TO: **Portfolio Committee on Justice and Constitutional Development**

Parliament of RSA

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FROM: **The Centre for Applied Legal Studies (CALS),**
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CALS
Centre for Applied Legal Studies

SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT:

PREVENTION AND COMBATING OF TORTURE OF PERSONS BILL

[B21-2012]

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Introduction

The Centre for Applied Legal Studies (CALS) is a civil society organisation based at the University of the Witwatersrand. CALS is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a country where human rights are respected, protected and fulfilled by the State, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

CALS' mission is:

- to challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;
- to provide professional legal representation to victims and survivors of human rights abuses;
- to actualise a politically, socially and economically just society;
- through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and
- to act with courage against impunity for non-compliance with human rights standards.

CALS would like to commend the Department of Justice and Constitutional Development (DoJCD) for tabling the long awaited Prevention and Combating of Torture of Persons Bill (the Bill). South Africa ratified the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 1984 (UNCAT) on 10 December 1998. We are pleased that the Bill has been tabled with the purpose of giving effect to the Republic's obligations under UNCAT by *inter alia* providing for the offence of torture of persons and other offences associated with the torture of persons and to prevent and combat the torture of persons, both within and across the borders of the Republic.

We thank you for the opportunity to make submissions on the Bill and wish to express our intention to continue to engage on the Bill and any processes that may follow from the Bill.

The shameful South African history of gross human rights abuses that included the torture of many citizens and inhabitants of South Africa passed,[1] the Bill now presents an opportunity for South Africa to be a leader against the commission of torture. Our submissions aim to address whether the Bill in its current form fully complies with UNCAT and other international law obligations of South Africa, as a minimum. We will make necessary recommendations where we consider the Bill to fall short of these obligations and will propose how these shortfalls may be remedied.

CALS and other organisations support the view that the Bill should aspire to establish a legislative framework that is as comprehensive as possible to facilitate South Africa's compliance with its duties under UNCAT and thus protect fundamental human rights of victims of torture.[2]

Structure of the submission

This submission will be divided according to the arrangement of sections as they appear in the Bill. Therefore the submissions will be divided into the following seven sections:

A. Acts constituting torture;
B. Offences and penalties;
C. Factors to be considered in sentencing;
D. Extra-territorial jurisdiction;
E. Liability;
F. General responsibility to promote awareness; and
G. Additional recommendations.

[1] Preamble, the Bill.
[2] Members of the Campaign to Domesticate the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which CALS is a member.

A. Acts constituting torture

The definition falls short of that required under UNCAT

1.1 The United Nations Committee Against Torture (CAT) has deemed it an essential requirement of UNCAT) that the definition of torture as it appears in national legislation be defined at least as precisely as the definition as it appears in Article 1 of the UNCAT (emphasis added).[3]

1.2 The *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (The Robben Island Guidelines) also stipulate that States must ensure that "acts which fall within the definition of torture, based on Article 1 of the UNCAT, are offences within their national legal systems."[4]

1.3 The definition of torture as it currently appears in the Bill is not in compliance with Article 1 of UNCAT and falls short of the minimum required standard under the Convention. The definition in Section 3 of the Bill fails to include torture committed "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[5] Section 3 reads as follows:

> *For the purposes of this Act, "torture" means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted, by a public official or any person acting on behalf of a public official, on a person –*
> *(a) In order to –*
> *(i) Obtain information or a confession from him or her or a third person;*
> *(ii) Punish him or her for an act he or she or a third person has committed, is suspected of having committed or is planning to commit; or*
> *(iii) Intimidate or coerce him or her or a third person to do, or to refrain from doing, anything; or*
> *(b) For any reason based on discrimination of any kind,*
> *But does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.*

[3] A/51/44 (Armenia) 1995.
[4] Article 4 RIG.
[5] Article 1 UNCAT.

1.4 Even when reading Section 3, with the definition of a public official as it appears in Section 1 of the Bill, the meaning of torture in the Bill still falls short. A public official is defined as:

> "(a) …
> (b) …
> (c) any person acting with the consent or acquiescence of a person contemplated in paragraph
> (a) or (b)." [6]

The sections read together still do not provide for the criminal liability of a public official who knew, or had reasonable grounds to believe, that torture or ill-treatment were being or were going to be committed by private actors or non-State officials and failed to "exercise due diligence to prevent, investigate, prosecute, and punish such non-state officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[7] This is not apparent in the Bill and needs to be explicit and unambiguous.

