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# DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS AGAINST TORTURE IN LESOTHO

Thesis submitted by

**ITUMELENG MAMOKHALI SHALE**

In fulfilment of the requirements of the degree of

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South Africa

**2017**

**SUPERVISOR:**

**PROFESSOR LILIAN CHENWI**

## DECLARATION

I, **ITUMELENG MAMOKHALI SHALE**, declare that this is my own work and that it has not previously been submitted for any degree or examination in any institution or published in any journal, textbook or media.

This thesis is up to date as of **31 JULY 2017.**

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## ABSTRACT

Absolute prohibition of torture is a peremptory norm of international customary law that all states must comply with. Obligations to prevent and prohibit torture, to punish its perpetrators and to provide adequate redress to victims of torture, as well as to report on measures taken against torture are contained in several international human rights instruments to which Lesotho is a party. A key obligation contained in these instruments is for state parties to harmonise their national legal systems, as well as practices with standards contained in each instrument.

Thus, the main question, which this thesis investigates, is the extent to which international human rights standards against torture are effectively implemented in Lesotho's domestic legal regime. In order to respond to this question, the thesis seeks to answer four sub-questions aimed at identifying international human rights standards and states' obligations against torture, to determine the relationship between international law and the legal system of Lesotho, to evaluate Lesotho's legal and institutional frameworks against the international human rights standards identified and lastly, to extract from Lesotho's political history the extent to which torture is practised in Lesotho, factors, which influence its commission, as well as those, which inhibit effective implementation of the international standards against it.

In Chapter 1 of the thesis, the research is introduced, a definition of torture under both international human rights and international criminal law is provided and the structure of the thesis is set out. In Chapter 2, the history of international prohibition of torture is first discussed so as to provide the context in which the international standards against torture were adopted, and then the obligations against torture, which each international human rights instrument adopted by the United Nations (UN) and African Union imposes on state parties to them, are extrapolated. The overall states' obligations in these instruments are: the obligation to prevent and prohibit torture, to prosecute and punish its perpetrators and to provide redress to victims of torture, as well as to report on measures taken against torture. In Chapter 2, the specific ways in which states are mandated to implement these obligations are also discussed. In Chapter 3, the extent of implementation of these obligations in Lesotho's legal and institutional frameworks are assessed, and in Chapter 4, their practical implementation by Lesotho's three law enforcement institutions, the Lesotho Mounted Police Service (LMPS), the Lesotho Defence Force (LDF) and the Lesotho Correctional Service (LCS) are evaluated.

An analysis of Lesotho's legal system in Chapter 3 reveals that the legal system is receptive of international law and that judicial activism has led to the application of international human rights instruments by the courts of Lesotho without probing into their domestication. Therefore, similar arguments may be used to apply Lesotho's

international human rights obligations against torture in the legal system of Lesotho. A further review of the legal and institutional frameworks against torture in Chapter 3, as well as the practice of torture in Chapter 4, leads to a conclusion that the legal and institutional frameworks are weakened by both political instability and failure to implement international human rights standards. Failure to prohibit torture as a distinct crime and the granting of immunity and amnesty for politically motivated torture have resulted in the continued practice of torture, impunity for perpetrators and a lack of adequate redress to victims of torture.

In the thesis, a multi-pronged approach to addressing these challenges is recommended. Firstly, the national legal framework must be reformed and harmonised with the international human rights standards against torture. A specific anti-torture legislation must be enacted. The existing laws must be reviewed and amended to incorporate Lesotho's obligations under the relevant international human rights instruments, such as the UN and African regional levels. Laws, which are in conflict with the international standards, must be repealed and those not yet enacted, such as the Amnesty Bill, 2016 must not be enacted. Secondly, Lesotho's institutions and offices, such as the LMPS, the Police Complaints Authority, the Director of Public Prosecutions, the Office of the Ombudsman and the Judiciary must be capacitated through training and alignment of their mandates with international standards in order for them to effectively investigate allegations of torture, to prosecute perpetrators, to impose appropriate penalties on those convicted and to award reparative remedies to victims of torture. Because of the link between the prevalence of torture and the involvement of the military in Lesotho's political instability, the dissolution of the LDF as a torture prevention measure is further recommended.

## DEDICATION

This thesis is dedicated to:

My late father, **Senior Inspector Jacob Lehloa Tsolo**, who despite being a Police Officer at the time when torture was highly used as an interrogation tool within the LMPS, instilled in me that all human beings are equal and that no circumstances justify the torture of fellow human beings – May his soul rest in peace;

and to

All the victims and survivors of torture and members of their families in Lesotho and the world at large.

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The production of this work has been made possible by God, the Almighty, who plotted the path for me and walked me through it. I thank God deeply for giving me life, loving me and surrounding me with individuals who have guided and helped me throughout this journey.

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I thank my family, my ever supportive husband, Shale Patrick Shale, our sons, Mokhali and Motlatsi, who have always encouraged Mummy and held her hand to the finish line. Completion of this work is yet another result of having a praying mother who has been there for me throughout; I thank God for Mme Maitumeleng Tsolo. My mother- and father-in-law's support and belief in my ability to produce this work is also deeply appreciated. I am deeply indebted to my younger sister and brother, as well as all my sisters-in-law who each played a distinguished role in assisting me to complete this work.

