



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

**REPORT ON THE DOMESTICATION
OF THE UNITED NATIONS CONVENTION AGAINST
TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT**

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REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

Tel: (+264 61) 230 486
Fax: (+264 61) 240 064
Email: chairpersonlrdc@moj.gov.na
Enquiries: The Secretary

Private Bag 13302
WINDHOEK
NAMIBIA

7 March 2017

Hon. Dr. Albert Kawana, MP
Minister of Justice
Private Bag 13302
Windhoek

Dear Honourable Minister,

Re: Statutory Submission of the Report on the Domestication of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

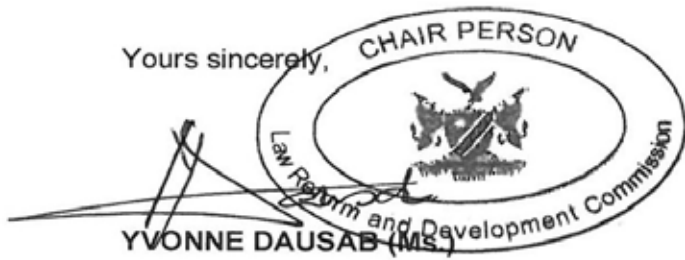
Pursuant to section 9 (1) of the Law Reform and Development Commission Act, 1991 (No. 29 of 1991), the Law Reform and Development Commission (LRDC) is obliged to report to the Minister of Justice for consideration in regard to any matter it examines.

It is my privilege, therefore, as Chairperson of the LRDC, to present to you this Report on the Domestication of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In doing so, I would also like to thank the previous Commissioners of the LRDC as well as all our stakeholders and the staff involved in bringing the Report to fruition.

All official correspondence must be addressed to The Secretary.

The LRDC will be available to assist the Minister in considering the contents of this Report.

Yours sincerely,



YVONNE DAUSAB (MS.)

CHAIRPERSON

LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission is a creature of statute established by section 2 of the Law Reform and Development Commission Act, 1991 (No. 29 of 1991).

The Commission's core mandate is to undertake research in connection with all branches of the law, and to make recommendations for its reform and development, where necessary.

In terms of section 3 of the said Act, Commissioners are appointed by the President. The current members of the Commission are as follows:

- Ms Y Dausab, Chairperson
- Adv. S-K Shakumu, Deputy Chairperson
- Adv. J Walters, Ombudsman
- Adv. D Khama
- Adv. U Hengari
- Mrs F !Owoses-!Goagoses
- Ms L Usebiu, and
- Mrs A van der Merwe.

The post of Secretary to the Commission, most recently held by Mr JT Namiseb, Chief of the Directorate of Law Reform in the Ministry of Justice, fell vacant after his resignation.

The Directorate of Law Reform serves as the Commission Secretariat, assisting it in exercising its powers and in performing its duties and functions under the Act. The Commission and Secretariat are both housed on the 1st Floor, Mutual Platz Building in Post Street Mall, Windhoek.

The project leader assigned to this project is Mrs. Jessica J. Gawachab, senior legal researcher in the Directorate Law Reform, Ministry of Justice who was supervised by the Chairperson of the LRDC, and assisted by Commissioner !Owoses - !Goagoses on the Prevention and Combating of Torture Bill.

Prof. Jamil Ddamulira Mujuzi (Associate Professor of Law, Faculty of Law, University of the Western Cape, South Africa, djmujuzi@gmail.com) served as the consultant on drafting Namibia's Prevention and Combating of Torture Bill, and whose insights and guidance were invaluable.

All correspondence to the Commission should be addressed as follows:

The Office of the Chairperson
Law Reform and Development Commission
Private Bag 13302
Windhoek
Republic of Namibia

The Commission can also be contacted via the following:

Tel.: (+264 61) 230 486
Fax: (+264 61) 240 064
E-mail: chairpersonlrhc@moj.gov.na

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List of abbreviations

CAT	Committee against Torture
CIDT	Cruel, inhuman or degrading treatment or punishment
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Executive summary

1. This report was commissioned as a companion study to the process of drafting a Prevention and Combating of Torture Bill for Namibia.
2. Torture is currently not a specific criminal offence in Namibia.
3. Namibian law also does not expressly criminalise any other forms of cruel, inhuman or degrading treatment or punishment (CIDT).
4. As a result, victims of torture and other forms of CIDT do not have readily available legal remedies for any damages or prejudice they may have suffered as victims.
5. Namibia acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) on 28 November 1994.
6. As a state party to UNCAT, Namibia accepted a range of obligations to prevent and combat torture and other forms of CIDT in any territory under its jurisdiction.
7. The drafting of the Prevention and Combating of Torture Bill is a crucial aspect of Namibia taking the steps necessary to meet its obligations under UNCAT.
8. The drafting process has to be informed by a number of legal sources, key among which are the provisions of UNCAT itself and the jurisprudence which has been developed over time by the Committee against Torture (CAT) as the body which oversees the implementation of UNCAT internationally.
9. This report surveys Namibia's conventional obligations to prevent torture and CIDT, with reference to current Namibian law, UNCAT, and CAT reports on a range of other countries.
10. The following guidelines emerge from this survey as central to the drafting of Namibia's Prevention and Combating of Torture Bill (for ease of reference, the applicable UNCAT article is indicated in brackets at the end of the bullet point concerned):

- 10.1 The Namibian Bill must remain faithful to the content and spirit of UNCAT and must embrace the various general recommendations emanating from CAT concerning UNCAT's implementation.
- 10.2 Namibia's conventional obligation to prevent torture in any territory over which it exercises jurisdiction is absolute. (Art. 2)
- 10.3 Torture in Namibian law must be defined expansively to incorporate all the elements contained in the UNCAT definition. (Art. 1)
- 10.4 All forms of torture must be criminalised, including all attempts to commit torture and all complicity or participation in torture. (Art. 4)
- 10.5 Namibia must uphold the principle of non-refoulement contained in UNCAT. This means that it must not extradite or hand over a person in any other way to a country where the person would face the danger of torture. The non-refoulement obligation is an absolute one. (Art. 3)
- 10.6 UNCAT requires each state party to establish universal jurisdiction over torture. In other words, Namibian anti-torture legislation must confer jurisdiction on Namibian courts over all crimes of torture, whether committed inside or outside its territory. (Art. 5)
- 10.7 All torture suspects on Namibian territory must be detained or measures must be taken to prevent their fleeing. (Art. 6)
- 10.8 Namibia has an obligation to extradite for prosecution persons found in its territory and suspected of having committed torture abroad. If it does not extradite such suspects, it must prosecute them itself. (Art. 7)
- 10.9 Namibia must make torture an extraditable offence. This obligation follows from the earlier obligation to extradite torture suspects who are not prosecuted in Namibia. (Art. 8)

- 10.10 UNCAT requires all state parties to provide one another with generous mutual assistance in relation to criminal proceedings against torture suspects. Namibian law must provide for this obligation in all its various aspects. However, such mutual assistance must exclude as inadmissible all evidence obtained through torture. (Art. 9)
- 10.11 All Namibian personnel who face the risk of committing torture or who may have to deal with the victims of torture must be educated about and receive training on the prohibition of torture. (Art. 10)
- 10.12 Namibian anti-torture legislation must provide for the systematic review of the procedural rules governing the treatment of arrested, detained and imprisoned persons in order to safeguard them from torture. (Art. 11)
- 10.13 Alleged victims of torture and CIDT must be afforded the right to complain. Well-founded allegations of torture and CIDT in Namibia must be investigated promptly and impartially by an independent watchdog body. Complainants and witnesses in such investigations must be protected against ill-treatment and intimidation. (Art. 12 & 13)
- 10.14 Namibia must give all torture victims an enforceable right of redress in various forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. (Art. 14)
- 10.15 Namibia must legislate that all varieties of evidence obtained through torture be rejected as inadmissible in all proceedings. The only exception here is that such evidence be admissible against the perpetrator as proof of his having tortured the victim. (Art. 15)
- 10.16 As its name indicates, UNCAT goes beyond torture to encompass all forms of CIDT. In this connection, Namibia has to undertake to prevent CIDT in any territory over which it exercises jurisdiction. It should take seriously also the emerging CAT trend in support of the criminalisation of CIDT. (Art. 16)

11. The drafting of a Prevention and Combating of Torture Bill for Namibia amounts to an exercise in domesticating UNCAT.
12. Such domestication must result in a Namibian anti-torture and anti-CIDT legal regime which accords materially with all the relevant provisions of UNCAT as interpreted and refined by the work of CAT.

Introduction

Namibia acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)¹ on 28 November 1994.² The Committee against Torture (CAT) is established under UNCAT to monitor the implementation of the Convention.³ UNCAT imposes various obligations on Namibia. In particular, article 2 provides as follows:

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
2. *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
3. *An order from a superior officer or a public authority may not be invoked as a justification of torture.*

The measures that Namibia is required to take to give effect to article 2 are detailed in CAT's General Comment No. 2, which include all the measures discussed in this report. Namibian legislation on torture does not have to reproduce article 2 of UNCAT; what is required is a range of effective preventive anti-torture measures – legislative, administrative, judicial and other measures – applicable to all territory under Namibia's jurisdiction. The obligation to prevent torture is absolute. In *Kauesa v Minister of Home Affairs and Others*,⁴ the court observed that

Prof. Jamil Ddamulira Mujuzi (Associate Professor of Law, Faculty of Law, University of the Western Cape, South Africa, djmujuzi@gmail.com) served as the consultant on drafting Namibia's Prevention and Combating of Torture Bill for the Ministry of Justice's Law Reform and Development Commission.

¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85. Available online at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>, last accessed 5 September 2016.

² See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en, (accessed 5 September 2016).

³ See articles 17–24, UNCAT.

⁴ 1994 NR 102 (HC).

the right to freedom from torture was one of the very few human rights protected by customary international law.⁵ Torture is prohibited by the Namibian Constitution and by the international human rights instruments to which Namibia is a party. What is more, experts in Namibia such as clinical psychologists have given evidence in court indicating that torture causes in victims conditions such as post-traumatic stress disorder.⁶

Torture is not criminalised in Namibian law. As a result, some suspects against whom the police allegedly have used force to extract confessions do not argue that they have been tortured: instead, they submit that they have been assaulted. Yet, in practice, as the CAT has stated, this treatment could amount to torture.⁷ This explains why, in their arguments, the alleged victims of police torture invoke article 8(2)(b) of the Namibian Constitution in their efforts to have their confessions excluded as evidence.⁸

This report shall discuss the position of torture in Namibian law and ways in which Namibia could give domestic effect to some of the UNCAT provisions. The report also deals with measures taken by different African countries and countries from other parts of the world to prevent torture. Instead of reproducing the individual measures taken by the various countries considered in this report, emphasis is put on the recommendations which the relevant human rights treaty monitoring bodies have made to each country to strengthen its measures to prevent and combat torture. This approach should assist Namibia to avoid some of the mistakes that have been made by other countries.

Torture in Namibia: Case law and legislation

⁵ (ibid.:45). The court observed the following: “No wonder that the learned commentator, Sieghart, in his book *The Lawful rights of Mankind* at 60, concluded that ‘... there are only four human rights which one can say with some confidence are now already protected by customary international law: freedom from slavery, freedom from genocide, freedom from racial discrimination and freedom from torture’ [emphasis in original removed].

⁶ *Vivier NO & Another v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 (HC) para. 14.

⁷ Committee against Torture, General Comment No. 2, CAT/C/GC/2, 24 January 2008, para. 3.

⁸ See e.g. *S v Titus* 1991 NR 318 (HC).

Torture is prohibited by article 8(2)(b) of the Namibian Constitution, which provides as follows:

No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

In *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State*,⁹ which dealt with the constitutionality of corporal punishment meted out by organs of state, the Supreme court held that the relevant words in article 8 have to be read disjunctively. Such a reading means that article 8 protects the citizen against seven different violations: torture; cruel treatment; cruel punishment; inhuman treatment; inhuman punishment; degrading treatment; and degrading punishment.¹⁰ The court added that all the rights under article 8(2)(b) were non-derogable and that –

*[t]he State's obligation is absolute and unqualified. All that is therefore required to establish a violation of Article 8 is a finding that the particular statute or practice authorised or regulated by a state organ falls within one or other of the seven permutations of Article 8(2)(b).*¹¹

The court held further that, even if the challenged act or practice –

*... succeeds in avoiding "torture" or "cruel" treatment or punishment, it would still be unlawful if what it authorises is "inhuman" treatment or punishment or "degrading" treatment or punishment.*¹²

Litigants have distinguished between these different forms of treatment in their submissions.¹³ For example, in *McNab & Others v Minister of Home Affairs NO & Others*,¹⁴ in which the

⁹ (SA 14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991). The court held that corporal punishment by organs of state on adult and juvenile offenders and in schools was inhuman and degrading punishment within the meaning of article 8(2)(b) of the Constitution.

¹⁰ (ibid.:18).

¹¹ (ibid.:19). See also *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC) at 232.

¹² *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* (SA 14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991) at 19.

¹³ In cases relating to minimum sentences, for example, the constitutionality of the relevant provisions of the legislation have been challenged on the grounds that they violate the offender's

plaintiffs argued that their detention at the police station in degrading conditions violated article 8(2)(b) of the Constitution, the court observed that –

... it was not the plaintiffs' case that they were subjected to torture or cruel treatment at the hands of the police officers. However, all the plaintiffs testified that they were subjected to inhuman and degrading conditions at the holding cells.¹⁵

After referring to the plaintiffs' submissions regarding their conditions of detention, the judge observed as follows:

This evidence was not disputed. I am therefore bound to accept it. Having said that, I should point out that in my view the police officers cannot be held liable for the degrading and inhuman conditions prevailing in the holding cells. The liability rests with the State. That the conditions of the police holding cells are "horrendous", "unhygienic" and "lack basic facilities" is notorious and has become a matter of public knowledge and of which this court is entitled to take judicial notice. Local newspapers have over recent years been carrying headlines bemoaning the conditions of the police cells in the country.¹⁶

The court further held that –

... the conditions in the holding cells in which the plaintiffs were detained are inhuman and degrading and therefore unlawful in that it [sic] violated the plaintiffs' constitutional right to human dignity.¹⁷

right not to be subjected to cruel, inhuman or degrading treatment or punishment. See *Daniel & Another v The Attorney General & Others* (A 430/2009) [2011] NAHC 66 (10 March 2011); *Peter v Attorney-General & Others* 2011 (1) NR 330 (HC); *S v Vries* (CR 32/96) [1996] NAHC 53 (19 June 1996), *S v Vries* (CR 32.96) [1996] NAHC 20 (10 September 1996) (challenging the constitutionality of sections 14(1)(a)(ii) and (b) of the Stock Theft Act 12 of 1990); *S v Likuwa* 1999 NR 151 (HC) (section 38(2)(a) of the Arms and Ammunition Act 7 of 1996).

¹⁴ (I2852/05) [2007] NAHC 50 (12 July 2007); *McNab & Others v Minister of Home Affairs NO & Others* 2007 (2) NR 531 (HC).

¹⁵ *McNab & Others v Minister of Home Affairs NO & Others* (I2852/05) [2007] NAHC 50 (12 July 2007) para. 48.

¹⁶ (ibid.:para. 49).

¹⁷ (ibid.:para. 52).

However, the plaintiffs' claim for damages was unsuccessful because they had not followed the rules of pleadings as they had failed to inform the defendants of the nature of the claim they were to meet.¹⁸

It should be recalled that the right to human dignity is inseparable from the right to freedom from torture. This explains why case law from Namibia shows that courts have dealt with these rights together.¹⁹ In *Tjijeura v Minister of Safety and Security*,²⁰ the plaintiff argued that some of the acts committed by the police against him amounted to torture and others amounted to cruel, inhuman and degrading treatment.²¹ For a person to convince the court that he was subjected to torture, his oral testimony must be consistent with the evidence of his witnesses and with the medical evidence.²² In *Namunjepo and others v Commanding Officer, Windhoek Prison & Another*,²³ the Supreme Court held that the practice of placing prisoners in leg-irons or chains was contrary to article 8(2)(b) of the Constitution and therefore unconstitutional.²⁴ The court observed, *inter alia*, as follows:

... Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current[-]day values of the people. Therefore the accession of Parliament to both the Convention against Torture and other Cruel[, Inhuman or Degrading Treatment or Punishment ("CAT") and the International Covenant [sic] on Civil and Political Rights ("ICCPR") [sic] on 28 November 1994 is significant. Both these instruments contain provisions similar to our Article 8 and Article 10.1 of the ICCPR which provides specifically that –

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."²⁵

¹⁸ (ibid.:para. 52).

¹⁹ *Attorney-General of Namibia v Minister of Justice & Others* (P.12/2009) [2013] NASC 3 (4 April 2013) para. 26; *S v Mwetuyeka* (CC08/2007) [2007] NAHC 27 (5 June 2007) para. 13.

²⁰ (I 336/2013) [2015] NAHCMD 75 (30 March 2015).

²¹ (ibid.:para.'s 5, 2.1–2.2).

²² (ibid.:para. 17).

²³ (SA 3/98) [1999] NASC 3; 2000 (6) BCLR 671 (NmS) (9 July 1999).

²⁴ (ibid.:para. 28).

²⁵ (ibid.:20–21).

There have also been cases where courts have found that a relevant government department violated article 8(2) of the Constitution without specifying whether the acts committed against the plaintiff amounted to torture or to other designated forms of ill-treatment. This approach has been taken, for example, in cases dealing with prison gangs and the failure by prison officials to prevent prisoner-on-prisoner violence.²⁶ The rights under article 8 of the Constitution and the jurisprudence developed on the basis of this article “are primarily directed at preventing physical humiliation and torture of one person by another person or persons”.²⁷

The Supreme Court has also considered the question of whether the sentence of life imprisonment is contrary to article 8 of the Constitution. In *S v Tcoeib*,²⁸ the appellant was convicted of murder and theft and sentenced to life imprisonment on both counts. The High Court had imposed an 18-year non-parole period of imprisonment. The appellant argued that his sentence was unconstitutional as it violated article 8(2)(b) of the Constitution, which prohibits cruel, inhuman and degrading punishment.²⁹ The Supreme Court held that Namibian law allows for the release of an offender sentenced to life imprisonment. The court added the following:

*Can it properly be said that life imprisonment unconstitutionally violates the dignity of the person sentenced or constitutes an invasion of the right of every person to be protected from cruel, inhuman or degrading treatment or punishment? There can be little doubt that a sentence which compels any person to spend the whole of his or her natural life in incarceration, divorced from his family and his friends in conditions of deliberate austerity and deprivation, isolated from access to and enjoyment of the elementary bounties of civilised living is indeed a punishment of distressing severity. Even when it is permitted in civilised countries it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence.*³⁰

²⁶ *Kennedy & Others v Minister of Prisons and Correctional Services* ((P) I 147/2005) [2008] NAHC 13; 2008 (2) NR 631 (HC) (24 June 2008) para. 18.