1.5 General Comment No. 2 (GC 2)[8] makes it clear that States parties are obliged to adopt effective measures to:

> *[P]revent public authorities and other persons acting in an official capacity from directly committing, instigating, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, <u>from consenting to or acquiescing in any acts of torture</u>* (emphasis added).

When States parties fail to fulfil these obligations they are in violation of UNCAT.[9] These effective measures are important as they cover instances where private individuals carrying out functions of the State commit

[6] Section 1, the Bill.
[7] CAT/C/GC/2 (2008) at 5.
[8] As above.
[9] As above.

torture. This is particularly important in relation to violence against women and will be discussed more fully in 17.5 below.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasised that "the language used in Article 1 of UNCAT concerning consent and acquiescence by a public official clearly extends States obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals."[10]

1.6 This important aspect of what constitutes torture must be incorporated into the Bill. An example of explicit incorporation of this provision can be found in the United Kingdom's Torture (Damages) Bill where the following is found:

> *4(1) … a public official or person acting in an official capacity, whatever his nationality, commits torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his duties.*
>
> *4(2) … a person not falling into subsection (1) above commits torture, whatever his nationality, if –*
>
> *(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence of –*
>
> *(i) a public official, or*
>
> *(ii) a person acting in an official capacity; and*
>
> *(b) the official or other person is performing or purporting to perform his official duties when he instigates the infliction of that pain or suffering or consents to or acquiesces in it.*
>
> *4(3) … where a person commits torture in circumstances falling within subsection (2) above, the official or other person concerned, whatever his nationality, also commits torture for the purposes of this Act.*[11]

[10] A/HRC/7/3 (2008) at 7.
[11] Torture (Damages) Bill available at http://services.parliament.uk/bills/2010-11/torturedamageshl.html (accessed 30 July 2012).

2. The exclusion of the words "for such purposes as" from Section 3 of the Bill and the inclusion of the words "in order to" makes the motive, as an objective determination, behind the commission of the torture seem to be a closed list. The words "in order to" should be replaced with the words "for such purposes as to".

The omission of other acts of cruel, inhuman and degrading treatment or punishment from the Bill

3.1 The Bill fails in its entirety to make reference to and thus to criminalise and punish any other acts of cruel, inhuman or degrading treatment or punishment which do not amount to acts of torture as defined in Article 1.[12]

3.2 As a part of the South Africa's obligation to prevent torture, we should prevent other acts of cruel, inhuman or degrading treatment or punishment. The CAT considers Article 16, prohibiting ill-treatment, as a provision in UNCAT that must be observed in all circumstances.[13] The CAT further considers that Articles 3 – 15 of UNCAT "are likewise obligatory as applied to both torture and ill-treatment."[14] The Philippines *Act Penalizing the Commission of Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, prescribing Penalties therefore and for other purposes* (Anti-Torture Act) contains both a definition as well as enumerations of cruel, inhuman and degrading treatment.[15]

3.3 When discussing the scope of State obligations and responsibility, the CAT has said that each State party should:

> *[P]rohibit, prevent and redress torture and ill-treatment in all contexts of custody of control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm* (emphasis added).[16]

[12] Article 16 UNCAT.
[13] CAT/C/GC/2 (2008) at 2.
[14] As above.
[15] Anti-Torture Act 2009 available at http://services.parliament.uk/bills/2010-11/torturedamageshl.html (accessed 31 July 2012).
[16] CAT/C/GC/2 (2008) at 4.

Therefore we are of the opinion that the failure of the Bill to address other cruel, inhuman and degrading treatment or punishment is fatal and should be addressed comprehensively and in accordance with international law requirements.

B. Offences and penalties

The omission of torture committed under the consent or acquiescence of a public official as an offence

4.1 Section 4 of the Bill does not include instances where an individual, with the consent or acquiescence of a public official, commits torture. As stated in paragraph 1.4 above, the definition of public official read with Section 4 is unclear and is not sufficient to measure up to the requirements of UNCAT.

4.2 In instances where torture is committed with the consent or acquiescence of a public official, both the individual committing said torture as well as the public official who failed to prevent the torture from occurring, should be guilty of committing the offence of torture and liable on conviction to imprisonment. For conciseness we will not repeat the submissions under paragraphs 1.1 – 1.6 above and request that they be read in here.