I thank the PhD candidates of 2014 to 2016, the Law Writing Centre and individual staff members and lecturers of the University of the Witwatersrand School of Law who gave off their time to attend presentation sessions, made comments and gave constructive criticism, which yielded this work. I also thank the officers of the Security institutions, the LDF, the LMPS and the LCS, as well as those of the High Court of Lesotho who assisted me with information, which I needed for this work.

Lastly, but most importantly, I thank the National University of Lesotho and the Government of Lesotho for their financial contribution towards my PhD studies.

## ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| ABC | All Basotho Convention |
| ACDEG | African Charter on Democracy, Elections and Governance |
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACHPR | African Commission on Human and Peoples' Rights |
| ACHR | American Convention on Human Rights |
| ANC | African National Congress |
| APT | Association for Prevention of Torture |
| AU | African Union |
| BCP | Basotho Congress Party |
| BTI | Bertelsmann Stiftung's Transformation Index |
| BMP | Basutoland Mounted Police |
| BNP | Basotho National Party |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CIDT | Cruel, Inhuman and Degrading Treatment |
| CMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families |
| Compol | Commissioner of Police |
| CPTA | Committee on Prevention of Torture in Africa |
| CPWA | Children's Protection and Welfare Act |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| DC | Democratic Congress |
| Dispol | District Police |
| DRC | Democratic Republic of the Congo |

| | |
|---|---|
| Doc | Document |
| DPP | Director of Public Prosecutions |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECOSOC | Economic and Social Council |
| FC | Female Circumcision |
| FGM | Female Genital Mutilation |
| GBT | Gender-based Torture |
| GBV | Gender-based Violence |
| GC | General Comment |
| GR | General Recommendation |
| HRC | Human Rights Committee |
| IACHR | Inter-American Commission on Human Rights |
| IC&D | Inspectorate, Complaints and Discipline |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IDPs | Internally Displaced Persons |
| IHL | International Humanitarian Law |
| ILO | International Labour Organisation |
| INA | Interim National Assembly |
| ISA | Internal Security Act |
| LCD | Lesotho Congress for Democracy |
| LCS | Lesotho Correctional Service |
| LDF | Lesotho Defence Force |
| LEAs | Law Enforcement Agencies |
| LLA | Lesotho Liberation Army |
| LMPF | Lesotho Mounted Police Force |
| LMPS | Lesotho Mounted Police Service |
| MDGs | Millennium Development Goals |

| | |
|---|---|
| NPMs | National Prevention Mechanisms |
| NSS | National Security Services |
| OAU | Organization of African Unity |
| OC | Officer Commanding |
| OHCHR | Office of the High Commissioner for Human Rights |
| OLC | Office of the Legal Counsel |
| OPCAT | Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment |
| PCA | Police Complaints Authority |
| PTC | Police Training College |
| Regipol | Regional Police |
| RIGs | Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa |
| RLDF | Royal Lesotho Defence Force |
| SADC | Southern African Development Community |
| SALC | Southern African Litigation Centre |
| SAPS | South African Police Services |
| SCSL | Special Court for Sierra Leone |
| TRC | Transformation Resource Centre |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |
| VCLT | Vienna Convention on the Law of Treaties |

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# CHAPTER 1

# INTRODUCTION AND BACKGROUND

## 1.1 Introduction

> Prevention of torture requires an effective national legal framework that incorporates international human rights standards and includes specific provisions to prohibit and prevent torture.[1]

The debates about the moral and legal nature of the prohibition of torture reflect widely divergent views, ranging from total prohibition to permissibility of some exceptions,[2] especially in situations in which torture may be the only means to obtain information to prevent greater harm to innocent people.[3] Notwithstanding the debates, central to this study is the generally accepted view that both customary international law and treaties to which Lesotho is a party totally prohibit torture.[4] The main argument in this thesis is that because Lesotho is a party to international human rights instruments, which contain standards on total prohibition of torture, over and above its obligations under customary international law, it has created law for itself and therefore has an obligation to implement, at the domestic level, absolute prohibition of torture in accordance with both customary and treaty law.[5] In this

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[1] Association for Prevention of Torture 'National anti-torture laws and standards' (2008) http://www.apt.ch/en/national-level/ [accessed 26 November 2013].

[2] O Gross 'The prohibition of torture and the limits of the law' in S Levinson (eds.) *Torture: A collection* (2004) 1.

[3] These situations are also referred to as the ticking bomb situations. See M Farell 'On Torture' unpublished PhD Thesis, University of Liverpool (2011) 93 https://aran.library.nuigalway.ie/handle/10379/2171 [accessed 6 July 2016]; K Ambos 'May a state torture suspects to save life of innocents?' (2008) 6 (2) *Journal of International Criminal Justice* 262.

[4] Universal Declaration of Human Rights (Universal Declaration) 1948 article 5; International Covenant on Civil and Political Rights (ICCPR) 1966 article 7; African Charter on Human and Peoples' Rights 1981 (African Charter) article 5; Human Rights Committee (HRC), General Comment 24 'Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant', 4 November 1994 UN Doc CCPR/C/21/Rev.1/add.6 (HRC, GC 24); See also *Prosecutor v Anto Furundzija* Case No IT-95-17/1-T Judgement 10 December 1998 para 153; See also *National Commissioner of South African Police Service v Southern African Human Rights Litigation Centre & Others* (2014) 2 SA 42 paras 36 & 37.