²⁷ *Muheto & Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC) at 183.

²⁸ (SA/93) [1996] NASC 1.

²⁹ (ibid.:29).

³⁰ (ibid.:31–32).

The court added the following:

It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).³¹

The Supreme Court will set aside a sentence if it believes that it is excessive (unduly long) and violates the offender's right under article 8(2)(b) of the Constitution.³²

Article 12(1)(f) of the Constitution provides as follows:

No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

Namibian courts have held that evidence obtained through torture and assaults is inadmissible, whether the evidence in question has been extracted from the accused or a third party.³³ In *S v Malumo & Others*,³⁴ the court observed as follows:

This witness when he testified during his evidence-in-chief stated that he gave his statement freely and voluntarily to the police. During cross-examination he admitted that he had been assaulted by the police prior to giving his statement. The witness testified that he refused to give any information to the police before he was assaulted. He testified that he was extensively

³¹ (ibid.:33).

³² *S v Ndikwetepo & Others* 1993 NR 319 (SC).

³³ *S v Malumo & Others* (CC 32/2001) [2013] NAHCMD 33 (11 February 2013) para.'s 46–49 (adopting the reasoning of the Supreme Court of Zimbabwe).

³⁴ (ibid.). For the High Court judgement, see *S v Malumo* (CC 32/2001) [2010] NAHC 20 (1 March 2010). See also *S v Malumo & Others* (CC 32/2001) [2011] NAHC 318 (24 October 2011) (the trial-within-a-trial to challenge the admissibility of a pointing out obtained through torture); *S v Malumo & Others* (CC 32/2001) [2011] NAHC 220 (19 July 2011) (the trial-within-a-trial to determine the admissibility of a statement allegedly obtained through torture).

*assaulted over a period of one day, spent the night at a certain house and was picked up again by the police the next morning. It was a humiliating experience. He was assaulted because he denied knowledge of the incident and that the statement came about as a result of force. The witness testified that even as he was giving his testimony he was scared of the police. The witness testified that when he was interviewed by the prosecutor the previous day he did not mention the assault to the prosecutor ... because the police had informed him that he should not even mention the assault.*³⁵

Against that background, the judge concluded as follows:

*I have discussed the issue of torture and degrading and humiliating treatment of witnesses ... and must mention at this stage that had the State presented the evidence of this witness as the only evidence against the accused person I would have disallowed such evidence and would have released the accused.*³⁶

Evidence will be excluded whether the torture was physical or mental (psychological).³⁷ The court in this case appears to have been influenced by UNCAT although it does not refer to article 15 of the Convention, which requires the exclusion of evidence obtained through torture.³⁸

The question arises as to whether evidence obtained through cruel, inhuman or degrading treatment or punishment should be inadmissible also. As mentioned earlier, article 12(1)(f) of the Namibian Constitution provides that evidence obtained through violating article 8(2)(b) is inadmissible. In *Shipanga & Another v S*,³⁹ the Supreme Court referred to article 12(1)(f) of the Constitution in the following terms:

That Article provides that a court shall not admit in evidence testimony that has been obtained in violation of Article 8(2)(b) of the Constitution. Testimony includes a pointing out done through an

³⁵ *S v Malumo & Others* (CC 32/2001) [2013] NAHCMD 33 (11 February 2013) para. 220.

³⁶ (ibid.:para.'s 221, 419).

³⁷ (ibid.:para.'s 396–397).

³⁸ (ibid.:para.'s 46–47, 551).

³⁹ (SA 65/2011, SA 72/2011) [2014] NASC 22 (31 October 2014).

*admission or a statement and therefore a pointing out obtained in violation of Article 8(2)(b) of the Constitution cannot be used in evidence against the accused.*⁴⁰

The court added the following:

*Article 8(2)(b) prohibits torture and cruel, inhuman or degrading treatment or punishment. The second appellant was not subjected to any of the prohibitions contained in Article 8(2)(b) of the Constitution.*⁴¹

In *S v Minnies & Another*,⁴² the court held expressly that a pointing out discovered as a result of a confession that was extracted from the accused through torture was inadmissible, despite section 218⁴³ of the Criminal Procedure Act⁴⁴ allowing a court to admit evidence obtained on the basis of an inadmissible confession.

⁴⁰ (ibid.:para. 55). *S v Shipanga & Another* 2015 (1) NR 141 (SC) para. 55.

⁴¹ *Shipanga & Another v S* (SA 65/2011, SA 72/2011) [2014] NASC 22 (31 October 2014) para. 56. See also *S v Kukame* 2007 (2) NR 815 (HC) para.'s 4–5; *S v Van den Berg* 1995 NR 23 (HC) at 38.

⁴² 1990 NR 177 (HC).

⁴³ Section 218 provides as follows:

- “(1) Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
- (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.”

See also section 247 of the Criminal Procedure Act 2004, (Act No. 25 of 2004) (not yet in force at the time of writing), which provides as follows:

- “(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered

The Constitution and other Namibian legislation do not define *torture* or *cruel, inhuman or degrading treatment or punishment*. The result is that courts refer to sources such as dictionaries and textbooks to give meaning to the words *inhuman* and *degrading*.⁴⁵ A person who suspects that the police might torture him/her may make an application to court to transfer him/her from one police station to another.⁴⁶ The High Court has held that one of the purposes of the right of the suspect to be brought to court within 48 hours of arrest (under article 11(3) of the Constitution) is that this time limit acts as –

*... an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her.*⁴⁷

The rights under article 8 of the Constitution are also important for realising the right to a fair trial,⁴⁸ in the sense that inculpatory evidence cannot be obtained from the accused in violation of

such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in a confession or statement which by law is not admissible in evidence against that accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of that witness against the wish or will of that accused.

- (2) The court may, if in its opinion it will be in the interests of justice to do so, admit evidence at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by that accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against that accused at such proceedings.”

⁴⁴ Act 51 of 1977.

⁴⁵ See e.g. *McNab & Others v Minister of Home Affairs NO & Others* (I2852/05) [2007] NAHC 50 (12 July 2007) para. 46.

⁴⁶ *Pienaar v Minister of Safety and Security & Others* (A 304/2012) [2012] NAHC 317 (27 November 2012) (although in this case the application was dismissed because the applicant was absent from court when the matter was called).

⁴⁷ *Sheehama v Minister of Safety and Security & Others* (A22/2011) [2011] NAHC 81 (17 March 2011) para. 5. See also *Minister of Safety and Security v Kabotana* (SA 35/2012) [2014] NASC 2 (26 March 2014) para. 15.

his/her rights guaranteed under the section.⁴⁹ Given that torture or cruel, inhuman or degrading treatment or punishment are not offences in Namibia, those who commit corporal punishment are prosecuted for and convicted of assault.⁵⁰ This is the practice despite the court having held expressly that corporal punishment violates article 8(2)(b) of the Constitution.⁵¹

Jurisprudence from Namibian courts show that some judges are of the view that torture may be committed by private individuals (non-public officials). In *S v Jeremia*,⁵² the accused was convicted of the murder of her five-year-old foster child. The court observed as follows:

*As a parent and a mother yourself you do not need our Constitution or legislation to teach you or remind you of your obligations towards children, be they your own or someone else's. To a good parent this responsibility comes naturally. Ms Jeremia, you were not faced or confronted with an explosive situation where you were compelled to suddenly act irrationally. You committed this hideous crime over a protracted period of approximately eight months. You systematically and continuously tortured and maltreated the deceased. The deceased cried and pleaded for mercy with you when you tortured her, but you showed no compassion and like a monster you continued torturing her. According to the evidence of Moses Matthias when you pumped hot water into her she cried: "Mummy you are burning me, mummy you are burning me!" Yet you went on unperturbed. Such callous and ruthless behaviour like yours fills any reasonable human being with revulsion and puts a lump in one's throat.*⁵³

In sentencing the offender to life imprisonment, the judge held as follows:

Having said all that, Ms Jeremia, I am duty bound on the demands of the circumstances under which you committed the murder to impose a severe sentence, in order hopefully to send a message to our society that this Court will not tolerate the torture, abuse and maltreatment of defenceless children. Those members of our society who commit and are convicted of crimes against children can be rest assured that the sword of justice will come down heavily on them. In

⁴⁸ *Mukuwe v S* (CC 08/2009) [2010] NAHC 64 (2 August 2010) para. 13.

⁴⁹ *Sankwasa v S* (CA 70/2012) [2013] NAHCMD 249 (23 August 2013) para. 22; *S v Sankwasa* 2014 (3) NR 751 (HC) para. 22.

⁵⁰ *S v Mwinga & Others* (CC 64.94) [1994] NAHC 10 (12 October 1994).

⁵¹ (ibid.).

⁵² 1993 NR 227 (HC).

⁵³ (ibid.:230).

*the circumstances of your case, the protection of the community, especially children, is of paramount importance. The evil of your deed is so shocking and so clamant of extreme retribution that I am compelled to exercise my judicial discretion in favour of the prosecution's request to remove you from society for the rest of your natural life, because life imprisonment is the only proper sentence in the circumstances of your case.*⁵⁴

However, it should be noted that, in this case, the court refers neither to article 8 of the Constitution (although it does refer to articles 6 and 15 therein) nor to UNCAT. It is therefore possible that, here, the word *torture* was not used in its strict legal sense. However, the facts of the case demonstrate that some acts by private individuals may cause sufficiently severe pain and suffering to amount to torture had they been committed by public officials. This explains why, in countries such as Uganda,⁵⁵ private individuals, like public officials, may be prosecuted and punished for torture.

Some pieces of legislation in Namibia deal with the issue of torture. Thus, for example, torture as a grave breach of the Geneva Conventions is criminalised by the Geneva Conventions Act.⁵⁶ Section 2(1) of this Act provides as follows:

Any person who, in Namibia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an offence.

A person convicted of committing a grave breach of the Geneva Conventions is liable to be sentenced to imprisonment for life if the offence involves the wilful killing of a protected person, or to 14 years' imprisonment should the offence not involve the wilful killing of a protected person.⁵⁷ However, a court may deviate from the minimum sentence if there are substantial and compelling circumstances to do so.⁵⁸

⁵⁴ (ibid.:32).

⁵⁵ See section 2 of the Ugandan Prevention and Prohibition of Torture Act of 2012. For a discussion of this Act, see e.g. JD Mujuzi. 2012. "Issues to grapple with in implementing the Ugandan Prohibition and Prevention of Torture Act". *International Human Rights Law Review* 1:382–394.

⁵⁶ Act 15 of 2003.

⁵⁷ (ibid.:section 2(4)).

⁵⁸ (ibid.:section 2(5)).

In terms of sections 4(1)(b) and 4(3) of the Namibia Refugees (Recognition and Control) Act,⁵⁹ a person shall not be granted refugee status in Namibia “if such person has, before his or her admission to Namibia as a refugee, committed a crime against peace or a war crime or a crime against humanity”. Section 3 of the Act stipulates that “a crime against peace or a war crime or a crime against humanity” includes “mistreatment or torture of civilians or prisoners of war”.

The next section will deal with how the international community has reacted to the fact that torture is not a crime in Namibia.

The international community and Namibia’s obligation to prevent torture

At the international level, Namibia has been called on to put in place measures to combat torture. In particular, CAT has recommended the following:

*Namibia should enact laws, particularly prohibiting torture, as required under the Convention against Torture and other human rights agreements binding on Namibia, in fields that are not yet regulated. Existing national laws should be further reviewed in the light of the Convention and protection of human rights in general.*⁶⁰

During the Universal Periodic Review, the Namibian Government reported as follows:

*Incidents of excessive use of force by members of the Police Force during arrest of suspects had been noted with concern. The Police had embarked on awareness campaigns and training on the use of minimum force during arrests. The Namibian Police Force also offers human rights training during its Basic and Developmental Courses.*⁶¹

⁵⁹ Act 2 of 1999.

⁶⁰ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 242.

⁶¹ Universal Periodic Review, Report of the Working Group on the Universal Periodic Review (Namibia), A/HRC/17/14, 24 March 2011, para. 22.

The Namibian Government also stated that, “[a]ccording to the Constitution, evidence obtained by torture shall not be admitted in court. A bill to criminalize torture was under consideration”.⁶² Furthermore, it declared the following:

*Regarding the signing of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), the relevant Ministries would do the necessary research and make submissions to the Inter-Ministerial Committee on Human Rights, which would then make a recommendation to the Cabinet. This approach applies to all outstanding treaties which Namibia has not yet ratified.*⁶³

While countries such as Portugal⁶⁴ and Swaziland⁶⁵ applauded the efforts being made by Namibia to combat torture, others called on the country to strengthen its efforts regarding the prevention of torture. For example, Portugal –

*... requested clarification on the powers of traditional judges [under the Traditional Courts and Traditional Authorities Act], their knowledge of and abidance by human rights law, including the prohibition of torture.*⁶⁶

Zambia urged Namibia “to make torture a specific crime”,⁶⁷ Slovakia observed that “torture was not defined as statutory crime”,⁶⁸ and France “noted prison overcrowding and torture in prisons, and enquired about measures to prevent ill-treatment in detention, improve prison conditions and ensure detainees are judged within reasonable time frames”.⁶⁹

It is against this background that the following recommendations, supported by Namibia, were formulated during interactive dialogue sessions:

⁶² (ibid.:para. 23).

⁶³ (ibid.:para. 24).

⁶⁴ (ibid.:para. 42).

⁶⁵ (ibid.:para. 41).

⁶⁶ (ibid.:para. 42).

⁶⁷ (ibid.:para. 71).

⁶⁸ (ibid.:para. 87).

⁶⁹ (ibid.:para. 75).

- (1) *Namibia should “review its criminal law framework with a view to incorporate the crime of torture in accordance with its international obligations”;*⁷⁰ and
- (2) *Namibia should “sign and ratify [the International Convention for the Protection of All Persons from Enforced Disappearances], as it constitutes an important instrument for the prevention against torture”.*⁷¹

Countries such as Argentina,⁷² Ecuador,⁷³ France,⁷⁴ Mauritius,⁷⁵ Spain⁷⁶ and Sweden⁷⁷ called on Namibia to ratify the Optional Protocol to UNCAT.⁷⁸ The objective of the Optional Protocol to UNCAT –

*... is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*⁷⁹

In its concluding observations on Namibia’s consolidated second and third periodic reports, the United Nations Committee on the Rights of the Child, which is the monitoring body of the Convention on the Rights of the Child,⁸⁰ also called on Namibia to ratify the Optional Protocol to UNCAT.⁸¹ The call was made “in order to further strengthen the fulfilment of children’s rights”.⁸²

⁷⁰ (ibid.:para. 96.2). This recommendation was made by Slovakia.

⁷¹ (ibid.:para. 98.13). This recommendation was made by France.

⁷² (ibid.:para. 98.16).

⁷³ (ibid.:para. 98.3).

⁷⁴ (ibid.:para. 98.10).

⁷⁵ (ibid.:para. 98.12).

⁷⁶ (ibid.:para. 98.15).

⁷⁷ (ibid.:para. 98.4).

⁷⁸ Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199; entry into force 22 June 2006.

⁷⁹ See article 1.

⁸⁰ Namibia ratified the Convention on the Rights of the Child on 30 September 1990.

⁸¹ See Committee on the Rights of the Child, Concluding observations on the consolidated second and third periodic reports of Namibia, adopted by the Committee at its sixty-first session (17 September–5 October 2012), CRC/C/NAM/CO/2-3, 16 October 2012, para. 77.

⁸² (ibid.:para. 77).

It will be recalled that, on 28 November 1994, Namibia acceded to the International Covenant on Civil and Political Rights (ICCPR).⁸³ Article 7 of the ICCPR provides as follows:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

In its concluding observations on Namibia's initial report, the Human Rights Committee, which monitors the ICCPR, noted –

*... with concern that the crime of torture is not defined in domestic criminal law and is still considered a common law offence to be charged as assault or crimen injuria.*⁸⁴

The Committee recommended that Namibia “should, as a matter of priority, make torture a specific statutory crime”.⁸⁵ The Committee also noted “the decrease in reported violations of human rights in the northern parts of Namibia” and regretted that –

*... no extensive fact-finding initiatives have been undertaken to determine accountability for alleged acts of torture, extrajudicial killings and disappearances.*⁸⁶

Namibia is also a state party to the African Charter on Human and Peoples' Rights, Article 5 of which provides the following:

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

⁸³ International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, and Vol. 1057, p. 407.

⁸⁴ Concluding observations of the Human Rights Committee on the initial report of Namibia (CCPR/C/NAM/2003/1), CCPR/CO/81/NAM, August 2004, para. 11.

⁸⁵ (ibid.:para. 11).

⁸⁶ (ibid.:para. 12).

The African Commission on Human and Peoples' Rights is the monitoring body of the African Charter on Human and Peoples' Rights. It has noted that the Namibian Government shared a draft of its report to CAT with non-governmental organisations (NGOs) for their comments before the final report was submitted.⁸⁷ The African Commission was also informed by the Legal Assistance Centre, a donor-funded Namibian NGO, that there was an increase in cases of torture by police and other security forces,⁸⁸ and has observed "that at times, police officers obtain confessions through torture and often do not inform suspects of their rights before effecting arrests".⁸⁹ The African Commission also expressed concern that some accused in a treason trial allegedly had been subjected to torture⁹⁰ and recommended that the government should "investigate the allegation".⁹¹

The next section will examine Namibia's obligations under UNCAT and suggest ways in which the Prevention and Combating of Torture Bill may give effect to these obligations.