Penalties

5.1 Article 4 of UNCAT requires that States ensure that all acts of torture are offences under the national criminal law. It is further required of States to make such offences punishable by appropriate penalties that take the grave nature of the offences into account.

5.2 We are pleased to note that the Bill is somewhat reflective of this requirement in that it does not have the option of a fine upon conviction, for acts of torture committed.

5.3 We are of the opinion however that due to the grave nature and seriousness of acts of torture as well as the effect they have on both the victim and society, that the minimum sentencing regime finds application for convictions of torture. The Bill should amend the provisions of the *Criminal Law Amendment Act,* 105 of 1997 to incorporate minimum sentences for acts of torture committed.

Enumerated list of acts constituting torture?

6.1 UNCAT does not provide an exhaustive list of acts or omissions that may constitute an act of torture. Some countries, like the Philippines, have enumerated instances where conduct may amount to torture or other cruel, inhuman or degrading treatment or punishment.[17] It is important to note that such enumerations are not exhaustive.

6.2 It is not a requirement under UNCAT to enumerate conduct that amounts to torture or other ill-treatment. All that is required is that all acts of torture are offences under the State's criminal law[18] (emphasis added).

6.3 The European system has refrained from drawing up a list of conduct that will automatically be considered as sufficiently severe to constitute an act of torture; or other acts of cruel, inhuman and degrading treatment and punishment. Instead the European Court of Human Rights (ECtHR) has held that the *European Convention on Human Rights* is a living instrument and must be interpreted in light of present-day conditions.[19] This allows a court the necessary degree of flexibility when considering cases before it.

6.4 The Bill does not contain enumerated instances of torture. We wish to stress the importance of the fact that any such list should never be exhaustive and must never be limited to the instances listed.

6.5 Further, we are of the opinion and strongly recommend that the commission of other acts of cruel, inhuman and degrading treatment is both properly defined and made an offence under our law, with an appropriate penalty.

Immunity from jurisdiction (official capacity) and superior orders

7.1 We commend the insertion of Section 4(3) excluding immunity and superior orders as neither a defence to a charge of committing an offence of torture, nor as a ground for reduction in sentence.

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[17] Section 4 Anti-Torture Act 2009 available at http://services.parliament.uk/bills/2010-11/torturedamageshl.html (accessed 31 July 2012).
[18] Article 4 UNCAT.
[19] *Tyrer v United Kingdom* 5856/72 Judgment of 25 April 1978.

7.2 We note however that the proper implementation of superior orders will require directives and training in the necessary departments and fields of operation, such as the South African Police Services (SAPS); Departments of Correctional Services and Defence and similar institutions.[20]

Absolute and non-derogable prohibition against torture

8.1 Article 2 of UNCAT provides that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture in any territory under their jurisdiction. The *Inter-American Convention to Prevent and Punish Torture* (Inter-American Convention) is broader than UNCAT and provides that a state of war, the threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or any other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture[21] (emphasis added). The Inter-American Convention goes even further to add that neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture[22] (emphasis added).

8.2 The Bill is in compliance with UNCAT in this regard. However based on the importance of the interests protected by the absolute prohibition against torture, and as was enunciated by the ECtHR,[23] we recommend that expansion of this provision in line with the Inter-American Convention is considered.

C. Factors to be considered in sentencing

Clarification of factors to be considered in sentencing

9.1 Section 5 of the Bill is ambiguous and vague. While we appreciate the inclusion of aggravating factors to be taken into account by the courts when imposing sentence, the current Section is ambiguously worded and thus problematic.

[20] CAT/C/CR/33/2 (Greece) (2004) at para 6(g).
[21] Article 5 Inter-American Convention.
[22] As above.
[23] *Chahal v United Kingdom* 70/1995/576/662 Judgment of 15 November 1996 where the Court held that the prohibition against torture enshrines one of the most fundamental values of democratic society and that the Convention prohibits torture in absolute terms, irrespective of the victims conduct.