[5] See principles of *pacta sunt servanda* in article 26 of Vienna Convention on the Law of Treaties (VCLT) 1969; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA res. 2625, Annex, 25 UN GAOR, Supp. (No 28), UN Doc A/5217 (1970)**;** Draft Articles on Responsibility of States for

thesis, it is argued that effective implementation of international human rights standards against torture requires the national legal and institutional frameworks to be consistent with the obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims as well as to report on measures taken against torture. That is, the national legal framework must contain specific measures aimed at torture prevention,[6] prohibit torture as a distinct crime,[7] provide for appropriate penalties which take into account the gravity of the offence of torture,[8] and also contain the appropriate redress which must be awarded to victims of torture. In like manner, there must exist, national institutions which are competent and impartial in their discharge of the obligations to investigate allegations of torture, to prosecute its perpetrators and to award and enforce appropriate redress to victims of torture.[9]

This research is premised on the observation that despite clear prohibition of torture in international law, acts of torture continue to take place in Lesotho, perpetrators go unpunished and victims remain without redress. In chapter 4 it is illustrated that the law enforcement and security institutions in Lesotho employ torture for different purposes amongst which are those that Amnesty International[10] has reported as common in other parts of the world. Members of the Lesotho Mounted Police Service (LMPS), Lesotho Defence Force (LDF) and Lesotho Correctional Service (LCS) use torture in order to obtain information, to punish suspects, for intimidation or coercion

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Internationally Wrongful Acts, Report of the International Law Commission UN Doc A/56/10 (2001) articles 12 & 13**;** M Dixon *Textbook on international law* (2013) 30.

[6] ICCPR article 2(2); CAT article 2(1); African Charter article 1; HRC, General Comment 31 'The nature of the general legal obligation imposed on state parties to the Covenant' 26 May 2004 UN Doc CCPR/C/21/Rev.1/Add.3 (HRC, GC 3); Committee against Torture General Comment 2 'Implementation of Article 2 by States Parties', 24 January 2008, UN Doc CAT/C/GC/2 (Committee against Torture, GC 2).

[7] CAT article 4; Committee against Torture, GC 2 para 11; L Fernandez & L Muntingh 'The criminalisation of torture in South Africa' (2016) 60 (1) *Journal of African Law* 93.

[8] Committee against Torture, GC 2 para 11. See also Frenandez and Muntingh (note 7 above) 99.

[9] CAT article 14; Committee against Torture, General Comment 3 'Implementation of article 14 by states parties' 19 November 2012 UN Doc CAT/C/GC/3 (Committee against Torture, GC 3) para 1; D. Shelton *Remedies in international human rights law* (2015) 32; Hall CK 'The duty of states parties to the Convention Against Torture to provide procedures permitting victims to recover reparations for torture committed abroad' (2007) 18 (5) *European Journal of International Law* 922.

[10] Amnesty International is a global movement of more than 7 million people who campaign for observance of rights protected in the Universal Declaration of Human Rights 1948 and other international human rights instruments. www.amnesty.org/en/who_we_are [accessed 14 January 2015].

and for reasons based on discrimination.[11] Analysis of human rights reports dating from the time when Lesotho gained independence to date, leads to the conclusion that many of the cases of torture in Lesotho are closely linked to the absence of anti-torture laws and political instability in the country.[12] The practice of torture during political instability is fuelled by enactment of laws which authorise prolonged detention,[13] immunity and amnesty for perpetrators of torture as well as total neglect of redress to victims of torture.[14] All these factors violate Lesotho's international human rights obligations against torture.

In this thesis the aim is to interrogate both general and specific obligations against torture under both customary international and treaty law.[15] The international human rights obligations are used as a yardstick to measure Lesotho's legal and institutional frameworks, as well as the practice of torture as reflected in court cases, reports of human rights organisations and Lesotho's state party reports to various human rights treaty bodies.[16] Analysis of the legal and institutional frameworks is aimed at assessing the implementation of international human rights standards against torture in theory (as contained in the laws), while analysis of case law and human rights reports, is aimed at assessing the practical implementation of international human rights standards against torture.[17] The analysis also helps to identify factors, which inhibit effective domestic implementation of international standards against torture. It is on the basis of this analysis that an argument is made that alignment of the national legal framework with international human rights standards against torture, including enactment of an anti-torture law, is key to the eradication of torture in

[11] See generally, Amnesty International 'Torture in 2014: 30 years of broken promises' (2014) http://www.amnesty.org/library/info/ACT40/004/2014/en [accessed 8 October 2014].
[12] For a detailed analysis of the cases of torture within the security institutions in Lesotho see chapter 4 of this thesis.
[13] Internal Security Act (General) of 1967 & International Security Act (General) of 1974, which gave the Commissioner of Police excessive detention powers and allowed detention for lengthy periods. For a detailed analysis of these laws, see chapter 3 of this thesis.
[14] For instance, section 3 of the Indemnity Order of 1988, prohibited the taking of legal proceedings, whether civil or criminal in any court of law against the crown, an officer or member of the military, the police force or any person employed in the public service for acts committed for the defence of the Kingdom of Lesotho or public safety, or for the prevention or suppression of mutiny or internal disorder between 24 February 1988 and 30 April 1988.
[15] See chapter 2.
[16] See chapter 3.
[17] See chapter 4.