Namibia's obligations under UNCAT

UNCAT imposes a variety of obligations on Namibia. CAT is of the view that state parties should incorporate all the provisions of UNCAT into their domestic legislation "in order to allow persons to invoke it directly in courts, give prominence to the Convention and raise awareness of its

⁸⁷ See Promotional Mission to Namibia and Botswana, 26 May–10 June 1996 (Commissioner EVO Dankwa), p. 2. Available at http://www.achpr.org/files/sessions/20th/mission-reports/botswana-namibia/achpr20_misrep_promo_namibia_botswana_1996_eng.pdf (accessed 17 July 2015).

⁸⁸ Report on Promotion Mission to Namibia 2–6 July 2001 (mission conducted by Commissioner Andrew Ranganayi Chigovera), p. 20. Available at http://www.achpr.org/files/sessions/30th/mission-reports/namibia/achpr30_misrep_promo_namibia_2001_eng.pdf (accessed 17 July 2015).

⁸⁹ Promotion Mission Report to the Republic of Namibia, 24–27 August 2009 (mission undertaken by Ms Pansy Tlakula, the Commissioner responsible for the promotion and protection of human rights in the Republic of Namibia), para. 206. Available at http://www.achpr.org/files/sessions/47th/mission-reports/namibia/misrep_promo_namibia_2009_eng.pdf (accessed 17 July 2015).

⁹⁰ (ibid.:para. 211(iv)).

⁹¹ (ibid.:para. 212 (xxix)).

provisions among members of the judiciary and the public at large”.⁹² It has recommended that a state party to UNCAT “should take all appropriate measures to ensure the full applicability of the provisions of the Convention in its domestic legal order”.⁹³ Below are CAT’s most recent practice and jurisprudence to explain how it has interpreted state parties’ obligations. Although most of the jurisprudence does not relate directly to Namibia, it is applicable to Namibia as it is the Committee’s practice to make similar recommendations in similar cases. Drafting torture legislation with reference to this jurisprudence would help Namibia avoid some of the mistakes which other state parties to UNCAT have made. Whereas all obligations are important, the jurisprudence emanating from CAT, the Human Rights Committee and the Universal Peer Review mechanism places much emphasis on the obligation to criminalise torture. This jurisprudential preference informs the current report in the sense that the obligation to criminalise torture is discussed in more detail than the other obligations.

Definition of torture and obligation to criminalise torture

Article 1 of UNCAT contains the following definition of torture:

1. *For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*
2. *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

⁹² Concluding observations of the Committee against Torture on the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/CO/6, 25 June 2012, para. C.

⁹³ Concluding observations of the Committee against Torture on the second periodic report of Cambodia (CAT/C/KHM/2), CAT/C/KHM/CO/2, 20 January 2011 para. 10.

Article 4 of UNCAT imposes on Namibia an obligation to criminalise torture. It provides as follows:

1. *Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*
2. *Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*

In its concluding observations on Namibia's initial report, CAT recommended the following:

Namibia should enact a law defining the crime of torture in terms of article 1 of the Convention and it should legally integrate this definition into the Namibian substantive and procedural criminal law system, taking especially into account:

- (a) *The need to define the offence of torture as a specific offence committed by or at the instigation of or with the consent of a public official (delictum proprium);*
- (b) *Any special intent to extract a confession or other information, to arbitrarily punish, to intimidate, to coerce or to discriminate;*
- (c) *The need to legislate for complicity in torture and attempts to commit torture as equally punishable;*
- (d) *The need to exclude the legal applicability of any justification in cases of torture.*⁹⁴

The issue of the definition of torture under article 1 of UNCAT is related closely to the obligation to criminalise torture. The definition of torture adopted into Namibian law does not have to reproduce the UNCAT definition verbatim. However, CAT has commented as follows:

8. *States Parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.*
9. *Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that*

⁹⁴ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 241.

all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).

10. *The Committee recognizes that most State Parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.*
11. *By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that State parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also –*
 - (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence,*
 - (b) strengthen the deterrent effect of the prohibition itself,*
 - (c) enhance the ability of responsible officials to track the specific crime of torture[,] and*
 - (d) enable and empower the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.⁹⁵*

In order to ensure that Namibia complies with its obligations under articles 1 and 4 of UNCAT, the domestic definition of the offence of torture should include the elements of torture contained in article 1 of the Convention. Since the publication of its General Comment No. 2, CAT has called on state parties whose definition of torture in domestic legislation does not comply with UNCAT's article 1 to amend their relevant legislation. For example, in its concluding observations on Sri Lanka's combined third and fourth periodic report, CAT recorded that it –

⁹⁵ Committee against Torture, General Comment No. 2, CAT/C/GC/2, 24 January 2008, para.'s 8–11.

... [r]eiterates its view that the definition of torture included in section 12 of the 1994 Convention against Torture Act (hereinafter, CAT Act) does not entirely reflect the internationally agreed definition set out in the Convention. It restricts acts of torture to “any act which causes severe pain, whether physical or mental”, while the Convention definition refers to “severe pain or suffering”. It thus does not cover acts that are not violent per se, but nevertheless inflict suffering (arts. 1 and 4).⁹⁶

On the basis of this observation, the Committee recommended that Sri Lanka –

... [s]hould amend the definition of torture included in section 12 of the CAT Act in order to expand the definition of torture to all acts of torture, including those causing severe suffering, in accordance with article 1 of the Convention. In this regard, the Committee draws attention to its general comment No. 2 (2007), which states that serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity.⁹⁷

In the same vein, CAT recommended that Cameroon should ensure that its domestic law on torture “fully incorporated the definition of torture under articles 1 and 4 of the Convention”, and noted “with concern that domestic legislation does not provide for the imposition of sentences that take into account the seriousness of the offence (arts. 1 and 4)”.⁹⁸ In response to these deficiencies, the Committee advised that the Cameroonian Government –

... [s]hould provide the Committee with the necessary information for it to assess whether or not the State party has incorporated into its Criminal Code a definition of torture that complies with articles 1 and 4 of the Convention. The Committee emphasizes that the definition of torture should set out clearly the purpose of the offence, provide for aggravating circumstances, include the attempt to commit torture as well as acts intended to intimidate or coerce the victim or a third person, and refer to discrimination of any kind as a motive or reason for inflicting torture. The definition should also criminalize torture inflicted by or at the instigation of or with the consent or

⁹⁶ Concluding observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka (CAT/C/LKA/3-4), CAT/C/LKA/CO/3-4, 8 December 2011, para. 25.

⁹⁷ (ibid.:para. 25).

⁹⁸ Concluding observations of the Committee against Torture on the fourth periodic report of Cameroon (CAT/C/CMR/4), CAT/C/CMR/CO/4, 19 May 2010, para. 10.

*acquiescence of a public official or other person acting in an official capacity. The State party should also ensure that the provisions criminalizing acts of torture and making them punishable by criminal penalties are proportional to the seriousness of the acts committed.*⁹⁹

The cases of Sri Lanka and Cameroon highlight the requirement that the definition of torture has to be consistent with article 1 of UNCAT and has to be supported by a penalty that takes into account the gravity of the offence. As a further example, CAT was concerned that, in Bulgaria, –

*... a comprehensive definition of torture incorporating all the elements of article 1 of the Convention is not included in the Penal Code and that torture is not criminalized as an autonomous offence in law, as required under the Convention.*¹⁰⁰

Thus, CAT recommended that Bulgaria –

*... [a]dopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should take effective legislative measures to include torture as a separate and specific crime in its legislation and ensure that penalties for torture are commensurate with the gravity of this crime. It should ensure that the absolute prohibition against torture is non-derogable and that acts amounting to torture are not subject to any statute of limitations.*¹⁰¹

CAT made similar recommendations in relation to countries such as Estonia,¹⁰² Guinea,¹⁰³ the Holy See,¹⁰⁴ Kazakhstan,¹⁰⁵ Lithuania,¹⁰⁶ Turkmenistan,¹⁰⁷ Ukraine,¹⁰⁸ and the United States of America.¹⁰⁹

⁹⁹ (ibid.:para. 10).

¹⁰⁰ Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Bulgaria (CAT/C/BGR/4-5), CAT/C/BGR/CO/4-5, 14 December 2011, para. 8.

¹⁰¹ (ibid.:para. 8).

¹⁰² Concluding observations of the Committee against Torture on the fifth periodic report of Estonia, CAT/C/EST/CO/5, 17 June 2013, para. 7. “[T]he Committee is concerned that the definition of torture in section 122 of the Penal Code does not reflect all of the elements contained in article 1 of the Convention, such as infliction of mental pain (arts. 1 and 4).The Committee recommends that the State party amend its Penal Code to include a definition of torture in conformity with the Convention which covers all the elements contained in article 1 of the Convention”.

Like CAT, the Human Rights Committee has called on some state parties to the ICCPR to ensure that the definition of torture in their domestic legislation complies with article 1 of UNCAT. For example, in its concluding observations on the third periodic report of the Plurinational State of Bolivia,¹¹⁰ the Human Rights Committee was “concerned ... that the definition of the offence of torture is not in line with international standards” and that “there have been ongoing delays in the prosecution of cases involving torture and ill-treatment and that no national prevention mechanism has yet been established”. This concern prompted the Human Rights Committee to recommend that Bolivia –

¹⁰³ Concluding observations of the Committee against Torture on Guinea in the absence of its initial report, CAT/C/GIN/CO/1, 20 June 2014, para. 7.

¹⁰⁴ Concluding observations of the Committee against Torture on the initial report of the Holy See, CAT/C/VAT/CO/1, 17 June 2014.

¹⁰⁵ Concluding observations of the Committee against Torture on the third periodic report of Kazakhstan, CAT/C/KAZ/CO/3, 12 December 2014, para. C.

¹⁰⁶ Concluding observations of the Committee against Torture on the third periodic report of Lithuania, CAT/C/LTU/CO/3, 17 June 2014, para.'s 7–8.

¹⁰⁷ Concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/1), CAT/C/TKM/CO/1, 15 June 2011, para. 8. “The Committee urges the State party to adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The definition of torture should set out clearly the purpose of the offence, provide for aggravating circumstances, include the attempt to commit torture as well as acts intended to intimidate or coerce the victim or a third person, and should refer to the motive or reasons for inflicting torture identified in article 1 of the Convention. The State party should also ensure that acts of torture are not defined in terms of a less serious offence, such as the causing of physical and moral suffering, and that these offences are punishable by appropriate penalties which take into account their grave nature, as set out in article 4, para. 2, of the Convention. Furthermore, the State party should ensure that the absolute prohibition against torture is non-derogable and that acts amounting to torture are not subject to any statute of limitations”.

¹⁰⁸ Concluding observations of the Committee against Torture on the sixth periodic report of Ukraine, CAT/C/UKR/CO/6, 12 December 2014, para. C.

¹⁰⁹ Concluding observations of the Committee against Torture on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014, para. C.

¹¹⁰ Concluding observations on the third periodic report of the Plurinational State of Bolivia, CCPR/C/BOL/CO/3, 6 December 2013, para. 13.

*... [s]hould ... amend the Criminal Code to include a definition of torture that is fully in line with articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and with article 7 of the Covenant. The State party should ensure that all alleged acts of torture or ill-treatment are promptly investigated, that the perpetrators are prosecuted and punished in a manner that is commensurate with the seriousness of the offence and that the victims obtain appropriate redress and protection. The State party should expedite its adoption of the measures required to establish a national mechanism for the prevention of torture and ensure that that body is provided with sufficient resources to enable it to operate efficiently.*¹¹¹

In addition, the Human Rights Committee has recommended that the State of Israel –

... should explicitly prohibit torture, including psychological torture, and cruel, inhuman or degrading treatment by incorporating into its legislation a definition of torture that is fully in line with article 7 of the Covenant, and ensure that the law provides for penalties commensurate with the gravity of such acts. It should also:

- (a) remove the notion of “necessity” as a possible justification for the crime of torture;*
- (b) refrain from inflicting “moderate physical pressure” in cases of “necessity” and ensuring that interrogation techniques never reach the threshold of treatment prohibited by article 7 of the Covenant, and*
- (c) provide for audio or visual documentation of interrogations in cases of persons detained for security offences.*¹¹²

The Human Rights Committee made comparable recommendations in relation to countries such as Indonesia¹¹³ and Mauritania.¹¹⁴ The Special Rapporteur on Torture and Other Cruel, Inhuman

¹¹¹ (ibid.:para. 13).

¹¹² Concluding observations of the Human Rights Committee on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014.

¹¹³ Concluding observations of the Human Rights Committee on the initial report of Indonesia, CCPR/C/IDN/CO/1, 21 August 2013, para. 14.

¹¹⁴ Concluding observations of the Human Rights Committee on the initial report of Mauritania, CCPR/C/MRT/CO/1, 21 November 2013, para. 14.

or Degrading Treatment or Punishment also made a similar recommendation for Ghana on his recent mission to that country.¹¹⁵

What emerges from the practice of the human rights bodies considered above is that Namibia has an obligation to adopt a definition of *torture* that fully complies with article 1 of UNCAT. The above practice also shows that countries have adopted two approaches to the criminalisation of torture: some have enacted torture-specific legislation, whereas others have amended their penal laws (such as the penal code or the criminal code) and added the offence of torture to the existing offences in those laws. CAT appears not to take issue with either of these approaches: what matters most is that the offence of torture includes all the important elements contained in UNCAT's article 1.

Non-refoulement and the danger of torture

Article 3 of UNCAT provides as follows:

1. *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
2. *For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

As far as Namibia is concerned, CAT has recommended as follows:

The Namibian authorities should institute proper procedures in order to comply with article 3 of the Convention, i.e. to enable refugees to apply for residence in cases where substantial grounds

¹¹⁵ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez (Mission to Ghana), A/HRC/25/60/Add.1, 5 March 2014, Recommendation B(b).

*exist for believing that such refugees would be in danger of being subjected to torture if expelled, returned or extradited to another country.*¹¹⁶

According to CAT, the obligation under article 3 of the Convention is absolute.¹¹⁷ It applies even if the person in question poses a security threat to the state party concerned.¹¹⁸ CAT has proposed that –

*... [w]here there is a risk that a person may be subject to torture if returned to his or her country of origin, the State party should undertake a thorough assessment of his or her claim, in full compliance with the provisions of article 3 of the Convention.*¹¹⁹

The Committee has also submitted that a state party “should respect, in law and in practice, its non-refoulement obligations under article 3 of the Convention”¹²⁰ by taking the necessary legislative, judicial and administrative measures.

Although article 3 expressly refers only to torture, the Committee considers that the obligation therein extends to cases where there is a risk that the expelled, returned or deported person will

¹¹⁶ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 249.

¹¹⁷ Conclusions and recommendations of the Committee against Torture on the initial report of Guyana (CAT/C/GUY/1), CAT/C/GUY/CO/1, 7 December 2006, para. 8. The Committee states that it “would like to remind the State party of the absolute nature of the prohibition on expelling, returning (refouler) or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, as established by article 3 of the Convention. The State party should submit in its next periodic report information regarding the implementation of article 3 of the Convention in cases of extradition, expulsion or return (refoulement) of foreigners”.

¹¹⁸ Concluding observations of the Committee against Torture on the combined second to fifth periodic reports of Bosnia and Herzegovina (CAT/C/BIH/2-5), CAT/C/BIH/CO/2-5, 20 January 2011, para. 14(e).

¹¹⁹ Concluding observations of the Committee against Torture on the fifth periodic report of New Zealand (CAT/C/NLZ/5), CAT/C/NZL/CO/5, 4 June 2009.

¹²⁰ Concluding observations of the Committee against Torture on the sixth and seventh periodic reports of Sweden, CAT/C/SWE/CO/6-7, 12 December 2014.

be subjected to “torture or ill-treatment”.¹²¹ In addition, although article 3 requires the existence of substantial grounds for believing that the person would be in danger of torture, the Committee has pronounced that a state party has an obligation to “ensure that the competent authorities strictly observe article 3 of the Convention and do not expel, return or extradite a person to a State where he/she might be subjected to torture”.¹²² The implication here is that a mere possibility of torture is sufficient to prevent the expulsion, return or extradition of the person in question. What is more, the Committee has gone beyond the specified non-refoulement obligations and condemned so-called rendition, in its recommendation that a “State party should refrain from abducting terrorism suspects from other countries where they may enjoy the protection of article 3 of the Convention”.¹²³ It should be noted in this regard that Namibian courts will refuse to exercise jurisdiction in cases where suspects have been abducted from foreign countries in contravention of international law.¹²⁴

Namibia has three obligations under article 3(1) of UNCAT: not to expel, not to return, and not to extradite a person to another state if there are substantial grounds to believe that the person would be in danger of torture. Article 3(2) provides some of the considerations that the relevant authorities in Namibia have to take into account in determining whether the “substantial grounds” referred to in article 3(1) exist. As noted above, CAT has recommended that state parties not expel, return or extradite persons to countries where they would be in danger of being tortured. For example, in its concluding observations on Albania’s second periodic report, the Committee noted –

... with concern the lack of information with regard to grounds for expulsion and means of protection of individuals, considered as a security threat, in accordance with article 3 of the Convention.

¹²¹ Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/GBR/CO/5, 24 June 2013, para. 20; Concluding observations of the Committee against Torture on the second periodic report of Qatar, CAT/C/QAT/CO/2, 25 January 2013, para. 21(a).

¹²² Conclusions and recommendations of the Committee against Torture on the initial report of Lithuania (CAT/C/37/Add.5), CAT/C/CR/31/5, 5 February 2004, para. 6(g).

¹²³ Concluding observations of the Committee against Torture on the initial report of Ethiopia (CAT/C/ETH/1), CAT/C/ETH/CO/1, 20 January 2011, para. 20.

¹²⁴ See generally *S v Mushwena & Others* (SA4/04, SA4/04) [2004] NASC 2 (21 July 2004).

The Committee then advocated –

*... that the State party strictly observe in all cases article 3 of the Convention requiring that the State party shall not expel, return or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.*¹²⁵

The Committee has urged also that Cambodia –

*... take all the necessary measures to ensure that the requirement of article 3 of the Convention is taken into consideration when deciding on the expulsion, return or extradition of foreigners.*¹²⁶

In these cases, the Committee has not recommended that the state party should make any legislative amendments to give effect to article 3 of the Convention. Thus, an administrative direction to all those responsible for a country's refoulement practices to ensure that expulsions, returns or deportations do not occur in violation of article 3 could suffice.