9.2 In order to add value to the Bill this Section needs to be made clear so that the intention of the Legislature is better reflected. In conjunction with the recommendation that the minimum sentencing regime is applied to punishment for acts of torture under the Bill, we further recommend that this Section is more detailed and acts in conjunction with minimum sentences. The Philippines, for example, provide for specific punishment to be imposed on perpetrators where they commit particular acts of torture or where certain consequences arise as a result of the torture.[24]

D. Extra-territorial jurisdiction

Lawful presence in the Republic not a requirement

10.1 Article 5(1) of UNCAT provides that State parties shall take measures necessary to establish jurisdiction over the offences referred to in Article 4. Article 5(2) further places an obligation on a State party to "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" (emphasis added).

10.2 Section 6(1)(c) of the Bill provides that a court of the Republic has jurisdiction in respect of an act committed outside of the Republic which would have constituted an offence under sections 4(1) or (2), if the person to be charged is, after the commission of the offence, lawfully present in the territory of the Republic and that person is not extradited pursuant to Article 8 of UNCAT (emphasis added).

10.3 We submit that the lawfulness or otherwise of the presence of the person to be charged in South Africa is irrelevant and that the word "lawfully" in Section 6(1)(c) of the Bill must be removed.

10.4 This will bring the Section in line with UNCAT and other domestic legislation, such as the *Implementation of the Rome Statute of the International Criminal Court Act,* 27 of 2002 and provides both clarity and consistency in our law.

[24] Section 14 Anti-Torture Act 2009 available at http://services.parliament.uk/bills/2010-11/torturedamageshl.html (accessed 31 July 2012).

E. Liability

Inclusion of measures for redress in the Bill

11.1 Although Section 7 of the Bill provides that nothing in the Act affects any liability which a person may incur under the common law, or any other law, we submit that this provision alone is insufficient for the following reasons:

i. Article 14 of UNCAT provides that States shall ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible;
ii. The Robben Island Guidelines further place an obligation on States to offer reparation to victims, irrespective of whether a successful criminal prosecution can or has been brought. It further states that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation and are provided with appropriate levels of compensation and support;[25]
iii. The Robben Island Guidelines further stipulate that families and communities affected by torture and ill-treatment received by a member of said family or community can also be considered as victims;[26]
iv. Claims brought under the normal civil law and common law process, such as claims in delict, are often difficult to bring and ineffective.[27]

11.2 There is a need to recognise the importance of providing redress and an enforceable right to fair and adequate compensation for victims of torture. The psychological and physical damage sustained cannot be equated to an ordinary claim for damages and needs to be recognised as such. The UNCAT envisages that reparation and adequate redress (which can take on various forms) is available independent of a claim for damages under the civil and common law systems.

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[25] Article 50 RIG.
[26] As above.
[27] REDRESS (2003) *Reparation for Torture* available at http://www.redress.org/downloads/publications/AuditReportText.pdf (accessed 30 July 2012).

11.3 Based on the above we are of the opinion that the Bill should provide for different forms of redress but particularly for adequate financial compensation for physical and psychological pain and suffering, without having to follow the normal route of claiming damages through a delictual or similar action. The State should be the entity primarily responsible for the provision of redress to victims of torture and other ill-treatment and shall include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

11.4 The United Kingdom is in the process of enacting the *Torture (Damages) Bill* to make provision for actions for damages for torture and for connected purposes. We submit that similar provisions should be included in the Bill. It must further be noted that the CAT is in the process of finalising a general comment on Article 14 of UNCAT on measures for redress, currently in draft form.[28] This should be monitored and its recommendations incorporated into the Bill.

F. General responsibility to promote awareness and the prevention of torture

Detailed provisions on measures to promote awareness and prevent torture required

12.1 Article 2 of UNCAT requires that State parties "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 10 and 11 impose specific obligations on States to prevent torture by enacting provisions to promote education and training as well as to keep the following under systemic review; interrogation rules, instructions, methods and practices relating to the custody and treatment of persons subjected to any form of arrest, detention or imprisonment with a view to preventing torture.