Lesotho.[18]

Human rights standards against torture are set out in human rights treaties and soft law adopted by the United Nations (UN), as well as other bodies in regional human rights systems such as the African, European and the Inter-American human rights systems. Lesotho is a member state of the UN and African Union (AU). Therefore, for purposes of examining Lesotho's obligations, reference is made to instruments adopted by both the UN and AU to which Lesotho is a party. Instruments adopted in other regions are, however, used for interpretation and comparative purposes.

Because the international human rights instruments referred to in this study do not only make reference to torture, but also to inhumane and degrading treatment (CIDT), torture is firstly defined and differentiated from other CIDT. This approach is adopted because the legal meaning of torture may not be as clear as its literal meaning when it is used to indicate moral outrage against certain acts.[19] Furthermore, the definition of torture and states' obligations under national human rights law are quite different from those under international human rights law,[20] as well as under international humanitarian law.[21] In this study, the view of the Human Rights Committee (HRC)[22] that 'legal obligations against torture go beyond the normal understanding of torture and depend on the kind, purpose and severity of the act in question'[23] is adopted. It is therefore important to first define torture before determining Lesotho's international human rights obligations, which are specific to torture. It is also important to first define torture because the failure of international instruments adopted before the Convention against Torture and other Cruel,

[18] See chapter 5.
[19] GH Miller 'Defining Torture' *Flosheimer Centre Occasional Paper* No. 3 (2005) 9.
[20] For a distinction between international human rights law and national human rights law, see F Viljoen *International human rights law in Africa* (2012) 6, stating that 'international human rights law differs from national human rights law as to its source, in that its concretized content is found mainly in provisions of international human rights treaties'.
[21] A Orakhelashvili 'The Interaction between human rights and humanitarian law: Fragmentation, conflict, parallelism, or convergence?' (2008) 19 (1) *European Journal of International Law* 161.
[22] The Human Rights Committee is established in terms of article 28 of International Covenant on Civil and Political Rights (ICCPR) to monitor its implementation.
[23] HRC, General Comment 7: 'Article 7 (Torture or Cruel, Inhuman or Degrading Treatment or Punishment' 30 May 1982 para 2 (HRC, GC 7), which has since been replaced by General Comment 20.

Inhuman or Degrading Treatment or Punishment 1984 (CAT)[24] to provide a concrete definition of torture has shown to be problematic. The diversity of acts, victims and circumstances under which torture may be committed, posed challenges, which questioned the type of acts that constitute torture,[25] the threshold of pain or suffering, which constitutes torture, as well as whether any and every person is capable of committing torture.

Definitional challenges regarding the prohibition of torture under international law were first faced by the European Commission on Human Rights (European Commission) in 1969.[26] In the case of *Denmark v Greece (Greek case),*[27] the European Commission was called to interpret prohibition of torture under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) 1950.[28] In this case, the Commission held that torture is 'inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment'.[29] Rodley argues that the Commission's interpretation of torture in the *Greek case* influenced the definition of torture, which was later contained in article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture) adopted in 1975.[30] The definition contained in the Declaration against Torture was then applied by both the European Commission and the European Court of Human Rights (European Court) in the case

[24] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
[25] *Ireland v United Kingdom* 25 European Court of Human Rights (1978) facts of which are considered later on in this section.
[26] European Commission is established to monitor implementation of the European Convention of Human Rights.
[27] *Denmark v Greece* Application 3321/67, *Norway v Greece* Application 3322/67, *Sweden v Greece* Application 3323/67 *Netherlands v Greece* Application 3344/67, Report of the Human Rights Commission volume 2 1 (*Greek case*).
[28] European Commission was called to interpret prohibition or torture under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) 1950.
[29] *Greek Case* (note 27 above) 186.
[30] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture) 1975 article 1(2) which provides that 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. See NS Rodley 'The definition(s) of torture in international law' (2005) 55 *Current Legal Problems* 471.

of *United Kingdom v Ireland*[31], which drew different conclusions. The European Court considered that Britain's 'interrogation in depth', which involved wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food amount to inhuman treatment and not torture, whereas the European Commission had held earlier that these acts constitute torture.[32] As will be illustrated in the next section of this chapter, with regard to the ICCPR, the HRC has refrained from defining torture and or differentiating it from CIDT.[33] The HRC's approach to the definition of torture considered in the next section shows that in many of the cases in which it found violation of article 7, it did not classify whether that was torture or CIDT. [34]

Because of the challenges, which faced bodies tasked with interpretation of the prohibition of torture under international law as illustrated above, torture was defined in article 1(1) of CAT.[35] While there have been a few challenges regarding its interpretation,[36] the CAT definition of torture, has been widely accepted as comprehensive.[37] In the next section, the definition of torture, including its essential