However, it bears noting that the Committee took a different approach as regards Paraguay. In its concluding observations on that country's combined fourth to sixth periodic reports, CAT expressed concern "about the allegations received concerning extraditions carried out by the State party without it having examined the risk of the person extradited being tortured in the receiving country", and also "about the lack of specific training for members of the judiciary regarding the scope of article 3 of the Convention".¹²⁷ As a result, the Committee advised that Paraguay –

¹²⁵ Concluding observations of the Committee against Torture on the second periodic report of Albania (CAT/C/ALB/2), CAT/C/ALB/CO/2, 26 June 2012, para. 8.

¹²⁶ Conclusions and recommendations of the Committee against Torture on the initial report of Cambodia (CAT/C/21/Add.5), CAT/C/CR/30/2, 27 May 2003, para. 7(e).

¹²⁷ Concluding observations of the Committee against Torture on the combined fourth to sixth periodic reports of Paraguay (CERD/C/PRY/4-6), CAT/C/PRY/CO/4-6, 14 December 2011, para. 17.

... [s]hould formulate and adopt legal provisions to incorporate article 3 of the Convention into its domestic law and ensure that the provisions of that article are applied in cases of expulsion, refoulement or extradition of foreign citizens. Under no circumstances should the State party expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in certain danger of being subjected to torture or ill-treatment.¹²⁸

In a similar vein, the Committee called on Burundi to –

... [t]ake legislative and any other necessary measures to prohibit the expulsion, return or extradition of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture, in accordance with article 3 of the Convention.¹²⁹

Furthermore, CAT has called upon state parties variously to –

- adopt domestic legislation to implement the principle of non-refoulement in article 3 of the Convention¹³⁰
- formulate and adopt legal provisions to implement article 3 of the Convention into ... domestic law¹³¹
- [incorporate the] “principle of non-refoulement ... into the domestic legislation of the State party¹³²

¹²⁸ (ibid.:para. 17).

¹²⁹ Conclusions and recommendations of the Committee against Torture on the initial report of Burundi (CAT/C/BDI/1), CAT/C/BDI/CO/1, 15 February 2007, para. 14.

¹³⁰ Conclusions and recommendations of the Committee against Torture on the initial report of Uganda (CAT/C/5/Add.32), CAT/C/CR/34/UGA, 21 June 2005, para. 10(b).

¹³¹ Concluding observations of the Committee against Torture on the second periodic report of Cambodia (CAT/C/KHM/2), CAT/C/KHM/CO/2, 20 January 2011, para. 24. See also Concluding observations of the Committee against Torture on the second periodic report of Jordan (CAT/C/JOR/2), CAT/C/JOR/CO/2, 25 May 2010, para. 23; Concluding observations of the Committee against Torture on the initial report of [the] Syrian Arab Republic (CAT/C/SYR/1), CAT/C/SYR/CO/1, 25 May 2010, para. 18.

¹³² Concluding observations of the Committee against Torture on the fourth periodic report of Israel (CAT/C/ISR/4), CAT/C/ISR/CO/4, 23 June 2009, para. 22.

- *take all legislative, judicial and administrative measures to comply with ... obligations under article 3 of the Convention*¹³³
- *bring all legislation and practices relating to the detention and deportation of immigrants or asylum seekers in line with the absolute principle of non-refoulement under article 3 of the Convention*¹³⁴
- *adopt a legislative framework regulating expulsion, refoulement and extradition and revise ... current procedures and practices in order to fulfil ... obligations under article 3 of the Convention*¹³⁵
- *unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into ... domestic law[.]*¹³⁶ [and]
- *incorporate the provisions contained in article 3 of the Convention under the Crimes (Torture) Ordinance.*¹³⁷

In the above examples, the cat recommendations encompass legislative steps and “other necessary measures” to give effect to UNCAT article 3. This implies that legislative steps by themselves may not be sufficient and may have to be supplemented by other measures to give effect to them. The Committee also recommends that judicial officers be trained on the meaning and operation of article 3. Although the Committee refers to foreign nationals only, it should be recalled that the article 3 obligations also extend to cases where nationals are to be extradited.¹³⁸ The decision whether or not to return, expel or extradite a person who is likely to

¹³³ Concluding observations of the Committee against Torture on the initial report of Mongolia (CAT/C/MNG/1), CAT/C/MNG/CO/1, 20 January 2011, para. 13.

¹³⁴ Concluding observations of the Committee against Torture on the second periodic report of Japan, CAT/C/JPN/CO/2, 28 June 2013, para. 9(a).

¹³⁵ Concluding observations of the Committee against Torture on the initial report of Chad (CAT/C/TCD/1), CAT/C/TCD/CO/1, 4 June 2009, para. 23.

¹³⁶ Conclusions and recommendations of the Committee against Torture on the fourth and fifth periodic reports of Canada (CAT/C/55/Add.8 and CAT/C/81/Add.3), CAT/C/CR/34/CAN, 7 July 2005, para. 5(a).

¹³⁷ Concluding observations of the Committee against Torture on the report of the Hong Kong Special Administrative Region (HKSAR), forming part of the fourth periodic report of China (CAT/C/HKG/4), CAT/C/HKG/CO/4, 19 January 2009, para. 7(a).

¹³⁸ Conclusions and recommendations of the Committee against Torture on the second periodic report of the Republic of Korea (CAT/C/53/Add.2), CAT/C/KOR/CO/2, 25 July 2006, para. 12,

be subjected to torture should be left in the hands of the judiciary and not to a member of the executive.¹³⁹ In its concluding observations on the second periodic report of Latvia, the Committee recommended that the country –

*... [e]nsure that anyone detained under immigration law has effective legal means of challenging the legality of administrative decisions to detain, deport or return (refouler) him/her and extend, in practice, the right to be assisted by assigned counsel to foreigners being detained with a view to their deportation or return (refoulement).*¹⁴⁰

State parties are permitted to secure diplomatic assurances that a person will not be subjected to treatment contrary to article 3 before such person is extradited or returned to another country. However, CAT has recommended as follows:

*When determining the applicability of its non-refoulement obligations under article 3 of the Convention, the State party should only rely on “diplomatic assurances” in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.*¹⁴¹

The Committee made similar recommendations in relation to Canada,¹⁴² the Czech Republic,¹⁴³ Morocco,¹⁴⁴ Sweden¹⁴⁵ and Tajikistan.¹⁴⁶ Even in cases where there are no diplomatic assurances, a state party should put in place “effective post-return monitoring arrangements”.¹⁴⁷

where CAT recommends “[t]he State party should ensure that the requirements of article 3 of the Convention apply when deciding on the expulsion, return or extradition of each case of non-citizens or persons of Korean nationality who may be returned to areas outside the jurisdiction of the Republic of Korea”.

¹³⁹ Concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/1), CAT/C/TKM/CO/1, 15 June 2011, para. 23(b).

¹⁴⁰ Conclusions and recommendations of the Committee against Torture on the second periodic report of Latvia (CAT/C/38/Add.4), CAT/C/LVA/CO/2, 19 February 2008, para. 8(b).

¹⁴¹ Conclusions and recommendations of the Committee against Torture on the second report of the United States of America (CAT/C/48/Add.3/Rev.1), CAT/C/USA/CO/2, 25 July 2006, para. 21.

¹⁴² Concluding observations of the Committee against Torture on the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/CO/6, 25 June 2012, para. C.

CAT, through the individual communications procedure, has developed rich jurisprudence on article 3 of UNCAT. Regrettably, a full discussion of this jurisprudence falls outside the scope of this report. However, the Committee has established that the obligations contained in Article 3 –

- should be included in a state party's refugee law¹⁴⁸
- also apply in cases where detainees possibly have to be transferred from the custody of one state to that of another,¹⁴⁹ and
- also pertain to the return of trafficked persons.¹⁵⁰

The measures taken to give effect to UNCAT article 3 must be effective.¹⁵¹ Individual interviews should be conducted systematically to determine whether or not foreign nationals face a risk of

¹⁴³ Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of the Czech Republic (CAT/C/CZE/4-5), CAT/C/CZE/CO/4-5, 13 July 2012, para. 8.

¹⁴⁴ Concluding observations of the Committee against Torture on the fourth periodic report of Morocco (CAT/C/MAR/4), CAT/C/MAR/CO/4, 21 December 2011, para. 9.

¹⁴⁵ Concluding observations of the Committee against Torture on the sixth and seventh periodic reports of Sweden, CAT/C/SWE/CO/6-7, 12 December 2014.

¹⁴⁶ Concluding observations of the Committee against Torture on the second periodic report of Tajikistan, CAT/C/TJK/CO/2, 21 January 2013, para. 18(a).

¹⁴⁷ Conclusions and recommendations of the Committee against Torture on the initial report of South Africa (CAT/C/52/Add.3), CAT/C/ZAF/CO/1, 7 December 2006.

¹⁴⁸ Concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/1), CAT/C/TKM/CO/1, 15 June 2011, para. 23(a).

¹⁴⁹ Concluding observations of the Committee against Torture on the fifth periodic report of Sweden (CAT/C/SWE/5), CAT/C/SWE/CO/5, 4 June 2008, para. 14.

¹⁵⁰ Concluding observations of the Committee against Torture on the second periodic report of Albania (CAT/C/ALB/2), CAT/C/ALB/CO/2, 26 June 2012, para. 15(d).

¹⁵¹ Concluding observations of the Committee against Torture on the third periodic report of Turkey (CAT/C/TUR/3), CAT/C/TUR/CO/3, 20 January 2011, para. 15; Concluding observations of the Committee against Torture on the initial report of [the] Syrian Arab Republic (CAT/C/SYR/1), CAT/C/SYR/CO/1, 25 May 2010, para. 18; Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, para. 15.

torture should they be returned to their countries.¹⁵² In other words, decisions on whether or not to expel, return or extradite foreign nationals should be –

*... arrived at following an examination of each individual case, rather than on a collective basis, and that the persons concerned have an opportunity to appeal such decisions.*¹⁵³

In this connection, CAT has recommended as follows:

*The State party should ensure that it complies fully with article 3 of the Convention and that individuals under the State party's jurisdiction receive appropriate consideration by its competent authorities and [are] guaranteed fair treatment at all stages of the proceedings, including an opportunity for effective, independent and impartial review of decisions on expulsion, return or extradition.*¹⁵⁴

In the light of the above discussion, Namibia has an absolute duty to ensure that people are not expelled, returned or extradited in violation of UNCAT's article 3. In order to ensure compliance, Namibia may need a specific legislative provision expressly incorporating its obligation under article 3. The Namibian Immigration Control Act¹⁵⁵ does not prohibit the deportation, expulsion or return of a person to a country where there are grounds to suspect that she/he would be subjected to torture. This law may have to be amended to reflect Namibia's obligation under UNCAT article 3.¹⁵⁶ On the question of extradition, section 5(1)(h) of the Extradition Act¹⁵⁷

¹⁵² Concluding observations of the Committee against Torture on the second periodic report of Togo, CAT/C/TGO/CO/2, 11 December 2012, para. 16(a).

¹⁵³ Concluding observations of the Committee against Torture on the initial report of Gabon, CAT/C/GAB/CO/1, 17 January 2013, para. 15. See also Concluding observations of the Committee against Torture on the second periodic report of Indonesia (CAT/C/72/Add.1), CAT/C/IDN/CO/2, 2 July 2008, para. 28; Concluding observations of the Committee against Torture on the second periodic report of Yemen (CAT/C/YEM/2), CAT/C/YEM/CO/2/Rev.1, 25 May 2010, para. 22.

¹⁵⁴ Concluding observations of the Committee against Torture on the second periodic report of Lithuania (CAT/C/LTU/2), CAT/C/LTU/CO/2, 19 January 2009, para. 9.

¹⁵⁵ Act 7 of 1993.

¹⁵⁶ Concluding observations of the Committee against Torture on the initial report of Mongolia (CAT/C/MNG/1), CAT/C/MNG/CO/1, 20 January 2011, para. 13: "The Committee is concerned that from 2000 to 2008, Mongolian authorities implemented deportation decisions for 3,713

provides that Namibia will not grant a request for extradition if the Minister or the magistrate (who makes the extradition decision) is of the opinion “that the granting of the request for such return would be in conflict with Namibia’s obligations in terms of any international convention, agreement, or treaty”. This section is broad enough to cater for Namibia’s obligations under UNCAT article 3 since it would be contrary to the said obligations to extradite a person to a country where there are grounds to believe that she/he would be tortured. Namibia may have to include a similar provision in the Immigration Control Act or in the Prevention and Combating of Torture Bill.¹⁵⁸ CAT has recommended that the obligation under UNCAT article 3 be provided for expressly in immigration legislation.¹⁵⁹ It considers also that legal aid should be provided to foreign nationals facing expulsion or return.¹⁶⁰

Universal jurisdiction over torture

citizens from 11 countries. The Committee is also concerned that no deportation order was suspended or not implemented because the person to be deported was under the threat of being tortured in the country of destination. It is concerned further that in October 2009 an asylum-seeker and his family were deported to China against their will before a final decision on the asylum claim was made (art. 3)”.

¹⁵⁷ Act 11 of 1996.

¹⁵⁸ Concluding observations of the Committee against Torture on the initial report of Madagascar (CAT/C/MDG/1), CAT/C/MDG/CO/1, 21 December 2011, para. 19: “The State party should amend article 19 of the law against torture of 25 June 2008 so that it also covers cases of deportation and refoulement, in accordance with article 3 of the Convention”.

¹⁵⁹ Concluding observations of the Committee against Torture on the initial report of Rwanda (CAT/C/RWA/1), CAT/C/RWA/CO/1, 26 June 2012, para. 18. See also Concluding observations of the Committee against Torture on the second periodic report of Kenya, CAT/C/KEN/CO/2, 19 June 2013, para. 20, where the Committee recommends that “[t]he State party should amend its legislation and bills, including the Refugee Bill (2006), the Extradition (Contagious and Foreign Countries) Act (2010), the Extradition (Commonwealth Countries) Act (2010), the Kenya Citizenship and Immigrations Act (2011) and the Refugee Bill (2012) to ensure that its law conforms to its non-refoulement obligation under article 3 of the Convention”. See also Concluding observations of the Committee against Torture on the third periodic report of Mauritius (CAT/C/MUS/3), CAT/C/MUS/CO/3, 15 June 2011, para. 12.

¹⁶⁰ Concluding observations of the Committee against Torture on the combined sixth and seventh periodic reports of Norway, CAT/C/NOR/CO/6-7, 13 December 2012, para. 16.

Article 5 of UNCAT provides as follows:

1. *Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:*
 - (a) *When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;*
 - (b) *When the alleged offender is a national of that State;*
 - (c) *When the victim is a national of that State if that State considers it appropriate.*
2. *Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.*
3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.*

When Namibia submitted its initial report to CAT, Namibian courts were yet to deal with the issue of torture committed abroad. However, the government did declare that a torture perpetrator who came to Namibia would be extradited for prosecution in another country.¹⁶¹ The practice and jurisprudence from CAT shows that article 5 of UNCAT requires a state party to ensure that its law confers upon its courts extraterritorial jurisdiction over torture, that is, jurisdiction over torture committed outside its territory. In other words, courts should have universal jurisdiction over the offence of torture, irrespective of where it is committed. This jurisdiction should be provided for “expressly” in domestic law.¹⁶² For example, in its concluding observations on Togo’s initial report, CAT regretted –

*... the way in which extraterritorial jurisdiction is dealt with in the State party’s legislation, particularly where allegations of torture are concerned. The Committee is also concerned by the fact that under Togolese legislation torture does not constitute an extraditable offence, since it has not been defined in the Criminal Code ...*¹⁶³

¹⁶¹ Namibia’s Initial Report to the Committee against Torture, CAT/C/28/Add.2, 29 January 1997, para. 17.

¹⁶² Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012, para. 23.

¹⁶³ Conclusions and recommendations of the Committee against Torture on the initial report of Togo (CAT/C/5/Add.33), CAT/C/TGO/CO/1, 28 July 2006, para. 15.

Against this background, the Committee advised as follows:

*The State party should take the necessary steps to ensure that acts of torture come under its extraterritorial jurisdiction, in conformity with article 5 of the Convention. The State party should also adopt appropriate legislative measures to ensure that torture constitutes an extraditable offence, while respecting the provisions of article 3 of the Convention.*¹⁶⁴

All in all, CAT entreats state parties to ensure that their legislation confers on their courts universal jurisdiction over the offence of torture (acts of torture). It has made this call in relation to countries such as Australia,¹⁶⁵ Benin,¹⁶⁶ Bulgaria,¹⁶⁷ Canada,¹⁶⁸ China (Macao),¹⁶⁹ the Democratic Republic of the Congo,¹⁷⁰ Egypt,¹⁷¹ France,¹⁷² Germany,¹⁷³ Kazakhstan,¹⁷⁴ Qatar,¹⁷⁵ Spain,¹⁷⁶ Sri Lanka,¹⁷⁷ the United Kingdom¹⁷⁸ and Uganda.¹⁷⁹

¹⁶⁴ (ibid.:para. 15).

¹⁶⁵ Concluding observations of the Committee against Torture on the third periodic report of Australia (CAT/C/67/Add.7), CAT/C/AUS/CO/3, 22 May 2008, para. 19.

¹⁶⁶ Conclusions and recommendations of the Committee against Torture on the second periodic report of Benin (CAT/C/BEN/2), CAT/C/BEN/CO/2, 19 February 2008, para. 15.

¹⁶⁷ Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Bulgaria (CAT/C/BGR/4-5), CAT/C/BGR/CO/4-5, 14 December 2011, para. 17.

¹⁶⁸ Concluding observations of the Committee against Torture on the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/CO/6, 25 June 2012.

¹⁶⁹ Concluding observations of the Committee against Torture on the fourth periodic report of China with respect to the Macao Special Administrative Region (Macao SAR) (CAT/C/MAC/4), CAT/C/MAC/CO/4, 19 January 2009, para. 6.

¹⁷⁰ Conclusions and recommendations of the Committee against Torture on the initial report of the Democratic Republic of the Congo (CAT/C/37/Add.6), CAT/C/DRC/CO/1, 1 April 2006, para. 5(b).

¹⁷¹ Conclusions and recommendations of the Committee against Torture on the fourth periodic report of Egypt (CAT/C/55/Add.6), CAT/C/CR/29/4, 23 December 2002, para. 6(l).