12.2 We submit that the ambit of Section 8 of the Bill, regulating the general responsibility to promote awareness and prevent acts of torture and other ill-treatment, should be widened to include the following:

i. Training of all persons working in or who may come into contact with detained persons or persons deprived of their liberty, such as health-sector personnel. This will include persons who work in health care

[28] Available at http://www2.ohchr.org/english/bodies/cat/comments_article14.htm (accessed 31 July 2012).

facilities such as psychiatric institutions, child and youth care centres, hospitals and the like;

ii. Training and preventive measures should include training on other cruel, inhuman and degrading treatment or punishment and should not be limited to torture;

iii. All government departments and institutions as well as private sector facilities who work with persons deprived of their liberties shall draft and continuously update policies on measures taken to prevent torture and other ill-treatment as well as a record of reported incidents of torture which record shall indicate that the matter was referred to the relevant authority for the appropriate action to be taken;

iv. Treaty monitoring bodies and other independent bodies such as the Judicial Inspectorate for Correctional Services shall be allowed to conduct and shall be provided assistance in conducting investigations into alleged acts of torture;

v. Every person, including those deprived of their liberty, shall be informed of the procedure to lodge a complaint of torture or ill-treatment with an independent body and shall not be hindered in doing so;

vi. Guarantees of protection from retaliation and intimidation for individuals reporting instances of torture and ill-treatment, victims of torture or ill-treatment and witnesses of torture or ill-treatment. In this respect the Bill must be aligned and bear reference to current witness protection and other protective mechanisms, such as the *Witness Protection Act,* 112 of 1998;[29]

vii. Assurances of proper impartial, independent investigations into allegations of torture and ill-treatment;[30]

viii. The establishment and maintenance of independent mechanisms to systematically review practices concerning the treatment of all persons deprived of their liberty and the conditions of detention;

ix. Medical and legal officials employed by the State to act on behalf of detainees shall have a legal obligation to report suspected acts of torture; and

x. The dissemination of practical guidelines, rules of conduct and principles that interpret States' international and regional obligations.

[29] Article 13 UNCAT imposes the obligation on States parties to ensure in any allegation of torture, the victim has the right to complain and have their case promptly and impartially examined by competent authorities and further that steps shall be taken to ensure the protection of complainants and witnesses.
[30] As above.

G. Additional recommendations

The duty to report

13.1 Article 19 of UNCAT requires that States parties submit reports on the measures they have taken to give effect to their undertakings under the Convention, within one year after entry into force for the State party concerned and thereafter every four years. The reports shall be submitted to the CAT. This is an important monitoring mechanism to ensure full and proper compliance by the State with UNCAT.

13.2 There is no provision in the Bill that provides for State reporting. Therefore such a provision must be included in the Bill to ensure that the Republic complies with their obligation under UNCAT and to assist South Africa in setting up the necessary mechanisms to ensure collection of information on a continual basis, monitoring and follow up. This information will feed into other aspects of work undertaken by the various departments and state institutions and will prove to be beneficial in a range of activities. We also recommend the engagement of civil society in this regard.

Non-refoulement

14.1 Article 3 of UNCAT provides that no State party shall expel, return 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. The CAT has said "a State party should unconditionally undertake to respect the absolute nature of Article 3 in all circumstances and fully incorporate the provision of Article 3 into the State's domestic law."[31] The principle of non-refoulement is further provided for in Article 15 of the Robben Island Guidelines.

14.2 The *Extradition Act,* 67 of 1962; the *Immigration Act,* 13 of 2002 and the *Refugees Act,* 130 of 1998 do not provide for non-refoulement where there are substantial grounds for believing that there is a danger of torture being carried out on the person in the requesting State or other country.

[31] CAT/C/CO/34/CAN (Canada) 2005.

14.3 The Constitutional Court has however, and most recently in the decision of *Minister of Home Affairs & Others v Tsebe & Others,*[32] adjudicated on similar issues and has affirmed the State's commitment to upholding the human rights of every person in everything that it did, and thus could not deport or extradite any person, where doing so would expose him or her to the real risk of the imposition and execution of the death penalty.

14.4 Thus where the rights to life, dignity and liberty of an individual are at risk the State is required both in terms of international and regional law as well as court precedent to, at the very least, seek an assurance that the individual will not be subjected to torture or other ill-treatment. Where there is the possibility that an individual will be subjected to torture or ill-treatment, the extradition, deportation or return of the individual shall not be allowed. A provision to this effect is required in the Bill to provide clarity in this respect.

Exclusion of evidence obtained as a result of torture

15.1 Article 15 of UNCAT provides that any statement established to be made as a result of torture shall not be invoked as evidence in any proceedings, except as against a person accused of torture. The prohibition also covers derivative information or evidence, which includes information uncovered by following leads given in statements made as a result of torture or ill-treatment.[33]

15.2 This principle is further confirmed in the Constitution in Section 35(5), which provides that "evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." The Robben Island Guidelines further affirm this principle under Article 19.