[31] *Ireland v United Kingdom* (note 25 above). See also J Conroy *Unspeakable acts, ordinary people: The dynamics of torture* (2000) 187.
[32] *Ireland v United Kingdom (note 25 above)*.
[33] Rodley (note 30 above).
[34] For instance, in the case of *Netto, Weismann & Lanza v Uruguay* Communication 8/1977 (HRC) 3 April 1980 UN Doc CCPR/C/OP/1 para 16 in which the author claimed that her aunt and uncle were arrested and subjected to torture during detention. The HRC held that their treatment violated a number of articles of ICCPR including article 7, but did not specify whether the violation constituted torture or CIDT. For a further discussion of unclassified cases before the HRC, see section 1.2.1, as well as NS Rodley & M Pollard *The treatment of prisoners under international law* (2009) 463.
[35] CAT definition of torture is discussed in detail in section 1.2
[36] For instance, the US Baybee Memo which interpreted the requirement of severe pain and suffering to mean suffering equivalent to death or organ failure was drafted when CAT was already in force. See LF Rouillard 'Misinterpreting the prohibition of torture under international law: The Office of Legal Counsel Memorandum' (2005) 21 (1) *American University International Law Review* 23. See also M Nowak, M Birk & T Crittin 'The Obama administration and obligations under the Convention against Torture' (2011) 20 (33) *Transnational Law and Contemporary Problems* 37.
[37] Rodley (note 30 above) 475. The European Commission has also endorsed and applied the CAT definition of torture in several cases including *Selmouni v France,* Application 25803/94 (European Court of Human Rights) 28 July 1999, para 100 in which the European Court relied on the definition of torture under CAT in order to determine whether the acts of ill-treatment and sexual abuse, which the author complained of amount to torture. Some other cases in which the European Court referred to the CAT definition of torture are *Ilhan v Turkey,* Application 2227/93 (European Court of Human Rights) 27 June 2000, para 85, *Salman v Turkey,* Application 21986/93 (European Court of Human Rights) 27 June 2000, para 114. See also Association for Prevention of Torture *Guide to jurisprudence on torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights* (2000) 16. The CAT definition of torture has also been applied in some cases under international criminal law. See *Prosecutor v Akayesu* Case No. ICTR-96-4-T (ICTR) 2 September 1998, paras 593 & 681. See also Y Dinstein *Non-international armed conflicts in international law* (2014) 168. See also O Hathaway, A Nowlan and J Spiegel 'Tortured reasoning: The intent to torture

elements as accepted in international human rights law will be investigated taking into account the general comments and jurisprudence of the HRC and the Committee against Torture. The definition of torture under international criminal law is also considered so as to highlight the difference between torture as a human rights violation and torture as part of international crimes. It is important to note that for purposes of this study, the human rights definition of torture is adopted as a basis for assessing Lesotho's implementation of international human rights standards against torture.

## 1.2 Definition of torture

### *1.2.1 Definition of torture under ICCPR*

Article 7 of the ICCPR provides that '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'. Article 7 neither defines torture nor other CIDT. This fact has been acknowledged and reinforced by the HRC through general comments and jurisprudence.[38] The types of acts, which the HRC has considered as a violation of article 7, are illustrated briefly in this section while the HRC's general comments, jurisprudence and concluding observations concerning states' obligations under article 7 are considered in chapter 2.

In its General Comment 20,[39] the HRC acknowledged that ICCPR does not contain any definition of the concepts covered by article 7, such as torture and CIDT.[40] It acknowledged further that it has not itself considered it necessary to draw up a list of prohibited acts.[41] The HRC, however, noted that certain acts, such as prolonged

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under international and domestic law' *Yale Law School Legal Scholarship Series Paper* 4723 (2012) 797.

[38] HRC, General Comment 20, 'Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment' 10 March1992 UN Doc HRI/GEN/1/Rev.7 (HRC, GC 20) para 2

[39] As above.

[40] HRC, GC 20 para 4.

[41] As above.

solitary confinement[42] and the manner in which the death penalty is carried out may violate article 7.[43] It must be noted that, although there are instances in which the manner of carrying out the death penalty may violate article 7,[44] the HRC has held that the death penalty itself does not constitute a violation of article 7.[45] However, the Committee has held that ill-treatment or torture of detainees on death row violates article 7.[46]

The trend of the HRC's jurisprudence with regard to defining torture has been consistent with its stance in GC 20 in that it has refrained from differentiating torture from CIDT.[47] In the majority of communications, it has held generally that article 7 has been violated without stating whether the treatment complained about constitutes torture or CIDT.[48] In some cases, involving the imposition of corporal punishment, the HRC has specifically held that corporal punishment constitutes

[42] HRC, GC 20 para 6. HRC, *Concluding observations on the fourth periodic report of Denmark*, 31 October 2000, UN Doc CCPR/CO/70/DNK, para 12 in which the HRC stated that 'the Committee is of the view that solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10 paragraph 1'. Denmark was called to reconsider the practice of solitary confinement and to ensure that it is used only in cases of urgent necessity. See also Rodley & Pollard (note 34 above) 404.

[43] HRC, GC 20 para 6.

[44] For a detailed discussion of torture and CIDT in the execution of the death penalty see L Chenwi *Towards the abolition of death penalty in Africa* (2007) chapter four.