¹⁷² Conclusions and recommendations of the Committee against Torture on the third periodic report of France (CAT/C/34/Add.19), CAT/C/FRA/CO/3, 3 April 2006, para.'s 13–14; Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 19.

¹⁷³ Concluding observations of the Committee against Torture on the fifth periodic report of Germany (CAT/C/DEU/5), CAT/C/DEU/CO/5, 12 December 2011, para. 28.

The Committee has also recommended that a state party should have jurisdiction over torture committed outside its territory if the suspect is “simply present” in its territory.¹⁸⁰ In other words, the suspect does not have to be a resident or citizen of the state party which asserts jurisdiction.¹⁸¹ Even if the suspect is inadmissible to the state party on the basis of any immigration law, s/he should be arrested and prosecuted instead of being expelled or deported.¹⁸² The Committee has further counselled that a state party –

*... should consider establishing its jurisdiction over the offences referred to in article 4 of the Convention in all cases listed in article 5 of the Convention, including when the victim is a national of the State party.*¹⁸³

This means that state parties ought not to have a discretion regarding the cases over which to establish jurisdiction. The universal jurisdiction over torture should be “effective”.¹⁸⁴ State parties

¹⁷⁴ Concluding observations of the Committee against Torture on the second periodic report of Kazakhstan (CAT/C/KAZ/2), CAT/C/KAZ/CO/2, 12 December 2008, para. 19.

¹⁷⁵ Concluding observations of the Committee against Torture on the second periodic report of Qatar, CAT/C/QAT/CO/2, 25 January 2013, para. 25.

¹⁷⁶ Concluding observations of the Committee against Torture on the fifth periodic report of Spain (CAT/C/ESP/5), CAT/C/ESP/CO/5, 9 December 2009, para. 17.

¹⁷⁷ Concluding observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka (CAT/C/LKA/3-4), CAT/C/LKA/CO/3-4, 8 December 2011, para. 26.

¹⁷⁸ Concluding observations of the Committee against Torture on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/GBR/CO/5, 24 June 2013, para. 22.

¹⁷⁹ Conclusions and recommendations of the Committee against Torture on the initial report of Uganda (CAT/C/5/Add.32), CAT/C/CR/34/UGA, 21 June 2005, para. 10(c).

¹⁸⁰ Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 19.

¹⁸¹ Concluding observations of the Committee against Torture on the fifth periodic report of Germany (CAT/C/DEU/5), CAT/C/DEU/CO/5, 12 December 2011, para. 28.

¹⁸² Concluding observations of the Committee against Torture on the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/CO/6, 25 June 2012, para. 14.

¹⁸³ Concluding observations of the Committee against Torture on the third periodic report of Australia (CAT/C/67/Add.7), CAT/C/AUS/CO/3, 22 May 2008, para. 19.

have an obligation to “take all necessary steps to ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be directly applied before domestic courts”.¹⁸⁵ The obligation to prosecute under article 5 arises when the state party does not extradite the suspect.¹⁸⁶

Detaining torture suspects

UNCAT’s article 6 determines the following in respect of detaining torture suspects:

1. *Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.*
2. *Such State shall immediately make a preliminary inquiry into the facts.*
3. *Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.*
4. *When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State*

¹⁸⁴ Concluding observations of the Committee against Torture on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/GBR/CO/5, 24 June 2013, para. 22.

¹⁸⁵ Concluding observations of the Committee against Torture on the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/CO/6, 25 June 2012, para. C.

¹⁸⁶ Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012, para. 23: “The State party should introduce provisions into its criminal legislation that establish its jurisdiction over acts of torture in accordance with article 5 of the Convention, including provisions under which the State party may prosecute, in accordance with article 7, foreign nationals who have committed acts of torture outside the State party’s territory but who are present in its territory and have not been extradited”.

which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

CAT has pronounced that a state party has an obligation to take into custody a person in its territory who is suspected of having committed torture. As intimated above, the mere presence of the suspect in the territory of the arresting state party is sufficient to trigger the obligation.¹⁸⁷ A state party would be in violation of UNCAT article 6 if, through agreements or otherwise, it exempted foreign nationals who were torture suspects from arrest while they were in its territory.¹⁸⁸ A state party does not always have to take the suspect into custody, since all that is required is to “take him into custody or take other legal measures to ensure his presence”.¹⁸⁹ Needless to say, the state party will have to put measures in place to ensure that the suspect does not flee from its territory if it elects not to detain him/her.¹⁹⁰

Prosecuting torture committed abroad

Article 7 of UNCAT stipulates the following in respect of prosecuting torture committed abroad:

1. *The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*
2. *These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in*

¹⁸⁷ Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 19.

¹⁸⁸ Concluding observations of the Committee against Torture on the second periodic report of the former Yugoslav Republic of Macedonia (CAT/C/MKD/2), CAT/C/MKD/CO/2, 21 May 2008, para. 12.

¹⁸⁹ Conclusions and recommendations of the Committee against Torture on the third periodic report of France (CAT/C/34/Add.19), CAT/C/FRA/CO/3, 3 April 2006, para. 14.

¹⁹⁰ J Hermann Burgers & Hans Danelius. 1988. *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The Hague: Martinus Nijhoff Publishers, p. 134.

article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. *Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.*

The obligations under article 7 should be read in the light of those under article 5. Such a reading means that, if a state party does not prosecute a suspect under article 5, it is required to extradite the suspect to another country for prosecution. Because of the close relationship between articles 5 and 7, CAT in some cases has combined the recommendations it makes to state parties. For example, in its concluding observations on the combined fifth and sixth periodic reports of Mexico, the Committee proposed that the –

*... State party should introduce provisions into its criminal legislation that establish its jurisdiction over acts of torture in accordance with article 5 of the Convention, including provisions under which the State party may prosecute, in accordance with article 7, foreign nationals who have committed acts of torture outside the State party's territory but who are present in its territory and have not been extradited.*¹⁹¹

The Committee made similar recommendations in relation to countries such as South Africa,¹⁹² Sri Lanka,¹⁹³ and the former Yugoslav Republic of Macedonia.¹⁹⁴ Different countries have taken different approaches on the issue of prosecuting torture committed abroad. In South Africa,¹⁹⁵ for example, torture committed abroad may be prosecuted only with the written authority of the National Director of Public Prosecutions. However, this is not a requirement in Uganda, unless

¹⁹¹ Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012, para. 23.

¹⁹² Conclusions and recommendations of the Committee against Torture on the initial report of South Africa (CAT/C/52/Add.3), CAT/C/ZAF/CO/1, 7 December 2006, para. 17.

¹⁹³ Concluding observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka (CAT/C/LKA/3-4), CAT/C/LKA/CO/3-4, 8 December 2011, para. 26.

¹⁹⁴ Concluding observations of the Committee against Torture on the second periodic report of the former Yugoslav Republic of Macedonia (CAT/C/MKD/2), CAT/C/MKD/CO/2, 21 May 2008, para. 11.

¹⁹⁵ Section 6(2), Prevention and Combating of the Torture of Persons Act 13 of 2013.

the suspect is not a Ugandan national.¹⁹⁶ Namibia will have to delineate a position for itself in this regard.

Torture as an extraditable offence

UNCAT article 8 reads as follows in respect of treating torture as an extraditable offence:

1. *The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.*
2. *If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.*
3. *States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.*
4. *Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.*

Thus, article 8 requires Namibia to make torture an extraditable offence. In Namibia's Extradition Act, an extraditable offence is one that carries a minimum of 12 months imprisonment, provided the dual criminality requirement is complied with. In light of the proposed punishment, torture would automatically fall within the ambit of the Extradition Act. Article 8 would require Namibia to "adopt appropriate legislative measures to ensure that torture constitutes an extraditable offence, while respecting the provisions of article 3 of the

¹⁹⁶ See section 19, Prevention and Prohibition of Torture Act 2012.

Convention".¹⁹⁷ In the case of Burundi, CAT has suggested the following, where the extradition legislation of a state party does not provide for torture as an extraditable offence:

*The State party should take appropriate legislative and administrative measures to ensure that the present Convention can be invoked as a legal basis for extradition in respect of the crimes enumerated in article 4 of the Convention, when it receives a request for extradition from another State party with which it has no extradition treaty, while at the same time observing the provisions of article 3 of the Convention.*¹⁹⁸

The Committee has made similar recommendations in respect of Zambia.¹⁹⁹ Namibia would have to amend its Extradition Act to provide expressly that torture is an extraditable offence. This amendment would be needed even though the government is of the view that no person may be extradited if there is evidence that such person may be subjected to torture.²⁰⁰ Alternatively, provision should be made for torture as an extraditable offence in the Prevention and Combating of Torture Bill.

Cooperation with other states

The provisions of UNCAT article 9 read as follows concerning cooperation with other states:

1. *States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.*
2. *States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.*

¹⁹⁷ Conclusions and recommendations of the Committee against Torture on the initial report of Togo (CAT/C/5/Add.33), CAT/C/TGO/CO/1, 28 July 2006, para. 15.

¹⁹⁸ Conclusions and recommendations of the Committee against Torture on the initial report of Burundi (CAT/C/BDI/1), CAT/C/BDI/CO/1, 15 February 2007, para. 15.

¹⁹⁹ Concluding observations of the Committee against Torture on the second periodic report of Zambia (CAT/C/ZMB/2), CAT/C/ZMB/CO/2, 26 May 2008, para. 7.

²⁰⁰ Namibia's initial report to the Committee against Torture, CAT/C/28/Add.2, 29 January 1997, para.'s 8–12.

The obligations imposed on Namibia by article 9 go beyond the supply of evidence to other states. Namibia has either signed or ratified multiple agreements on, and has concluded various arrangements on mutual assistance in, criminal matters. These include the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters (2002). The Protocol provides for circumstances in which evidence may be obtained from state parties²⁰¹ and for the transfer of persons in custody from one state party to another for testimony purposes.²⁰² In this connection, CAT has recommended that Chad should –

*... review the terms of the 1961 General Agreement on Cooperation in Judicial Matters and all other judicial cooperation agreements so as to ensure that the transfer of detainees to another signatory State is carried out under a judicial procedure and in strict compliance with article 3 of the Convention.*²⁰³

In its recommendations to Djibouti, the Committee stated the following:

*The terms of judicial cooperation agreements signed with neighbouring countries should be revised so as to ensure that the transfer of detainees to another signatory State is carried out under a judicial procedure and in strict compliance with article 3 of the Convention.*²⁰⁴

It is submitted that Namibia has a similar obligation to ensure that detainees are not transferred to a state where there is a risk that they will be subjected to torture. CAT has also reiterated –

... [i]ts constant view ... that article 3 of the Convention and its obligation of non-refoulement applies to a State party's military forces, wherever situated, where they exercise effective control over an individual. This remains so even if the State party's forces are subject to [the] operational command of another State. Accordingly, the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring State was or should have been aware of a real risk of torture ... With regard to the transfer of detainees within a State party's

²⁰¹ Article 12.

²⁰² Article 15.

²⁰³ Concluding observations of the Committee against Torture on the initial report of Chad (CAT/C/TCD/1), CAT/C/TCD/CO/1, 4 June 2009, para. 23.

²⁰⁴ Concluding observations of the Committee against Torture on the initial report of Djibouti (CERD/C/DJI/1), CAT/C/DJI/CO/1, 22 December 2011, para. 14(c).

*effective custody to the custody of any other State, the State party should ensure that it complies fully with article 3 of the Convention in all circumstances.*²⁰⁵

In its recommendations to the United States of America, the Committee pronounced as follows:

*The State party should take effective steps to ensure the provision of mutual judicial assistance in all matters of criminal procedure regarding the offence of torture and the related crimes of attempting to commit, [and] complicity and participation in[,] torture. The Committee recalls that article 9 of the Convention obligates States parties to “afford one another the greatest measure of assistance in connection with criminal proceedings” related to violations of the Convention.*²⁰⁶

The question of receiving evidence from abroad for use in Namibia or sending evidence from Namibia for use abroad is governed by the International Co-operation in Criminal Matters Act.²⁰⁷ This Act does not deal with the issue of transmitting from or receiving into Namibia evidence obtained through torture.²⁰⁸ Namibia should supply or accept cross-border evidence only if it was not obtained through torture, given that UNCAT article 15 and jurisprudence from Namibian courts make it clear that evidence elicited by torture is inadmissible. The Prevention and Combating of Torture Bill should address this matter expressly.

Education and training

Article 10 of UNCAT specifies the following in relation to education and training:

1. *Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or*

²⁰⁵ Conclusions and recommendations of the Committee against Torture on the fifth periodic report of Denmark, including Greenland (CAT/C/81/Add.1 (Part I), CAT/C/DNK/CO/5, 16 July 2007, para. 13. See also Conclusions and recommendations of the Committee against Torture on the fifth periodic report of Norway (CAT/C/81/Add.4), CAT/C/NOR/CO/5, 5 February 2008, para. 7.

²⁰⁶ Concluding observations of the Committee against Torture on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014.

²⁰⁷ Act 9 of 2000.

²⁰⁸ Section 9 deals with the rights of witnesses.

military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. *Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.*

CAT has called on Namibia to ensure the following:

*The education of members of the Police Department, the National Defence Force, the Prison Service, other law enforcement personnel and medical officers regarding the prohibition of torture and other cruel, inhuman and degrading treatment should be fully included in their training, in accordance with article 10 of the Convention, with special emphasis on the definition of torture as contained in article 1 of the Convention and also emphasizing the criminal liability of those who commit acts of torture.*²⁰⁹

According to CAT, the training should not be limited to the prohibition of torture, but should include the prohibition of ill-treatment.²¹⁰ CAT has recommended as follows in this respect:

*The State party should take all appropriate measures to ensure the full applicability of the provisions of the Convention in its domestic legal order. Such measures should include extensive training on the provisions of the international human rights treaties, including the Convention, for its State officials, law enforcement and other relevant officials, as well as judges, prosecutors and lawyers.*²¹¹

According to the Committee, a state party has a duty to train “all law enforcement and immigration officials in international refugee and human rights law, emphasizing the principle of

²⁰⁹ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 243.

²¹⁰ Concluding observations of the Committee against Torture on the initial report of Andorra, CAT/C/AND/CO/1, 20 December 2013, para. 10; Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of the Netherlands, CAT/C/NLD/CO/5-6, 20 June 2013, para. 8(c).

²¹¹ Concluding observations of the Committee against Torture on the second periodic report of Cambodia (CAT/C/KHM/2), CAT/C/KHM/CO/2, 20 January 2011, para. 10.

non-refoulement”.²¹² A state party also has an obligation to offer “appropriate training for judges regarding the risks of torture in receiving countries”.²¹³ CAT, in its concluding observations on Kenya’s initial report, observed as follows:

While acknowledging the existing training programmes on human rights for law enforcement personnel, the Committee remains concerned that such trainings do not include the prohibition of torture as [a] specific crime of grave nature and do not reach all relevant personnel who are in direct contact with detainees, including police officers, prison staff, judges and, including the military and health personnel. (Art. 10)

*The State party should reinforce and expand the human rights training programmes with the objective of bringing about a change in attitudes and behaviour. Training should include the prohibition of torture as [a] specific crime of grave nature and should be made available to all law enforcement personnel enumerated in article 10 of the Convention, at all levels, including to the military and health personnel who are in direct contact with persons deprived of their liberty.*²¹⁴

In its concluding observations and recommendations to Djibouti, the Committee recommended the following:

The State party should further develop and strengthen training programmes to ensure that all officials, in particular judges and law enforcement, security, army, intelligence and prison officers, are aware of the provisions of the Convention, and specifically that they are fully aware of the absolute prohibition of torture and of the fact that violations of the Convention will not be tolerated, that they will be promptly and impartially investigated and that the offenders will be prosecuted. Furthermore, all relevant personnel, including those referred to in article 10 of the Convention, should receive specific training on how to identify signs of torture and ill-treatment. This should specifically include an introduction to the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), published by the United Nations in 2004. In addition, the

²¹² Concluding observations of the Committee against Torture on the initial report of Mongolia (CAT/C/MNG/1), CAT/C/MNG/CO/1, 20 January 2011, para. 13.

²¹³ Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Bulgaria (CAT/C/BGR/4-5), CAT/C/BGR/CO/4-5, para. 16(d).

²¹⁴ Concluding observations of the Committee against Torture on the initial report of Kenya (CAT/C/KEN/1), CAT/C/KEN/CO/1, 19 January 2009, para. 18.

*State party should assess the effectiveness and impact of such training and educational programmes.*²¹⁵

The Committee made similar recommendations in regard to China,²¹⁶ Kazakhstan,²¹⁷ Kenya,²¹⁸ Madagascar,²¹⁹ Montenegro,²²⁰ Paraguay,²²¹ Saudi Arabia,²²² Senegal,²²³ Turkmenistan,²²⁴ and Zambia.²²⁵ The training in question should be regular and should be conducted “especially in cooperation with civil society organisations”.²²⁶ State parties are urged to “encourage the

²¹⁵ Concluding observations of the Committee against Torture on the initial report of Djibouti (CERD/C/DJI/1), CAT/C/DJI/CO/1, 22 December 2011, para. 19.

²¹⁶ Concluding observations of the Committee against Torture on the fourth periodic report of China (CAT/C/CHN/4), CAT/C/CHN/CO/4 12 December 2008 para. 36.

²¹⁷ Concluding observations of the Committee against Torture on the third periodic report of Kazakhstan, CAT/C/KAZ/CO/3, 12 December 2014.

²¹⁸ Concluding observations of the Committee against Torture on the second periodic report of Kenya, CAT/C/KEN/CO/2, 19 June 2013, para. 22.

²¹⁹ Concluding observations of the Committee against Torture on the initial report of Madagascar (CAT/C/MDG/1), CAT/C/MDG/CO/1, 21 December 2011, para. 17.

²²⁰ Concluding observations of the Committee against Torture on the second periodic report of Montenegro, CAT/C/MNE/CO/2, 17 June 2014.

²²¹ Concluding observations of the Committee against Torture on the combined fourth to sixth periodic reports of Paraguay (CERD/C/PRY/4-6), CAT/C/PRY/CO/4-6, 14 December 2011, para. 24.

²²² Conclusions and recommendations of the Committee against Torture on the initial periodic report of Saudi Arabia (CAT/C/42/Add.2), CAT/C/CR/28/5, 12 June 2002, para. 8(j).

²²³ Concluding observations of the Committee against Torture on the third periodic report of Senegal, CAT/C/SEN/CO/3, 17 January 2013, para. 25.

