, out of the 300 Million Rands earmarked for urgent interim reparations, the government had paid out 50 Million Rands to 18,000 beneficiaries.[150] However, as of January 2003, it remained unclear whether the government has acted upon the recommendations made by the TRC in 1998 and formulated a reparation policy. While the government had announced in January 2001 that 800 Million Rands would be provided for final reparations no such reparations have been set aside in the Annual Budget nor have they been paid out subsequently.[151] According to a government spokesperson, the government had said it would finalise its approach to long-term reparation after the TRC submitted its final report, the submission of which had been delayed because of pending litigation involving the Inkatha Freedom Party (IPF) and the TRC. When this dispute was settled in January 2003, the government did not take immediate action, which attracted the criticism of a group of NGOs.[152] In a related development, South African groups have initiated litigation in the USA demanding reparation from international companies for their support of Apartheid rule.[153]

There is no government reparation scheme for victims of human rights violations committed after 1994 or for victims of crime in general. However, the establishment of a crimes compensation fund has been proposed by the TRC[154] and in jurisprudence.[155] The Centre for the Study of Violence and Reconciliation, a South African NGO, has thoroughly examined the feasibility and advisability of setting up a compensation scheme for victims of crime in a recent study for the Law Commission.[156]

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in a third country

[148] Assistance for continuation of studies, building and improvement of schools and special education support services.

[149] Housing provision.

[150] See Independent Online www.iol.co.za, State dragging its heals over reparations, 29 January 2003..

[151] See AI/HRW, Truth and Justice, supra, p.9.

[152] The NGOs, i.e. Khulumani (the national and Cape Town Office), the Centre for the Study of Violence and Reconciliation and Reconciliation, the Trauma Centre for Victims of Violence, the National Association for Democratic Lawyers, the Institute for Healing of Memories and the NGO Working Group on Reparations issued a statement, criticising the government for finding excuses for the delay in implementing TRC recommendations. See State dragging its heals over reparations, supra.

[153] See Terry Bell, Apartheid victims sue Western banks and firms for billions, The Observer, 16 June 2002.

[154] TRC Final Report, 1998, Vol.5, Chapter 8, p.50.

[155] In *Smit v Minister van Polisie*, 1997 (4) SA 893, at 897, after holding that the State is not liable for damages caused by one of its police officers who was found not to have acted within the course and scope of his employment.

[156] See Project No. 82, Discussion Paper No. 97, 2001. The study also contains an overview of the steps taken by the government to strengthen the position of the victim in the criminal justice system, such as the Victim Empowerment Program and the Victim Charter by the Department of Justice, 1998, ibid., at pp. 36 et seq.

1.1. The Law

1.1.1. Criminal Law

On 18 July 2002, South Africa enacted the "Implementation of the Rome Statute of the International Criminal Court Act" (hereinafter Rome Statute Act). This act provides for the application of the active and passive personality principle and the exercise of universal jurisdiction for the crimes of genocide, crimes against humanity and war crimes but not torture as such.[157] Immunity or the duty to obey a manifestly lawful order cannot be raised as a defence.[158] The exercise of jurisdiction is subject to the presence of the person alleged to have committed the crime in the territory of South Africa.[159] A prosecution under the Act may only be commenced with the consent of the National Director.[160] As the Act does not apply retroactively, no prosecutions may be instituted for crimes committed before 16 August 2002.[161]

Prior to 18 July 2002, South African law did not expressly recognise, either in statutory law or in jurisprudence, universal jurisdiction for international crimes. The exercise of jurisdiction in South Africa has traditionally been based on the principle of territoriality. Unless provided otherwise, such as in the Defence Act, 1957,[162] or the Rome Statute Act, South African law does not provide for extraterritorial jurisdiction.[163] However, it is arguable that courts can exercise universal jurisdiction for acts of torture and international crimes committed before 18 July 2002 on the basis of the direct application of international law. Customary international law that allows for the exercise of universal jurisdiction over certain international crimes is applicable on the basis of Section 232 of the Constitution as there are no apparent grounds why such exercise of jurisdiction should be inconsistent with the Constitution or any Acts of Parliament.[164] Section 35(3)(l) of the Constitution expressly mentions

[157] Section 4 (1): "Despite anything to the contrary in any other law of the Republic, any person who commits a crime (i.e. crime of genocide, crimes against humanity and war crimes), is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment."