15.3 We submit that such a provision needs to be explicitly included in the Bill. Further, it must provide that any and all evidence obtained as a result of torture or ill-treatment must be excluded, and not limited to statements obtained only.

[32] [2012] ZACC 16. See also *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).
[33] A/54/44 (United Kingdom) 1999.

Retrospective application of the Bill

16.1 Article 15 of the *International Covenant on Civil and Political Rights,* 1966 provides that no person shall be held guilty of any criminal offence of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. It further states that nothing in Article 15 shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations. Section 35(3)(l) of the Constitution provides "every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted." It is recognised under the Constitution that an individual may be charged with and tried for an offence that was recognised as an offence under international law at the time it was committed, even if such offence was not explicitly established in national law. The Constitution further provides in Section 232 that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Torture is a crime under customary international law.[34]

16.2 The prohibition against torture is a *jus cogen* (peremptory norm) under international law. This means that the prohibition against torture contains a 'higher status' in international law, above treaties and ordinary customary law, and no derogation from this prohibition is permissible. South Africa ratified UNCAT on 10 December 1998. We submit therefore that the Bill should have explicit retrospective application, as a minimum from the date when South Africa ratified UNCAT.

Protection of vulnerable groups

17.1 We submit that the Bill must contain explicit provisions relating to the protection of vulnerable groups in the prohibition against torture. These groups include individuals deprived of their liberty through arrest, detention or incarceration and include awaiting trial and sentenced prisoners, patients in hospitals or institutions, children in child and youth care centres; and asylum seekers and refugees. These individuals generally find themselves in situations of powerlessness whereby another is exercising total power over them. Accordingly the State should prohibit,

[34] See *Furundzija Case* IT-95-17/1-T10 (Trial Chamber of ICTY, Judgment 10-12-1998.

prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as in the contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.[35] Some of the protections and recognitions of these vulnerable groups has already been mentioned previously in this submission.

17.2 "The protection of certain minority or marginalized individuals or populations, especially at risk of torture, is part of the obligation to prevent torture or ill-treatment. […] State parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection."[36]

Gender and Torture

18.1 Women are also recognised as a discrete group, whose experience of torture is both similar to and different from men. The CAT has emphasised that gender is a key factor in the prevention and prohibition of torture. This is based on the fact that "being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof."[37] The contexts in which women are at risk has been said to include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.

18.2 In addition, the commission of torture or ill-treatment with the consent or acquiescence of state officials has been recognised as a failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture. This then facilitates and thus enables non-State actors to commit acts impermissible under UNCAT with impunity, the States indifference or inaction being seen as a form of encouragement

[35] CAT/C/GC/2 (2008) at 4.
[36] As above at 6.
[37] As above.

or de facto permission.[38] The CAT has applied this principle to States' failure to prevent and protect victims from gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking.[39]

18.3 The Special Rapporteur has further reinforced that the language used in Article 1 of UNCAT concerning the consent and acquiescence by a public official extends State obligations into the private sphere and should be interpreted to include State failure to protect persons from torture and ill-treatment committed by private individuals.[40] Thus domestic violence against women, rape committed against women as well other violent acts against women and girls, committed by private individuals, may be seen as acts of torture and / or ill-treatment. This must be explicitly recognised in the Bill, in reinforcing the protection of vulnerable groups.

18.4 In measures of prevention of torture and ill-treatment, the Special Rapporteur has stressed that anti-torture monitoring mechanisms at the national and international levels must extend their level of scrutiny of the legal framework to a broad range of laws that may be of particular concern to women.[41] Therefore in measures of prevention, the Bill must explicitly state the requirements for the level of scrutiny required for vulnerable groups such as women.

Conclusion

We would like to thank the Portfolio Committee for the opportunity to make these submissions. We would like the opportunity to make verbal submissions in Parliament on 14 August 2012. Should there be any questions or should the Portfolio Committee wish any of the above submissions to be expanded upon, we will do so at the public hearings.

For queries or further information please contact Kathleen Hardy (Attorney: Rule of Law Programme) at kathleen.hardy@wits.ac.za or 011 717 8646.

[38] CAT/C/GC/2 (2008) at 5.
[39] As above.
[40] A/HRC/7/3 (2008) at 7.
[41] As above at 76.