²²⁴ Concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/1), CAT/C/TKM/CO/1, 15 June 2011, para. 24(a).

²²⁵ Concluding observations of the Committee against Torture on the second periodic report of Zambia (CAT/C/ZMB/2), CAT/C/ZMB/CO/2, 26 May 2008, para. 24.

²²⁶ Concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/1), CAT/C/TKM/CO/1, 15 June 2011, para. 24(a); Concluding observations of the Committee against Torture on the fourth periodic report of Belarus (CAT/C/BLR/4), CAT/C/BLR/CO/4, 7 December 2011, para. 21.

involvement of non-governmental organisations in training of law enforcement officials”.²²⁷ The training on the prohibition of torture should be introduced in official education programmes for the persons or parties mentioned in article 10.²²⁸ The training programmes should be mandatory or compulsory²²⁹ and be provided to “all public officials”.²³⁰ The training materials should include UNCAT and may include CAT’s General Comments, decisions and conclusions.²³¹ In other words, the training materials should be “suitable”²³² and the training should be “extensive”.²³³ The state party also “is encouraged to sensitize the media to its obligations under the Convention, in particular the absolute prevention [prohibition] of torture”.²³⁴

Review of interrogation rules

Article 11 of UNCAT provides as follows:

²²⁷ Concluding observations of the Committee against Torture on the second periodic report of Japan, CAT/C/JPN/CO/2, 28 June 2013, para. 17(c).

²²⁸ Conclusions and recommendations of the Committee against Torture on the initial report of Cambodia (CAT/C/21/Add.5), CAT/C/CR/30/2, 27 May 2003, para. 7(j).

²²⁹ Concluding observations of the Committee against Torture on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014; Concluding observations of the Committee against Torture on the fourth report of Cyprus, CAT/C/CYP/CO/4, 16 June 2014, para. 11(c); Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Guatemala, CAT/C/GTM/CO/5-6, 21 June 2013, para. 24.

²³⁰ Concluding observations of the Committee against Torture on the sixth periodic report of Ukraine, CAT/C/UKR/CO/6, 12 December 2014; Concluding observations of the Committee against Torture on the sixth and seventh periodic reports of Sweden, CAT/C/SWE/CO/6-7, 12 December 2014.

²³¹ Concluding observations of the Committee against Torture on the initial report of the Holy See, CAT/C/VAT/CO/1, 17 June 2014.

²³² Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Guatemala, CAT/C/GTM/CO/5-6, 21 June 2013, para. 24.

²³³ Concluding observations of the Committee against Torture on the second periodic report of Jordan (CAT/C/JOR/2), CAT/C/JOR/CO/2, 25 May 2010, para. 7.

²³⁴ Concluding observations of the Committee against Torture on the sixth and seventh periodic reports of Sweden, CAT/C/SWE/CO/6-7, 12 December 2014.

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

CAT has called upon state parties to review their interrogation rules and, in particular, to amend interrogation rules and procedures, such as introducing audio or videotaping, with a view to preventing torture and ill-treatment. This appeal has been made to Austria,²³⁵ Greece²³⁶ and Liechtenstein.²³⁷ Apart from amending interrogation rules and procedures, state parties are required to review their interrogation instructions, methods and practices with the aim of preventing cases of torture. The Committee has enjoined Austria,²³⁸ Croatia,²³⁹ Indonesia,²⁴⁰ Kenya,²⁴¹ the Maldives²⁴² and the Philippines²⁴³ in this regard. What is more, state parties are required to train their law enforcement officers on any rules and methods that have been

²³⁵ Conclusions and recommendations of the Committee against Torture on the third periodic report of Austria (CAT/C/34/Add.18), CAT/C/AUT/CO/3, 15 December 2005, para. 11.

²³⁶ Concluding observations of the Committee against Torture on the combined fifth and sixth periodic report of Greece (CAT/C/GRC/5-6), CAT/C/GRC/CO/5-6, 27 June 2012, para. 10(b).

²³⁷ Concluding observations of the Committee against Torture on the third periodic report of Liechtenstein (CAT/C/LIE/3), CAT/C/LIE/CO/3, 25 May 2010, para. 25.

²³⁸ Conclusions and recommendations of the Committee against Torture on the third periodic report of Austria (CAT/C/34/Add.18), CAT/C/AUT/CO/3, 15 December 2005, para. 11.

²³⁹ Conclusions and recommendations of the Committee against Torture on the third periodic report of Croatia (CAT/C/54/Add.3), CAT/C/CR/32/3, 11 June 2004, para. 9(n).

²⁴⁰ Concluding observations of the Committee against Torture on the second periodic report of Indonesia (CAT/C/72/Add.1), CAT/C/IDN/CO/2, 2 July 2008, para. 10.

²⁴¹ Concluding observations of the Committee against Torture on the initial report of Kenya (CAT/C/KEN/1), CAT/C/KEN/CO/1, 19 January 2009, para. 13.

²⁴² Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, CAT/OP/MDV/1, 26 February 2009, para. 133: "The SPT recommends that, as a means of preventing cases of torture and ill-treatment, interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest or detention should be kept under systematic review".

²⁴³ Concluding observations of the Committee against Torture on the second periodic report of the Philippines (CAT/C/PHL/2), CAT/C/PHL/CO/2, 29 May 2009, para. 7.

revised.²⁴⁴ One of the issues that should be addressed by the interrogation rules concerns arrested persons having access to a lawyer within a few hours of arrest.²⁴⁵

Investigation of torture

In article 12 of UNCAT the following is stipulated:

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

CAT has recommended that, in Namibia, there is “the need to legislate for and to enforce the prompt and impartial investigation of any substantiated allegations of torture”.²⁴⁶ It added the following:

*Independent governmental bodies consisting of persons of high moral standing should be appointed to take over the inspection of detention centres and places of imprisonment. The Government should also establish an independent police complaints authority dealing with complaints against members of the Police Department.*²⁴⁷

Notably, the Committee also expressed concern about the system in Luxembourg, –

²⁴⁴ Conclusions and recommendations of the Committee against Torture on the second report of the United States of America (CAT/C/48/Add.3/Rev.1), CAT/C/USA/CO/2, 25 July 2006, para. 23; Concluding observations of the Committee against Torture on the second periodic report of the former Yugoslav Republic of Macedonia (CAT/C/MKD/2), CAT/C/MKD/CO/2, 21 May 2008, para. 10(b); Concluding observations of the Committee against Torture on the third periodic report of Australia (CAT/C/67/Add.7), CAT/C/AUS/CO/3, 22 May 2008, para. 21.

²⁴⁵ Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 22.

²⁴⁶ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 241(e).

²⁴⁷ (ibid.:para. 244).

*... which gives the public prosecutor discretion to decide not to prosecute perpetrators of acts of torture and ill-treatment involving law enforcement officers or even to order an investigation, in blatant violation of the provisions of article 12 of the Convention.*²⁴⁸

CAT therefore advised as follows:

*In order to respect the letter and spirit of the provisions of article 12 of the Convention, the State party should consider departing from the system which gives the public prosecutor discretion to decide whether to prosecute so that there can be no doubt as to the obligation for the competent authorities to launch impartial investigations immediately and systematically in all cases in which there are reasonable grounds for believing that an act of torture has been committed anywhere in the territory under its jurisdiction.*²⁴⁹

The Committee made similar recommendations as regards Benin,²⁵⁰ Burundi²⁵¹ and France.²⁵² The obligation to investigate torture incorporates torture allegedly committed by a state party's troops which are stationed abroad. Thus, for example, the Committee has counselled that Italy should ensure it complies with article 5 of the Convention and should –

*... take the necessary measures to ensure prompt, impartial and effective investigations into all allegations of torture and ill-treatment committed by law enforcement officials and Italian troops, in Italy or abroad, and try perpetrators as well as impose appropriate sentences on those convicted.*²⁵³

²⁴⁸ Conclusions and recommendations of the Committee against Torture on the fifth periodic report of Luxembourg (CAT/C/81/Add.5), CAT/C/LUX/CO/5, 16 July 2007, para. 11.

²⁴⁹ (ibid.:para. 11).

²⁵⁰ Conclusions and recommendations of the Committee against Torture on the second periodic report of Benin (CAT/C/BEN/2), CAT/C/BEN/CO/2, 19 February 2008, para. 8.

²⁵¹ Conclusions and recommendations of the Committee against Torture on the initial report of Burundi (CAT/C/BDI/1), CAT/C/BDI/CO/1, 15 February 2007, para. 22.

²⁵² Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 31.

²⁵³ Conclusions and recommendations of the Committee against Torture on the fourth periodic report of Italy (CAT/C/67/Add.3), CAT/C/ITA/CO/4, 16 July 2007, para. 13.

Furthermore, the obligation in article 12 extends to investigating torture allegations in respect of inter-prisoner violence and deaths in custody,²⁵⁴ and military training.²⁵⁵ The investigation has to be “prompt, thorough and impartial”.²⁵⁶ In addition, it ought to be spontaneous whenever there are reasonable grounds to believe that an act of torture has been committed.²⁵⁷ In other words, the investigation under article 12 (and under article 16)²⁵⁸ must be conducted “even in the absence of a formal complaint”.²⁵⁹ CAT and the Subcommittee on Prevention of Torture take the view that, although article 12 refers to investigating torture, it also applies to investigating

²⁵⁴ Conclusions and recommendations of the Committee against Torture on the fourth report of Estonia (CAT/C/80/Add.1), CAT/C/EST/CO/4, 19 February 2008 para. 16; Conclusions and recommendations of the Committee against Torture on the initial report of South Africa (CAT/C/52/Add.3), CAT/C/ZAF/CO/1, 7 December 2006, para. 20; Concluding observations of the Committee against Torture on the fifth periodic report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012, para. 8.

²⁵⁵ Concluding observations of the Committee against Torture on the fifth periodic report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012, para. 16: “The State party should reinforce measures to prohibit and eliminate hazing in the armed forces and ensure prompt and impartial investigation of all allegations of hazing and deaths in the military in order to achieve zero tolerance of ill-treatment and torture of military personnel ... Where evidence of hazing is found, the State party should ensure prosecution of all incidents and appropriate punishment of the perpetrators, including exclusion from the armed forces; make the results of those investigations public; and provide redress for victims, including appropriate medical and psychological assistance”.

²⁵⁶ Conclusions and recommendations of the Committee against Torture on the second report of the United States of America (CAT/C/48/Add.3/Rev.1), CAT/C/USA/CO/2, 25 July 2006, para. 25; Conclusions and recommendations of the Committee against Torture on the initial report of South Africa (CAT/C/52/Add.3), CAT/C/ZAF/CO/1, 7 December 2006, para. 20; Concluding observations of the Committee against Torture on the initial report of Chad (CAT/C/TCD/1), CAT/C/TCD/CO/1, 4 June 2009, para. 17(a).

²⁵⁷ Concluding observations of the Committee against Torture on the second periodic report of Cuba (CAT/C/CUB/2), CAT/C/CUB/CO/2, 25 June 2012, para. 17(b).

²⁵⁸ See the section entitled “Preventing CIDT” below.

²⁵⁹ Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, CAT/OP/HND/1, 10 February 2010, para. 38.

CIDT.²⁶⁰ Thus, some of the recommendations made by the Committee under article 12 apply to article 16 as well.

The body responsible for investigating allegations of torture –

*... [s]hould be equipped with the necessary human and financial resources and have the executive authority to formulate binding recommendations in respect of investigations conducted and findings regarding such complaints, in line with the requirements of Article 12 of the Convention.*²⁶¹

The investigative body should be independent “and not subordinate to the executive branch of Government”,²⁶² and the investigation should not be conducted “under the authority of the police”.²⁶³ Namibian prosecutors are independent and have the discretion, in respect of all

²⁶⁰ Conclusions and recommendations of the Committee against Torture on the second report of the United States of America (CAT/C/48/Add.3/Rev.1), CAT/C/USA/CO/2, 25 July 2006, para. 25; Conclusions and recommendations of the Committee against Torture on the initial report of South Africa (CAT/C/52/Add.3), CAT/C/ZAF/CO/1, 7 December 2006, para. 20; Concluding observations of the Committee against Torture on the second periodic report of Cuba (CAT/C/CUB/2), CAT/C/CUB/CO/2, 25 June 2012, para. 17(a); Conclusions and recommendations of the Committee against Torture on the second periodic report of Venezuela (CAT/C/33/Add.5), CAT/C/CR/29/2, 23 December 2002, para. 11(b); Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/PRY/2, 30 May 2011, para. 51; Concluding observations of the Committee against Torture on the initial report of Nicaragua (CAT/C/NIC/1), CAT/C/NIC/CO/1, 10 June 2009, para. 11; Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, CAT/OP/PRY/1, 7 June 2010, para. 144(b).

²⁶¹ Concluding observations of the Committee against Torture on the report of the Hong Kong Special Administrative Region (HKSAR), forming part of the fourth periodic report of China (CAT/C/HKG/4), CAT/C/HKG/CO/4, 19 January 2009, para. 12.

²⁶² Concluding observations of the Committee against Torture on the second periodic report of Cuba (CAT/C/CUB/2), CAT/C/CUB/CO/2, 25 June 2012, para. 17(a).

²⁶³ Concluding observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka (CAT/C/LKA/3-4), CAT/C/LKA/CO/3-4, 8 December 2011, para. 18.

cases, to decide whether or not to prosecute.²⁶⁴ This prosecutorial discretion exists whether or not there is a *prima facie* case against the accused. However, it would be contrary to Namibia's obligation under article 12 of UNCAT for prosecutors to decline to pursue a torture suspect if there is evidence that the suspect committed the offence.

Right to complain

Article 13 of UNCAT requires the following:

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

The obligation to investigate in article 13 is an extrapolation of the obligation in article 12. The difference is that, under article 13, the investigation has to be initiated after receipt of a complaint by an alleged torture victim. The right to complain under article 13 is available to "anyone claiming to have been subjected to torture or cruel, inhuman or degrading treatment in any territory under [a state party's] jurisdiction".²⁶⁵ Thus, state parties should ensure that those who allege CIDT also have a right to complain on the basis of article 13.²⁶⁶ The complaint under article 13 does not have to be written.²⁶⁷

²⁶⁴ Namibia's initial report to the Committee against Torture, CAT/C/28/Add.2, 29 January 1997, para. 31.

²⁶⁵ Concluding observations of the Committee against Torture on the consolidated fourth to sixth periodic reports of France (CAT/C/FRA/4-6), CAT/C/FRA/CO/4-6, 20 May 2010, para. 33.

²⁶⁶ Conclusions and recommendations of the Committee against Torture on the third periodic report of France (CAT/C/34/Add.19), CAT/C/FRA/CO/3, 3 April 2006, para. 22.

²⁶⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Morocco, A/HRC/22/53/Add.2, 30 April 2013, para. 88(f).

The right enshrined in article 13 should be guaranteed “in law and in practice”.²⁶⁸ In other words, “the State party should create adequate conditions for victims to exercise their right to complain and have each case promptly, impartially and effectively investigated”.²⁶⁹ Where allegations of torture have been investigated, victims should “have access to their medical file upon their request”.²⁷⁰ CAT, in its recommendations relating to Peru, has determined that a state party also has the following obligation:

*In accordance with Article 13 of the Convention ... [to] adopt effective measures to ensure that those who report acts of torture or ill-treatment are protected from intimidation and possible reprisals for making such reports. The State party should investigate all reports of intimidation of witnesses and should set up an appropriate mechanism to protect witnesses and victims.*²⁷¹

The Committee has made similar proposals as regards Sri Lanka.²⁷² Importantly, lawyers who represent torture victims should also be protected against intimidation and reprisals.²⁷³ In

²⁶⁸ Concluding observations of the Committee against Torture on the combined fourth and fifth periodic reports of Croatia, CAT/C/HRV/CO/4-5, 18 December 2014, para. 9; Conclusions and recommendations of the Committee against Torture on the third periodic report of Uzbekistan (CAT/C/UZB/3), CAT/C/UZB/CO/3, 26 February 2008, para. 15.

²⁶⁹ Conclusions and recommendations of the Committee against Torture on the fifth periodic report of Ukraine (CAT/C/81/Add.1), CAT/C/UKR/CO/5, 3 August 2007, para. 14. See also Concluding observations of the Committee against Torture on the second periodic report of Qatar, CAT/C/QAT/CO/2, 25 January 2013, para. 19.

²⁷⁰ Concluding observations of the Committee against Torture on the combined second to fifth periodic reports of Bosnia and Herzegovina (CAT/C/BIH/2-5), CAT/C/BIH/CO/2-5, 20 January 2011, para. 21.

²⁷¹ Conclusions and recommendations of the Committee against Torture on the fourth periodic report of Peru (CAT/C/61/Add.2), CAT/C/PER/CO/4, 25 July 2006, para. 20.

²⁷² Conclusions and recommendations of the Committee against Torture on the second periodic report of Sri Lanka (CAT/C/48/Add.2), CAT/C/LKA/CO/2, 15 December 2005, para. 15.

²⁷³ Concluding observations of the Committee against Torture on the initial report of Mongolia (CAT/C/MNG/1), CAT/C/MNG/CO/1, 20 January 2011, para. 11.

Namibia, section 189 of the Criminal Procedure Act of 2004,²⁷⁴ makes provision for circumstances in which vulnerable witnesses may be protected against intimidation.²⁷⁵

Redress for victims of torture

In terms of UNCAT's article 14, victims of torture should be entitled to resort to redress:

1. *Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full [a] rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*
2. *Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*

In its concluding observations on Namibia's initial report, CAT stated its –

*... concern about the fact that there are no legal instruments to deal specifically with compensating victims of torture or other ill-treatment. The existing procedures for obtaining redress, compensation and rehabilitation seem to be inadequate and in many cases ineffective. Moreover, they limit the right to redress and compensation to the victim of torture, failing to give, in accordance with article 14, paragraph 1, of the Convention, the same standing to the deceased victim's dependants.*²⁷⁶

CAT considered the question of redress for torture victims important enough to draft a detailed General Comment on UNCAT's article 14.²⁷⁷ The General Comment sets out the scope of the right to redress under article 14 in the following terms:

²⁷⁴ Act no. 25 of 2004. The Act has been enacted by Parliament but is not operational in Namibia.