[158] Section 4 (2): "Despite any other law to the contrary, including customary and conventional international law, the fact that a person (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

[159] Section 4(3): "In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- a) that person is a South African citizen; or b) that person is not a South African citizen but is ordinarily resident in the Republic; or c) that person, after the commission of the crime, is present in the territory of the Republic; or d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

[160] Section 5 (1) ibid.

[161] Section 5 (2) ibid.

[162] Section 47 of that Act appears to provide for the possibility of exercising jurisdiction over the persons falling within the scope of the act: "Any person who beyond the borders of the Republic commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Republic, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to any penalty which could under section twelve of the Military Discipline Supplementary Measures Act, 1999, be imposed by a court martial in respect of such offence: Provided that no such penalty of such a nature that it could, if the offence in question had been committed within the Republic, have been imposed by any competent civil court, shall exceed the maximum penalty that could be imposed in respect of such offence by that civil court."

[163] See Florian Jessberger and Cathleen Powell, Prosecuting Pinochets in South Africa, in: SACJ (2001) 14, 344-372, 351 with further references. The only recognised exception under common-law is jurisdiction to try treason committed against the South African State anywhere in the world.

[164] See supra I, 1.2.

international crimes in the context of the right to a fair trial, thus implying that offences under international law could be tried in South Africa.[165]

The Diplomatic Immunities and Privileges Act, No 37 of 2001 incorporates the Convention on the Privileges and Immunities of the United Nations, 1946, the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963, into South African law. It provides in section 4 that a head of state, special envoy or representative from another state, government or organisation is immune from criminal and civil jurisdiction.[166]

1.1.2. Extradition Law

Extradition is governed by the Extradition Act 67 of 1962 as amended by the Extradition Amendment Act 77 of 1996. Extradition can occur if there is an extradition agreement with the requesting State.[167] In the absence of an extradition agreement, the President may consent to a surrender,[168] or designate the requesting state as fulfilling Section 2 (1) b) of the Extradition Act.[169] Anyone accused or convicted of an extraditable offence committed within the jurisdiction of a designated state may be extradited. Designated states include Namibia, Zimbabwe, Ireland and the United Kingdom. Extradition may be granted for offences that are punishable in both states by a deprivation of liberty for a period of at least six months,[170] and shall not be granted for political offences.[171] A person cannot be extradited to a third state if this state would violate the right to life and/or the right not to be subjected to cruel, inhuman or degrading punishment.[172] South African nationals may be extradited, depending on the terms of any existing extradition treaty with the concerned state or the discretion of the Minister.[173] The Minister of Justice is ultimately responsible to decide whether to surrender a person to a foreign State.[174]

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[165] There is some controversy over whether South African law allowed for the exercise of universal jurisdiction in this case. While Max du Plessis, The Pinochet Cases and South African Extradition Law, (2000) 16 SAJHR, 669-688, p.683, argues in favour of such a proposition, others hold a contrary view. See Jessberger and Powell, supra, p.351, who stated in 2001 that with regard to the crimes against international law *stricto sensu*, that no such legislative provisions (allowing for extra-territorial jurisdiction) exist. See, also on this question, Amnesty International, Universal Jurisdiction: The duty to enact and implement legislation, Chapter Six, September 2001, AI Index: IOR 53/009/2001.

[166] According to Section 3 of the Act, the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963 applies to all diplomatic missions and their members and to all consular posts and their members respectively. Section 4(1) provides for immunity of heads of states as follows: "A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) heads of state enjoy in accordance with the rules of customary international law; (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such head of state; or (c) may be conferred on such head of state by virtue of section 7 (2)".

[167] Section 3(1) of the Act. See overview of Extradition process in *Geuking v President of the Republic of South Africa and Others*, 2001 (2) SACR 490, 495.

[168] Section 3 (2) of the Act.

[169] Section 3 (3) of the Act.

[170] Section 1 Extradition Act.