[45] *Howell v Jamaica* Communication 798/1998 (HRC), 21 October 2003 UN Doc CCPR/C/79/D/798/1998, para 6.3; *Teesdale v Trinidad and Tobago* Communication 677/1996 (HRC), 1 April 2002 UN Doc CPR/C/74/D/677/1996, para 9.2; *Wanza v Trinidad and Tobago* Communication 683/1996 (HRC), 26 March 2002 UN Doc CCPR/C/74/D/683/1996, para 9.3.

[46] *Wilson v The Philippines* Communication 868/1999 (HRC), 30 October 2003 UN Doc CCPR/C/79/D/868/1999, para 7.4 in which the HRC found the state party to have violated article 7 in that while on death row, the author was subjected to torture and ill-treatment, which resulted in him having mental illness.

[47] Rodley (note 30 above) 484.

[48] *Sathasivam and Saraswathi v Sri Lanka* Communication 1436/2005 (HRC), 8 July 2008, UN Doc CCPR/C/93/D/1436/2005 para 6.7. In this communication, the HRC considered that the death of the author's son who died in hospital after a four-day detention during which he sustained injuries amounted to violation of article 7. The HRC did not specify whether the violation amounted to torture or CIDT. See also *Patricia Ndong Bee & Maria Jesus Bikene* Communications 1152/2003 & 1190/2003 (HRC), 31 October 2005 UN Doc CCPR/C/85/D/1152 & 1190/2003, para 6.1. In this combined communication, the HRC considered deprivation of food and drink for five consecutive days as violation of article 7 without stating which aspect of article 7; *Turdukan Zhumbaeva v Kyrgyzstan* Communication 1756/2008 (HRC), 19 July 2011 UN Doc CCPR/C/102/D/1756/2008, para 8.9. In this communication, the HRC considered that the death of the author's son in police custody and injuries on his face and neck which were revealed by an autopsy report amount to violation of article 7. Similarly, in *Isaeva v Uzbekistan* Communication 1163/2003 (HRC) 20 March 2009, UN Doc CCPR/C/95/D/1163/2003, para 9.2, the HRC considered that the author's son's death in police custody amounted to violation of article 7.

CIDT.[49] There are, however, limited cases in which the HRC specifically found a violation of article 7 to constitute torture. These cases involved a combination of acts, such as solitary confinement, food deprivation, systematic beatings as a result of which the victims' health deteriorated,[50] use of electric shocks and drowning,[51] parading victims naked and subjecting them to electric shocks in the genitalia.[52] It is important to note that in some communications involving similar acts and/or combinations of these acts, the HRC had held generally that it finds a violation of article 7. It is not clear as to what influences the HRC's general finding of a violation of article 7, as opposed to a specifc finding that torture or CIDT has been committed.[53]In the case of *Chani v Algeria*, the HRC held that it 'recognises the degree of suffering involved in being held indefinitely without contact with the outside world' [54] but did not mention whether that consideration leads to torture or CIDT.

All in all, the HRC has not laid down specific factors or elements, which influence its decision on whether an act, which violates article 7 of ICCPR, constitutes torture or

[49] *Boodlal Sooklal v Trinidad and Tobago* Communication 928/2000 (HRC), 25 October 2001, UN Doc CCPR/C/730/D/928/2000 para 4.6. See also *Osbourne v Jamaica* Communication 759/97 (HRC), 15 March 2000, UN Doc CCPR/C/68/D/759/1997, para 9.1. in which the HRC said 'irrespective of the nature of the crime for which one has been convicted, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading treatment or punishment contrary to article 7 of the Covenant'.

[50] *Sendic v Uruguay* Communication 063/1979 (HRC), 28 October 1981, UN Doc CCPR/C/14/D/63/1979, para 20. The HRC held that the state party's violation of article 7 amounted to torture because the victim had developed a hernia as a result of the beatings to which he was subjected to while in detention; *Chani v Algeria* Communication 2297/2013 (HRC), 11 March 2016, UN Doc CCPR/C/116/D/2297/2013, para 7.3 in which the author was detained *in communicado* for about 20 days during which he was systematically slapped, kicked, punched, choked and urinated on. Conversely in *Dunaev v Tajikistan* Communication 1195/2003 (HRC), 30 March 2009, UN Doc CCPR/C/95/D/1195/2003, para 9.2, although the author had sustained two broken ribs as a result of the beatings, the HRC held generally that such treatment violated article 7 without classifying it as torture or CIDT.

[51] *Angel Estrella v Uruguay* Communication 074/1980 (HRC), 29 March 1983, UN Doc CCPR/C/18/D/74/1980, para 10 in which the author and other detainees were subjected to electric shocks, beatings with rubber truncheons, punches and kicks, hanging with hands behind their backs, pushed into the water until they were close to asphyxiation and were also made to stand with legs apart and arms raised for up to 20 hours and the HRC held that article 7 had been violated because 'Miguel Angel Estrella was subjected to *torture* during the first days of this detention'. (Emphasis added).

[52] *Arzuaga Gilboa v Uruguay* Communication 147/1983 (HRC), 1 November 1985, UN Doc CCPR/C/OP/2, paras 4.3 and 14. In this case, the victim was brutally beaten on the streets at the time of her arrest and while in detention, she was subjected to an 'electric prod' particularly in the genital area. She was also strung up naked out in the open yard, handcuffed and left naked in the presence of guards and her torturers. The HRC held that article 7 had been violated 'because Lucia Arzuaga Gilboa was subjected to *torture* and degrading treatment in the period between 13 and 30 June 1983'.