²⁷⁵ The rationale behind section 189 is briefly referred to in *Eiseb v S* (SA 33/2012) [2014] NASC 12 (21 July 2014) para. 10.

²⁷⁶ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 240.

²⁷⁷ Committee against Torture, General Comment No. 3 (Implementation of article 14 by States parties), CAT/C/GC/3, 13 December 2012.

6. ... Redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Committee recognizes the elements of full redress under international law and practice as outlined in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines)*. Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.
7. Where State authorities or others acting in their official capacity have committed, know or have reasonable grounds to believe that acts of torture or ill-treatment have been committed by non-State officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention, the State bears responsibility for providing redress for the victims ...²⁷⁸

As to who qualifies for redress under article 14, the General Comment offers a fairly broad definition of torture victims to include –

[p]ersons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term “victim” also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization. The term “survivors” may, in some cases, be preferred by persons who have suffered harm. The Committee uses the legal term “victims” without prejudice to other terms which may be preferable in specific contexts.²⁷⁹

²⁷⁸ (ibid.:para.'s 6–7).

²⁷⁹ (ibid.:para. 3).

CAT has also made the following express statement:

To give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full [a] rehabilitation as possible. Such legislation must allow for individuals to exercise this right and ensure their access to a judicial remedy. While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress.²⁸⁰

The above extracts from General Comment No. 3 make it clear that Namibia has an obligation to ensure that its anti-torture legislation incorporates a right of redress for torture victims that complies with UNCAT article 14.

Evidence obtained through torture

Article 15 of UNCAT stipulates the following:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

CAT has recommended that Namibia should enact legislation which addresses –

... the need procedurally to exclude all evidence obtained by the use of torture in criminal and all other proceedings, except in proceedings against the perpetrator of torture himself.²⁸¹

Although article 15 refers only to “any statement” elicited by torture, the practice of CAT establishes that state parties have an obligation to exclude any statement or statements,²⁸²

²⁸⁰ (ibid.:para. 20).

²⁸¹ Report of the Committee against Torture, General Assembly, Official Records, 52nd Session, Supplement No. 44(A/52/44) (1997), para. 241(e).

confessions²⁸³ and “evidence”²⁸⁴ obtained as a result of torture. The jurisprudence and practice of other treaty monitoring bodies, such as the Human Rights Committee and the African

²⁸² Concluding observations of the Committee against Torture on the fourth periodic report of Israel, CAT/C/ISR/CO/4, 23 June 2009, para. 25; Concluding observations of the Committee against Torture on the third periodic report of Armenia, CAT/C/ARM/CO/3, 6 July 2012, para. 16; Concluding observations of the Committee against Torture on the combined fourth to sixth periodic reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011, para. 20; Concluding observations of the Committee against Torture on the combined fifth and sixth periodic report of Finland, CAT/C/FIN/CO/5-6, 29 June 2011, para. 21; Concluding observations of the Committee against Torture on the second periodic report of Tajikistan, CAT/C/TJK/CO/2, 21 January 2013, para. 13; Concluding observations of the Committee against Torture on the third periodic report of Senegal, CAT/C/SEN/CO/3, 17 January 2013, para. 13.

²⁸³ Concluding observations of the Committee against Torture on the second periodic report of Yemen, CAT/C/YME/CO/2/Rev.1, 25 May 2010, para. 28; Concluding observations of the Committee against Torture on the second periodic report of Jordan, CAT/C/JOR/CO/2, 25 May 2010, para. 30; Concluding observations of the Committee against Torture on the second periodic report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011, para. 28; Concluding observations of the Committee against Torture on the initial periodic report of Djibouti, CAT/C/DJI/CO/1, 22 December 2011, para. 20; Concluding observations of the Committee against Torture on the third periodic report of Armenia, CAT/C/ARM/CO/3, 6 July 2012, para. 16; Concluding observations of the Committee against Torture on the second periodic report of the Philippines, CAT/C/PHL/CO/2, 29 May 2009, para. 23; Concluding observations of the Committee against Torture on the initial report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para. 31; Concluding observations of the Committee against Torture on the second periodic report of the Republic of Moldova, CAT/C/MDA/CO/2, 29 March 2010, para. 21; Concluding observations of the Committee against Torture on the fourth periodic report of Belarus, CAT/C/BLR/CO/2, 7 December 2011, para. 18; Concluding observations of the Committee against Torture on the initial report of Mauritania, CAT/C/MRT/CO/1, 18 June 2013, para. 8(c); Concluding observations of the Committee against Torture on the third periodic report of Senegal, CAT/C/SEN/CO/3, 17 January 2013, para. 13; Concluding observations of the Committee against Torture on the fifth periodic report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012, para. 10; Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012, para. 15(a).

²⁸⁴ Concluding observations of the Committee against Torture on the second periodic report of Lithuania, CAT/C/LTU/CO/2, 19 January 2009, para. 18; Concluding observations of the

Commission on Human and Peoples' Rights, accord with that of CAT in confirming that evidence obtained through torture should be inadmissible.²⁸⁵ To their credit, the Namibian courts have held expressly that all evidence – and not only statements – obtained through torture is inadmissible. However, there is no specific legal provision in Namibian law which states expressly that evidence obtained through torture is inadmissible. Thus, the implementation of Namibia's obligation under UNCAT article 15 must take into account the body of jurisprudence emerging from CAT, the Human Rights Committee and the African Commission on Human and Peoples' Rights to the effect that all varieties of evidence obtained through torture should be inadmissible.²⁸⁶

Preventing CIDT

Article 16 of UNCAT provides as follows:

1. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*

Committee against Torture on the second periodic report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011, para. 28; Concluding observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka, CAT/C/LAK/CO/3-4, 8 December 2011, para. 11; Concluding observations of the Committee against Torture on the initial report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para. 31; Concluding observations of the Committee against Torture on the combined fourth to sixth periodic reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011, para. 20; Concluding observations of the Committee against Torture on the initial report of Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 20.

²⁸⁵ For a recent discussion of this jurisprudence, see, JD Mujuzi. 2015. "Evidence obtained through violating the rights to freedom from torture and other cruel, inhuman or degrading treatment in South Africa". *African Human Rights Law Journal* 15:89–109.

²⁸⁶ (ibid.).

2. *The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*

In a comment on article 16, CAT has submitted the following:

The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “ill-treatment”) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes “in particular” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.²⁸⁷

Although UNCAT does not oblige state parties to criminalise and punish CIDT, CAT’s practice appears to be moving towards calling on state parties to do so. For example, in its Concluding observations on the combined fifth and sixth periodic reports of Guatemala, the Committee urged “the State party to redouble its efforts to prevent and punish all acts of torture or other cruel, inhuman or degrading treatment inflicted on persons within its jurisdiction”.²⁸⁸ The Committee made a similar recommendation in respect of Luxembourg.²⁸⁹ Namibia ought to take seriously the possibility of criminalising CIDT.

²⁸⁷ Committee against Torture, General Comment No. 2, CAT/C/GC/2, 24 January 2008, para. 3.

²⁸⁸ Concluding observations of the Committee against Torture on the combined fifth and sixth periodic reports of Guatemala, CAT/C/GTM/CO/5-6, 21 June 2013, para. 15.

²⁸⁹ Conclusions and recommendations of the Committee against Torture on the fifth periodic report of Luxembourg (CAT/C/81/Add.5), CAT/C/LUX/CO/5, 16 July 2007, para. 11.

Conclusion

Namibia has an obligation to prevent torture and other CIDT. The Constitution and certain pieces of legislation prohibit torture. However, Namibia has not criminalised torture and still has to give effect to most of its obligations under UNCAT. This report highlights the measures needed to prevent and combat torture in Namibia and suggests ways in which Namibia, through legislation, may implement some of its obligations under UNCAT. The report will form the background to the drafting of Namibia's Prevention and Combating of Torture Bill.

ANNEXURE A:

THE PREVENTION AND COMBATING OF TORTURE BILL

Annexure A:

PREVENTION AND COMBATING OF TORTURE BILL

To give effect to the obligations of Namibia as a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to criminalise torture and other forms of cruel, inhuman and degrading treatment or punishment and to provide for matters incidental thereto.

(Introduced by the Minister of Justice)

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BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

CHAPTER 1
INTRODUCTORY PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates -

“Convention” means the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and acceded to by Namibia on 28 November 1994;

“court” means the High Court of Namibia;

“Minister” means the Minister responsible for Justice;

“Ombudsman” means the Ombudsman appointed under Article 90 of the Namibian Constitution;

“police” means the Namibian Police Force established by section 2 of the Police Act, 1990 (Act No. 19 of 1990);

“Prosecutor – General” means the Prosecutor – General appointed under Article 88 of the Namibian Constitution.

“public official” - means any elected or appointed official or employee of any organ of the central or local Government, any official of a para-statal enterprise owned or managed or controlled by the State, or in which the State or the Government has substantial interest, or any officer of the defence force, the police force, the central intelligence service, the prison service, but shall not include a Judge of the Supreme Court or High Court or, in so far as a complaint concerns the performance of a judicial function or any other judicial officer. It also includes a person acting in an official capacity.

“regulations” means regulations made under this Act;

“torture” has the meaning assigned to it in section 2;

“this Act” includes the regulations; and

“victim” means a person who has or has allegedly been subjected to an act of torture or cruel, inhuman and degrading treatment.

CHAPTER 2

ACTS OR OMISSIONS CONSTITUTING TORTURE AND CRIMINALISATION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Acts or omissions constituting torture

2. (1) For the purpose of this Act, “torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person -

- (a) for the purposes of obtaining from that person or a third person information or a confession;
- (b) for the purposes of punishing that person for an act he or she or a third person has committed or is suspected of having committed;
- (c) for the purposes of intimidating or coercing that person or a third person; or
- (d) for any reason based on discrimination of any kind,

by a public official or a person acting at the instigation, or with the consent or acquiescence, of a public official.

(2) The reference to pain or suffering in subsection (1), does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Criminalising torture

3. A public official commits an offence, if that person -
- (a) commits torture;
 - (b) attempts to commit torture;
 - (c) incites, instigates, commands or procures a person to commit torture; or
 - (d) participates in torture or conspires with a public official to aid or procure the commission of or to commit torture.

Criminalising cruel, inhuman and degrading treatment or punishment

4. (1) Cruel, inhuman or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official, which does not amount to torture as defined in section 2, is a criminal offence.

(2) For purposes of determining what amounts to cruel, inhuman and degrading treatment or punishment, the court shall have regard to the definition of torture as set out in section 2 and the circumstances of the case.

(3) In a trial of a person for the offence of torture the court may, in its discretion, convict the person for cruel, inhuman or degrading treatment or punishment, where the court is of the opinion that the offence with which a person is charged does not amount to torture.

CHAPTER 3
NO IMMUNITY OR JUSTIFICATION FOR TORTURE

No immunity

5. Despite any other law to the contrary, including customary international law, the fact that a suspect or an accused person -

- (a) is a member of government or parliament, an elected representative or a government official;
- (b) was under an obligation to obey an unlawful order of a government or superior, is -
 - (i) not a reason for him or her not to be arrested or tried for allegedly committing an offence under section 3;
 - (ii) not a defence to a charge of committing an offence under section 3;
 - (iii) not a ground for reduction of a sentence under this Act, if that person has been convicted of an offence under this Act.

No justification for torture

6. No exceptional circumstances, including but not limited to, a state of war, threat of war, state of national defence, martial law, internal political instability, serious or prevalent crime, national security, terrorism, or any state of emergency, may be invoked as a justification for torture.

Disobeying order to commit torture

7. A public official may not be subjected to any disciplinary or administrative action or be punished for disobeying an order to commit torture or other any other form of cruel, inhuman and degrading treatment or punishment.

CHAPTER 4

EXTRATERRITORIAL JURISDICTION OVER TORTURE

Extraterritorial jurisdiction over torture

8. (1) A court in Namibia has jurisdiction in respect of an act or omission committed outside Namibia which would have constituted an offence under section 3 of this Act had it been committed in Namibia, regardless of whether or not the act or omission constitutes an offence at the place of its commission, if the accused person -

- (a) is a citizen of Namibia;
- (b) is ordinarily resident in Namibia;
- (c) is, after the commission of the offence, present in the territory of Namibia, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in Namibia and that person is not extradited pursuant to the Extradition Act, 1996 (Act No. 11 of 1996); or
- (d) has committed the offence against a Namibian citizen or against a person who is ordinarily resident in Namibia.

(2) A public official may not be prosecuted for an offence under section 3 which was committed outside the territory of Namibia except with the written authority of the Prosecutor-General.

CHAPTER 5 EXTRADITION

Expulsion, return or extradition

9. (1) A public official may not expel, return or extradite a person from Namibia to another State, if there are grounds for believing that the person would be in danger of being subjected to torture in that State.

(2) For the purpose of determining such grounds contemplated in subsection (1), all relevant considerations must be taken in account including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Torture an extraditable offence

10. Torture is an extraditable offence in terms of the Extradition Act, 1996 (Act No. 11 of 1996).

CHAPTER 6 PREVENTING AND INVESTIGATING TORTURE AND OTHER FORMS OF CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

Training and education

11. (1) Government ministries, offices and agencies responsible for the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment must develop and implement programmes, to -

- (a) educate public officials involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, on the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment;
 - (b) provide assistance and advice to any person who wants to lodge a complaint of torture; and
 - (c) train public officials on the prohibition, prevention and combating of torture and other forms of cruel, inhuman and degrading treatment or punishment.
- (2) The programmes referred to in subsection (1) are compulsory and must be evaluated and conducted on a regular basis.

Review of interrogation rules

12. Government ministries, offices and agencies responsible for the custody, interrogation or treatment of persons subjected to any form of arrest, detention or imprisonment, must on a regular basis review its regulations, rules, codes, directives, instructions, methods and practices relating to interrogation of persons as well as arrangements for the custody and treatment of such persons with a view to prevent cases of torture and other cruel, inhuman or degrading treatment or punishment.

Investigation of torture and other forms of cruel, inhuman and degrading treatment

13. (1) If the Ombudsman receives a complaint under section 16, or on reasonable grounds suspects that torture or other forms cruel, inhuman or degrading treatment or punishment has been committed in Namibia, the Ombudsman must promptly, thoroughly and impartially investigate those facts.

(2) Nothing in this Act or in any other law prevents the Ombudsman from investigating an allegation of torture or other forms cruel, inhuman or degrading treatment or punishment which has already been investigated by the police if, on the basis of the available and reliable

evidence or information, the Ombudsman reasonably believes that the investigation by the police was not prompt, thorough or impartial.

(3) All public officials must cooperate with the Ombudsman for the purpose of investigations referred to in this section.

CHAPTER 7

REDRESS, EVIDENCE OBTAINED THROUGH TORTURE AND DUTY TO REPORT TORTURE

Redress for victims of torture

14. (1) A victim may obtain redress and has an enforceable right to fair and adequate compensation, restitution, rehabilitation and guarantees of non-repetition.

(2) If a victim dies as a result of torture, his or her dependants may claim the compensation contemplated in subsection (1).

(3) Nothing in this section affects any right of the victim or other persons to compensation which may exist under any other law.

Inadmissibility of evidence obtained through torture

15. Evidence obtained by means of torture is inadmissible as evidence in any proceedings before a court, but such evidence is admissible against the person accused of committing torture as evidence that the evidence was obtained, through torture.

Duty to report torture

16. (1) A person who suspects or has reasonable grounds to suspect that torture is being committed by a public official, must report that suspicion to the police and the Ombudsman.

(2) A public official who suspects or on reasonable grounds suspects that torture is being committed or has been committed by a public official, must report his or her suspicion to a member of the police and to the Ombudsman.

(3) A public official who fails, refuses or neglects to report his or her suspicion of the commission of torture under subsection (2) commits an offence.

Protection of victim, witnesses and persons reporting torture

17. The State must ensure that any person including the -

- (a) person making the complaint; whether the victim or not; or
- (b) witnesses,

are protected against all forms of ill-treatment or intimidation as a consequence of the complaint or any evidence given in respect of torture or other forms of cruel, inhuman and degrading treatment.

CHAPTER 8

GENERAL PROVISIONS

Penalties

18. (1) A person convicted of an offence under section 3 of this Act, is liable to life imprisonment.

(2) A person convicted of an offence under section 4 of this Act is liable to imprisonment for a period not exceeding 15 years.

(3) A person convicted of an offence under section 16 (3) is liable to imprisonment for a period not exceeding 5 years or to a fine not exceeding N\$10 000 or to both such fine and imprisonment.

Power of a court to make compensation order

19. (1) If a person is convicted of an offence under this Act, the court may, on the application of the victim or the victim's dependants where the victim has died, or the prosecutor acting on behalf of the victim, award the victim or the victim's dependants compensation for damage or loss he or she has suffered as a result of torture.

(2) The order under subsection (1), may include, but not limited to -

(a) restitution of the victim, his or her dependents to the greatest extent possible and such restitution may, include -

(i) payment for harm or loss suffered;

(ii) reimbursement of expenses incurred as a result of victimisation;

(b) compensation for damages resulting from torture such as -

(i) physical or mental harm, including pain, suffering and emotional distress;

(ii) loss of earnings and future loss of income;

(iii) costs required for legal, medical and psychological expenses;

(c) rehabilitation including -

(i) medical and psychological care; or

(ii) legal and psycho-social services to the victim in case of trauma; and

(e) guarantees of non-repetition.

(3) The court may also make such an order under subsection (2), against the convicted person's employer if the torture was committed in the course and scope of the convicted person's employment.

Regulations

20. (1) The Minister may make regulations relating to any matter that may be prescribed and to any matter that is reasonably necessary or expedient to be prescribed to achieve the objects of this Act.

- (2) Regulations made under subsection (1) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
 - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$2 000 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

Short title and commencement

21. This Act is called the Prevention and Combating of Torture Act and comes into operation on the date to be determined by the Minister by notice in the *Gazette*.

ANNEXURE B:

EXPLANATORY MEMORANDUM

Annexure B:

EXPLANATORY MEMORANDUM PREVENTION AND COMBATING OF TORTURE BILL

1. PURPOSE OF BILL

The purpose of the Torture and other Cruel, Inhuman and Degrading Treatment of Persons Bill (“the Bill”), is to give effect to Namibia’s obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”). Namibia acceded to the Convention on 28 November 1994. As a state party to the Convention, Namibia is obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture and cruel, inhuman and degrading treatment in any territory under its jurisdiction.