[171] Section 11 (b) (iv) and 12(2) (c) ii): "if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

[172] See *Mohamed and another v President of the Republic of South Africa and Others*, 2001 (2) SACR 66.

[173] See *Geuking v President of the Republic of South Africa and Others*, supra, 494.

[174] Section 11 Extradition Act.

1.2. Practice

In November 1999, Mengistu Haile Mariam, Ethiopian head of State from 1974 to 1991, came from Zimbabwe to South Africa for medical treatment. Human Rights Groups urged the South African Minister of Justice and the Minister of Foreign Affairs to institute an investigation into alleged crimes against humanity. While the South African authorities examined the possibility of doing so, Ethiopia had apparently sought the extradition of Mengistu from Zimbabwe and South Africa. Before the receipt of the formal extradition request, Mengistu was allowed to leave South Africa and returned to Zimbabwe on 7 December 1999.[175]

2. Claiming reparation for acts of torture committed in a third country

2.1. The Law

2.1.1. Legal action against individual perpetrators

The jurisdiction of a South African court depends on either the nature of the proceedings, or the nature of the relief claimed, or, in some cases, both.[176] A Magistrate's Court has jurisdiction over a person who resides, carries on business or is employed within the district or where the whole cause of action arose within the magisterial district.[177] Alternatively, it may exercise jurisdiction by the consent of the defendant. The court may order the arrest of a person or the attachment of property in respect of a person who does not reside in South Africa, so long as its other jurisdictional requirements are complied with. However, this will not be sufficient in cases where the plaintiff is also a person with neither domicile nor residence in South Africa in which case an additional basis for jurisdiction must be present.[178]T he High Court has jurisdiction when either the defendant is domiciled or resident within the court's territorial area of jurisdiction or the cause of action has arisen within the territory of the Court's jurisdiction.[179]

Diplomatic personnel and heads of State are accorded immunity *rationae personae* from the civil jurisdiction of the courts of South Africa during their term of office.[180] There have apparently not been any cases in which the immunity *rationae materiae* of former diplomatic personnel or heads of state has been addressed.

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[175] See Amnesty International, South Africa: Mengistu- failure to respect international human rights obligations, 8 December 1999, AI Index: AFR 53/99 and HRW, "Pinochet Precedent" Cited in Mengistu Case, 24 November 1999.

[176] *Estate Agents Board v Lek* 1979 3 SA 1048 (A) 1063.

[177] Section 28 of the Magistrates' Courts Act, No 32 of 1944.

[178] See AB Edwards, Conflict of Laws, The Law of SA, Vol. 2 (First Reissue) as cited at http://docweb.pwv.gov.za/Ecomm-Debate/myweb/docs/report5.html.

[179] Supreme Court Act 59 of 1959, § 19 (1) (a): "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have the power . . ."

[180] Sections 3 and 4 of the Diplomatic Immunities and Privileges Act 37 of 2001.

For delicts, it appears that the *lex loci delicti commissi* would be appropriate in most cases, although deviations may be made as appropriate, such as where the parties have a common residence or domicile.[181]

2.1.2. Legal Action against foreign States

Foreign States are as a general rule immune from the jurisdiction of South African courts according to the Foreign States Immunities Act 87 of 1981. This immunity may be waived expressly. However, no immunity may be claimed by a foreign state in respect of commercial transactions entered into by the foreign state, contractual obligations which fall to be performed in South Africa, proceedings related to certain contracts of employment, proceedings related to the death or injury of any person caused by an act or omission in South Africa or the like.[182] An entity of a foreign state distinct from the executive organs of government of that foreign state also enjoys immunity in accordance with section 15 of the Act.

2.2. Practice

There is no known case where a claim has been brought in respect of torture which occurred outside South Africa. However, in *Rogaly v General Imports (Pty) Ltd* 1948 (1) SA 1216 (C), it was held that a delict committed outside South Africa, in the form of defamation, is actionable in South Africa so long as the court has jurisdiction over the defendant.

[181] CF Forsyth, Private International Law, 3rd Ed., Juta & Co 1996, p. 316.

[182] See sections 2, 3, 4, 5 and 6 of the Act.