[53] Rodley (note 30 above) 374.

[54] *Chani v Algeria* (note 50 above) para 7.3.

CIDT. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has commended the HRC, for this approach on the grounds that:

> [it] allows the Committee to develop a dynamic case law by broadening the concept of torture. This factual approach enables the Committee to encompass within the scope of this prohibition acts that would not necessarily fall within the concept of torture at the time where a strict legal definition would have been adopted.[55]

The challenge with this approach however, is that it fails to highlight the gravity of the offence of torture as opposed to other CIDT.

### *1.2.2 Definition of torture under CAT*

Article 1(1) of CAT defines torture in the following terms:

> 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.[56]

From this definition, the following elements of torture can be identified: (a) *actus reus,* (b) *mens rea,* and (c) *official capacity of the perpetrator.*

#### *1.2.2.1 Actus reus (Infliction of severe pain or suffering)*

The first element of torture as contained in article 1(1) of CAT is that there must be an act, which has caused severe pain or suffering, whether physical or mental. On this basis, the Committee against Torture[57] has held that acts, such as the use of

[55] OHCHR 'Interpretation of torture in the light of the practice and jurisprudence of international bodies' 2011 www.ohchr.org/Documents/Issues/Torture/UNVFT/Interpretation_torture_2011_EN.pdf [accessed 19 March 2014].
[56] CAT article 1.
[57] Established in terms of CAT article17 with mandate to monitor implementation of CAT.

electric shocks on the body of a victim,[58] severe beatings[59] and solitary confinement[60] amount to torture. In the case of *Grasimov v Kazakhstan,* the Committee against Torture found that the following treatment to which the author was subjected amounts to torture: infliction of several heavy blows to his kidneys, threatening him with sexual violence and subjecting him to a technique known as 'dry submarino', which involved repeatedly suffocating him with a polypropylene bag and releasing it when he was about to suffocate.[61] These are examples of 'acts', which cause severe pain or suffering to the victim. However, the OHCHR has warned that 'torture is not an act itself, or specific type of acts, but it is the legal qualification of an event or behaviour'.[62] Hence, the Committee against Torture has found a violation of article 1 in cases where failure of a person to act has resulted in severe physical or mental pain or suffering to a victim.[63] It is therefore important that when determining whether an act or omission amounts to torture, the second leg, which is the effect of that act or omission, must be taken into account.

The second leg to the element of *actus reus* is that the act or omission must have caused severe pain or suffering. In the recent case of *R.O v Sweden,* the Committee against Torture held that FGM constitutes torture because 'it causes permanent physical harm and severe psychological pain to the victims, which may last for the

[58] *Alan v Switzerland* Communication 21/1995 (Committee against Torture), 8 May 1996, UN Doc CAT/16/D/21/1995, paras. 2.1-2.5, 11.2-11.6 & 12.
[59] *Niyonzima v Burundi* Communication 514/2012 (Committee against Torture), 21 November 2014, UN Doc CAT/C/53/D/514/2014, para 8.2 in which beatings leading to profuse bleeding were held to be torture as defined in article 1. In *Dmytro Slyusar v Ukraine* Communication 353/2008 (Committee against Torture), 14 November 2011, UN Doc CAT/C/47/D/353/2008, para 9.2 it was held that severe beatings, deprivation of food and sleep amount to torture.
[60] Committee against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, 19 December 2014, UN Doc CAT/C/USA/CO/3-5 paras 19 to 21 in which the Committee raised its concern about allegations of the use of solitary confinement in immigration detention facilities, prisons and mental health facilities for purposes of punishment, discipline and protection, as well as for health-related reasons and noted that 'solitary confinement for indefinite periods of time and its use with respect to juveniles and individuals with mental disabilities. Full isolation of 22 to 23 hours a day in super maximum security prisons is unacceptable' and violates article 16 of CAT.
[61] *Grasimov v Kazakhstan* Communication 433/2010 (Committee against Torture), 10 July 2012, UN Doc CAT/C/48//D/433/2010, paras 2.2 and 2.3.
[62] OHCHR, 2011 (note 54 above) 2.
[63] In *Dmytro Slyusar v Ukraine* (note 59 above) deprivation of food and sleep was held to amount to torture when combined with severe beatings, exposure of the author to a temperature of 4 degrees Celsius and threats that his mother and wife would be harmed if he did not confess that he killed his father; M Nowak & E McArthur *The UN Convention against Torture: A Commentary* (2008) 75.

rest of their lives…'[64] It has been the trend of the Committee against Torture to determine the effect, which an act has had on the victim before determining whether such act amounts to torture or not. For instance, whereas in the case of *Dmytro Slyusar v Ukraine*,[65] the Committee had held that deprivation of food amounts to torture, in *Kirsanov v Russian Federation* it held that the author's temporary confinement in a ward with no bedding, no toiletry items, no table, no toilet and sink and denial of walks outside did not amount to torture as defined in article 1 because such treatment did not cause 'severe pain and suffering' within the meaning of article 1.[66]

The question then becomes how this severity is measured. When addressing the confusion regarding the element of *actus reus and* the severity of pain, which the victim must have suffered, the former UN Special Rapporteur on Torture and other Cruel Inhuman and Degrading Treatment or Punishment (2004-2010), Manfred Nowak, stated that what qualifies conduct as torture is neither the conduct itself nor the severity of pain caused thereby, but the purpose of that conduct, as well as the powerlessness of the victim.[67] Nowak's approach thus highlights the interdependence of the three elements and also that, for torture to be proven, all elements must be present at the same time. Therefore, for an act or omission to constitute torture, there must also be a certain intention as discussed below.