2. BACKGROUND OF THE BILL

The Namibian Constitution, as the supreme law, provides in Article 8 (2)(b) that:

“No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”

Torture currently is not a specific criminal offence in Namibia. Namibian law also does not criminalise expressly any other forms of cruel, inhuman or degrading treatment (“CIDT”). As a result, victims of torture and other forms of CIDT do not have readily available legal remedies for any damages or prejudice they may have suffered as victims.

When Namibia ratified the Convention, Namibia accepted a range of obligations to prevent and combat torture and other forms of CIDT in any territory under its jurisdiction. The drafting of the Prevention and Combating of Torture Bill is a crucial aspect of Namibia’s taking the steps necessary to meet its obligations under the Convention.

The drafting process was informed by a number of legal sources. Key sources in this regard are provisions of the Convention itself and the jurisprudence which has been developed over time by the *Committee against Torture* (CAT) as the body which oversees the implementation of the Convention internationally. In preparation of the memorandum and the Bill, Namibia's conventional obligations to prevent torture and CIDT, with reference to current Namibian law and the Convention were considered. The Namibian Bill must remain faithful to the content and spirit of the Convention and must embrace the various general recommendations concerning the implementation of the Convention emanating from CAT.

The Prevention and Combating of Torture Bill addresses areas of non-compliance in particular obligations imposed by the Convention, with specific attention to areas highlighted by CAT. The specific obligations resonating from the Convention and reviews of the CAT are reflected in the Bill.

The Prevention and Combating of Torture Bill aims to liberate the general public from being subjected to any form of conduct that amounts to torture or cruel, inhuman and degrading treatment by public officials. Any victim of torture will have recourse in terms of this bill and the dependent of the victim has a legitimate claim for compensation for any damages suffered as a result of the torturous act or other cruel, inhuman and degrading treatment or punishment. Arrested and detained suspects equally are afforded additional protection in respect of their rights to a fair trial.

The Prevention and Combating of Torture Bill for Namibia amounts to an exercise in domesticating the Convention. Such domestication must result in a Namibian anti-torture and anti-CIDT legal regime which accords materially with all the relevant provisions of the Convention as interpreted and refined by the work of CAT. Domestication of the Convention ensures a reputable legal status for the Republic of Namibia within the international community. The enactment of this bill represents a state that is intolerant of gross violation of human rights and aims to protect the rights afforded by our Constitution. It is anticipated with the support from government and all relevant stakeholders that enactment and implementation of the law will be expedient and effective. The Law Reform Development Commission in its continued support

mandate to the Minister of Justice, will play a role in ensuring awareness and making the law accessible once passed.

3. THE PROVISIONS OF THE BILL CAN BE SUMMARISED AS FOLLOWS

Ad Clause 1 Definitions

This clause contains various definitions, such as “torture”, “victim”, “court”, “police” “public official” and “Minister”.

Ad Clause 2 Acts or omissions constituting torture

This clause define acts or omissions that constitute torture. This definition of “torture” is essentially identical to the definition of torture in the Convention.

Ad Clause 3 Criminalising torture

This clause criminalises torture. It provides that any public official who commits torture, attempts to commit torture, or incites, instigates, commands or procures any person to commit torture, or any person who participates in torture, conspires with a public official to aid or procure the commission of or to commit torture, commits an offence.

Ad Clause 4 Criminalising cruel, inhuman and degrading treatment or punishment

This clause criminalises other cruel, inhuman and degrading treatment or punishment, where the court is unable to convict that person on an offence of torture.

Ad Clause 5 No immunity

This clause provides that there is no immunity in respect of torture.

Ad Clause 6 No justification for torture

This clause provides that no exceptional circumstances, including but not limited to, a state of war, state of national defence, martial law, threat of war, internal political instability, serious or prevalent crime, national security, terrorism, or any state of emergency, may be invoked as a justification for torture.

Ad Clause 7 Disobeying order to commit torture or other cruel, inhuman and degrading treatment or punishment

This clause prohibits a public official from being subjected to any disciplinary or administrative action or punishment for disobeying an order to commit torture or other cruel, inhuman and degrading treatment or punishment.

Ad Clause 8 Extraterritorial jurisdiction over torture

This clause deals with extra-territorial jurisdiction, and provides that a court of Namibia has jurisdiction in respect of an act committed outside Namibia which would have constituted an offence under Clause 3 had it been committed in Namibia, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged-

- (a) is a citizen of Namibia;
- (b) is ordinarily resident in Namibia;
- (c) is, after the commission of the offence, lawfully present in Namibia , or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in Namibia and that person is not extradited pursuant to the Extradition Act, 1996 (Act No. 11 of 1996); or
- (d) has committed the offence against a Namibian citizen or against a person who is ordinarily resident in Namibia.

Ad Clause 9 Expulsion, return or extradition

This clause prohibits the expulsion, return or extradition of persons in certain circumstances.

Ad Clause 10 Torture an extraditable offence

This clause provides that torture is an extraditable offence.

Ad Clause 11 Training and education

This clause provides for duty of State to educate and train public official dealing with arrest, custody and detention of persons.

Ad Clause 12 Review of interrogation rules

This clause requires that institutions involved in custody and treatment of persons review its interrogation rules regularly as a torture prevention measure.

Ad Clause 13 Investigation of torture and other cruel, inhuman and degrading treatment or punishment

This clause deals with investigation of torture by the police and the Ombudsman.

Ad Clause 14 Redress for victims of torture or other cruel, inhuman and degrading treatment or punishment

This clause provides for rights of victims and families of victims to compensation on application to court in terms of clause 19.

Ad Clause 15 Inadmissibility of evidence obtained through torture

This clause deals with inadmissibility of evidence obtained through torture.

Ad Clause 16 Duty to report torture and other cruel, inhuman and degrading treatment or punishment

This clause deals with the duty to report torture and other cruel, inhuman and degrading treatment or punishment.

Ad Clause 17 Protection of victim, witnesses and persons reporting torture

This clause deals with protection of victims, witnesses and persons reporting torture.

Ad Clause 18 Penalties

This clause deals with penalties on conviction for torture and other forms of cruel, inhuman and degrading treatment or punishment.

Ad Clause 19 Powers of a court to make compensation order

This clause deals with powers of the High Court of Namibia to make compensation orders.

Ad Clause 20 Regulations

This clause deals with regulations which the Minister responsible for Justice may make.

Ad Clause 21 Short title and commencement

This clause contains the short title and commencement.

4. CONSULTATION

Consultations on the Bill took place with the following role-players when the Bill was initially prepared:

- Ministry of International Relations and Cooperations
- The National Assembly
- The National Council
- The Supreme Court of Namibia
- Office of the Prosecutor-General
- The Magistrate's Commission
- Ministry of Defence
- Ministry of Health and Social Services
- The Republikein
- Allgemeine Zeitung
- Namibian Correctional Services
- Ministry of Justice:
 - a) Office of the Permanent Secretary
 - b) Directorate of Legislative Drafting
 - c) Directorate of Legal Services and International Cooperation
- The Law Society of Namibia
- The Office of the Ombudsman
- Ministry of Safety and Security
- Ministry of Home Affairs and Immigration
- Legal Assistance Centre

5. FINANCIAL IMPLICATIONS FOR STATE

The State will incur financial costs in so far as it relates to the payment of compensation to victims of torture, a liability the State already has if a person that claims damages for injuries sustained as a result of assault emanating from a public official, for instance. The State will also incur financial costs as a result of the duty on the State to promote general awareness programmes on torture. It is, however, not possible to quantify these financial costs at this stage.

ANNEXURE C:

Report on the Stakeholder Consultative Meeting on the Prevention
and Combating of Torture Bill

Annexure C:

**Report on the Stakeholder Consultative Meeting on the Prevention
and Combating of Torture Bill**



REPUBLIC OF NAMIBIA

Law Reform and Development Commission

Report on the Stakeholder Consultative Meeting
on the Prevention and Combating of Torture Bill
on 7 August 2015
at the Protea Hotel Thüringerhof, Windhoek

Compiled by
Project Officer: Jessica Gawachab

Attendees

(See Annexure D.)

1. Opening

The proceedings commenced with Ms Yvonne Dausab, the Chairperson of the Law Reform and Development Commission (LRDC) welcoming the guests. The meeting was then called to order at 09:30.

2. Welcoming remarks

Ms Yvonne Dausab, the Chairperson of the LRDC welcomed the participants and thanked them for availing themselves to this consultative meeting. She informed the participants that the LRDC reports to the Minister of Justice and is mandated with the task to review, reform and develop the law and recommends for change. The LRDC is not a law making body and thus serves plays a supportive role. She clarified to the participants that the LRDC is an advisory body and that advice dispensed to the Minister of Justice, in its nature, is not binding. The participants were requested to provide ample input and help the LRDC with the Bill to ensure a comprehensive and effective draft bill is presented in its finality.

3. Introduction of the Prevention and Combating of Torture Bill

The guest speaker and consultant on the project, Dr Jamil Mujuzi introduced the draft proposed bill, the Prevention and Combating of Torture Bill of the Republic of Namibia. He outlined the background to the report with specific reference to Namibia's obligations under the United Nations Convention against Torture and other Cruel (UNCAT), Inhuman and Degrading Treatment or Punishment. He informed the stakeholders that Namibia is a member state of UNCAT and has not received positive reviews by the Human Rights Review Committee with regards to the Torture legislative framework. Namibia is under the obligation to prevent any torture within its territory therefore there is a need for torture to be criminalised.

Dr Mujuzi's presentation covered the following aspects:

- A discussion of the legal position of torture in Namibia from both the legislative and case law perspective;
- Namibia's international obligation to prevent torture and what the international community is doing with regards to torture;
- Namibia's obligations under the UNCAT.

4. Prevention and Combating of the Torture Bill in Namibia

(a) Long Title – note date which UNCAT acceded to.

(b) Clause 1 – Interpretation;

“Public Official”- Public Official is defined in our Constitution and it excludes court officials. Revisit definition to strictly address officials concerned with the commission of torture in terms of this Bill, i.e. Judiciary Bill definition for Public Official.

“Minister”- must be defined as “Minister responsible for Justice”.

“Procure”- define procure to layman's words. The word is too technical, consider definition as stated in ICC.

“Victim or Victims”- Have to choose between either “victim” or “victims”, cannot be used in conjunction. Otherwise, the content is acceptable it is just a matter of aligning it with the drafting requirements.

Define “expel” in Bill.

(c) Clause 2(1) – The use of words such as “acquiescence” is not favourable to the lay community thus replace it with a simpler term.

(d) Clause 3 – Delete the title and replace it with Offences and Penalties. Sub-clause 1 should read as “[a] public official who, In Namibia or elsewhere, commits, aids, abets, incites, instigates, commands, (acquiesces) in, or procures the commission by another

person of torture, commits an offence and may on conviction be subject to sub-clause 4 of this clause, be sentenced to life imprisonment”.

The offences and penalties must also preferably be separated into separate provisions.

Sub-clause 2 – Look at the maximum sentence and avoid imposing minimum sentences on the judiciary.

Sub-clause 3 – Replace “shall” with “may”.

- (e) Clause 4 – Look at the clause numbering and properly arrange the clause. Consider immunity as an aggravating ground for sentencing.
- (f) Clause 5 – Obligation should be designed as such to address individuals as well.
- (g) Clause 6 – The word punished includes criminal offences. Reference: Police Act criminalises refusing to comply with an order, thus Police Act needs to be reviewed to align with the Preventing and Combating of Torture Bill.
- (h) Clause 7, sub-clause 2 – Take note that the Attorney-General has final responsibility. The drafting must consider the scope and mandate of the Attorney-General as the advisory authority to Government.
- (i) Clause 8 – Delete the word “shall” and replace it with “must”.
- (j) Clause 9 – Concerns were raised as to which Criminal Procedure Act should be applicable (CPA 1977 CPA 2004).
- (k) Clause 11 – Replace the word “shall” with “must”. Look at the issue of the possibility of the enforcement of this clause. There is a responsibility present but no guideline on the enforcement of that responsibility. Look into including this in the regulations.
- (l) Clause 12 – Replace the word “shall” with “must”. The guidelines of this clause must be placed under regulations. Look at the issue of enforcement.

- (m) Clause 13 – The provision creates a source to criminalise CIDT. CIDT in itself creates confusion as it was not referred to earlier in the Act.
- (n) CIDT – Define CIDT. Currently Namibian court jurisprudence uses the dictionary to define it. Furthermore, CIDT must be formed as a separate clause as a preventative measure *contra* torture. Consider the following: training, awareness, funding and prevention.
- (o) Clause 14 – Delete adequate compensation and replace it with reparation. Reparation is expected to apply retrospectively considering the current status quo of reparation in Namibia. Look at limiting those requesting compensation (perhaps establishing a criterion) and who bears liability to compensate victims of torture.
- (p) Clause 15 – Legal Drafters have to redraft this provision.
- (q) Clause 16(1) – Failure to report torture must read as offence. 16(2) creates a legal obligation on private individuals to report torture. When referring to “Police”, note as appointed in terms of the Police Act.
- (r) Who does the victim report to in a Correctional centre?
- (s) Clause 17 – Include all other relevant laws.

5. General issues raised and commentary

The facilitator, Ms Yvonne Dausab facilitated the discussion efficiently allowing for ample stakeholder input. The participants were eager to participate and raised the following general issues:

5.1 Definitions

The participants were concerned with the definitions included in the Bill. They raised concern especially around the term “Public Official”. Public Official is defined in our Constitution and it excludes court officials. Minister must be defined as “Minister responsible for justice”. Procure –

define procure to layman's words. Technical phrases and words must comply with the definition as per Article 47 of the Vienna Convention which requires states to do so.

The general perception around definitions was that the Bill should cater for the layman therefore where possible; the use of technical terms should be avoided.

5.2 Access to justice

The participants enquired on who has the power to enforce the award of Torture? The Ombudsman proposed that there should be quick access to justice, and to ensure this due to the issue of backlog in our courts, courts should be relieved of the duty to hear torture cases. Complainant can therefore lodge a complaint before any Police Station with the necessary authority and the matter will be referred to the Ombudsman.

The right to redress is a matter of concern as the proceedings are not only lengthy but also expensive and not all victims can afford to approach the courts. To avoid these unnecessary delays, an administrative award if possible can be put in regulations. This therefore requires that the power to investigate matters of such concern should be included in the Bill and the measures or mechanisms must form part of the regulations.

5.3 Overlapping of duties

The Police Officers according to the Police Act have the duty to investigate any criminal offences. If this offence is to be under the investigation of the Ombudsman will it not overlap with the duties of the Police Force? The ombudsman only has the mandate to investigate if it is a human right violation. If the investigation is to be left as a duty of the Police, who then investigates the Police despite the mechanisms that they have within their structure? It is imperative that independence in investigation is maintained to avoid the integrity and credibility of the process.

5.4 Funding and compensation

If the Office of the Ombudsman is to take on the duty to investigate torture crimes it must be funded in order to be able to carry out their duties efficiently.

Funds expected to be allocated to the necessary line body (ministry) for the compensation of torture victims.

The State can be held vicariously liable for the conduct of the public officials. One way to ensure funds for compensation is to deduct from the salaries of the accused persons.

5.5 Education and training

Correctional services, police officers and health officials need to be trained. Factors such as the practicality and efficiency in the training provided must be considered.

6. Concluding remarks

Ms Yvonne Dausab thanked all the participants for their active participation in the discussion. The meeting adjourned and participants were invited to join LRDC for lunch.

ANNEXURE D:

List of participants at the Stakeholder Consultative Meeting
on the Prevention and Combating of Torture Bill

Annexure D:

List of participants at the Stakeholder Consultative Meeting on the Prevention and Combating of Torture Bill, 7 August 2015

Name	Position and institution represented	Landline No.	Cell No.	Fax No.	E-mail address
Bause, Tanja	Die Republikein		081 129 0770		tanja@republikein.com.na
Dyakugha, Basilius	Ministry of Justice	061 280 5356	081 260 6811	061 280 5356	bdyakugha@moj.gov.na
Esterhuizen, Carol-Ann	Chief Legal Officer National Assembly	061 288 2617	081 144 4870		c.estерhuizen@parliament.gov.na
Hancox, Toni	Director Legal Assistance Centre	061 223 356	081 298 9141	061 234 953	thancox@lac.org.na
Harris, C	Ministry of Justice	061 280 5318	081 302 6486		charris@moj.gov.na
Hofmann, Eberhard	Deputy Editor Allgemeine Zeitung	061 225 822			ehofmann@az.com.na
Isaacs, Sandi	Deputy Commissioner Namibian Police Force	061 209 3308			sandi.isaacs@gov.na
Kleinmans, Robyn	Chief Legal Officer, Legislative Drafting Ministry of Justice	061 280 5207	081 124 1287		rkleinhansster@gmail.com
Lamprecht, Henriette	Die Republikein		081 350 3801		henriette@republikein.com.na
Likando, MO	Senior Legal Officer: Legal Services Ministry of Justice	061 280 5356	081 288 0535		molikando@moj.gov.na
Limbo, Simataa	Ministry of Justice	061 280 5111	081 129 7466	061 254 054	slimbo@moj.gov.na
Mathupi, August	Chief Inspector Namibian Police	061 209 3376	081 581 2473		amathupi@gmail.com
Mubita, Delia	Assistant Commissioner: Legal Services Namibia Correctional Services	061-284 6366	081 170 1022		deliamubita@yahoo.com
Mynhardt, Bernadine	Legal Practitioner Law Society of Namibia	061 223 3356	081 304 1407	061 234 953	bmynhardt@lac.org.na
Ndjoze, Issaskar VK	Permanent Secretary Ministry of Justice	061 280 5111			kavizembua@gmail.com
Prothmann, Jens	Multilateral Agreements Ministry of International Relations and Cooperation	061 282 2335	081 140 7843	061 221 145	jprothmann@mirco.gov.na
Sibolile, Charles	Deputy Commissioner Namibian Police	061 209 3288	081 127 4707	061 209 3287	charlessibolile@yahoo.com
Tsamareb, Wilmary	Chief Legal Counsel National Council	061 202 8009	081 127 9094	061 202 8032 081 127 9094	w.tsamareb@parliament.gov.na
Walters, Adv. John	Ombudsman	061 207 3024	081 127 4657	061 220 550	