*1.2.2.2 Mens rea (Intention to attain a prohibited purpose)*

The second element of torture is that the act or omission by which severe pain or

[64] *R.O. v Sweden* Communication 644/2014 (Committee against Torture), 18 November 2016, UN Doc CAT/C/59/D/644/2014, para 8.7. See also *Niyonzima v Burundi* (note 59 above) para 8.2 in which the beating was held to amount to torture because 'it caused acute pain and suffering'. See also *N.Z. v Kazakhstan* Communication 495/2012 (Committee against Torture), 28 November 2014, UN Doc CAT/C/53/D/495/2012, para 7.4 in which the Committee held that the ill-treatment, which resulted in broken toes caused severe physical and psychological pain. In *Hanafi v Algeria* Communication 341/2008 (Committee against Torture), 3 June 2011, UN Doc CAT/C/46/D/341/2008, in finding that the state party had violated article 1, the Committee considered that while still in detention, the victim suffered treatment so harsh that it led to his death shortly after being released.

[65] *Dmytro Slyusar v Ukraine (note 59 above)*.

[66] *Kirsanov v Russian Federation* Communication 478/2011 (Committee against Torture), 18 June 2014, UN Doc CAT/C/52/D/478/2011, para 11.2.

[67] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 December 2005, UN Doc E/CN.4/2006/6 para 39.

suffering is inflicted must be done intentionally and for attaining a prohibited purpose, such as obtaining information,[68] confession,[69] punishment, intimidation, coercion or based on any ground of discrimination.[70] The element of *mens rea* thus excludes merely negligent conduct from the offence of torture.[71] In his 2010 Report to the Human Rights Council, the UN Special Rapporteur on Torture (2004-2010) highlighted that article 1 of CAT excludes negligent conduct, such as the one in which a prison official forgets to feed a detainee as a result of which the detainee suffers severe pain or suffering due to lack of food.[72] He stated that there is no doubt that this conduct is a serious human rights violation. However, it does not amount to torture in as much as there is no intention on the part of the prison authorities to inflict such pain or suffering caused by lack of food.[73] Negligent deprivation of food should, however, be distinguished from a conduct in which the detainee is deprived of food for purposes of extracting information from him or any other prohibited purpose listed in article 1(1) of CAT, such as intimidation, punishment or discrimination of whatever kind. In the latter case, the act of food deprivation would amount to torture, since the requisite intention would have been met.[74] The element of *mens rea* is thus essential in distinguishing torture from CIDT.

#### *1.2.2.3 Official capacity of the perpetrator*

According to article 1(1) of CAT, in order for an offence to amount to torture, there must be an involvement of a person who acts in an official capacity, either as the

[68] *Josu Arkauz Arana v France* Communication 63/1997 (Committee against Torture), 5 June 2000, UN Doc CAT/C/23/D/63/1997, para 2.1. In substantiating his case that his forcible return to Spain would be inconsistent with article 3 of CAT, the author gave account of victims of torture in Spain including his brother, who were subjected to torture in order to get information about the author's whereabouts.
[69] See *Dmytro Slyusar v Ukraine (note 59 above)*, para 2.4 in which the author was subjected to torture in order to force him to confess to killing his father.
[70] *R.O. v Sweden* (note 64 above) para 2.2 in which the author claimed that her three minor children would be subjected to FGM on the grounds of discrimination on the basis of their sex.
[71] JH Burgers & H Danelius *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (1988) 41; Nowak & McArthur (note 63 above) 29.
[72] Human Rights Council Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Addendum 'Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' 5 February 2010, UN Doc A.HRC.13.39.Add.5 para 34.
[73] Report of the Special Rapporteur on torture 2010 (note 72 above) para 31.
[74] See *Dmytro Slyusar v Ukraine (note 59 above)*.

actual perpetrator, an instigator or having given consent for the act to be committed. This element thus limits commission of torture under CAT to state-actors.[75] It also draws a distinction between torture as a human rights violation and torture as an international crime. It is important, however, to note that CAT's limitation of torture to state-actors has been a subject of debate. On the one hand, some scholars have criticised it and advocated for its removal from the definition of torture in order to cater for the prosecution of private individuals who commit torture.[76] On the other hand, some scholars argue that there is no need to remove this requirement because states have a general human rights obligation to prevent torture and to protect individuals from the acts of third parties.[77] As such, the acts of private individuals are, under human rights law, attributable to the state where the state, being able to prevent torture, has failed to do so;[78] and also in cases where the state had the knowledge of the activities of non-state actors, and generally agreed with those actions or purposively refused to act.[79] This thesis adopts the CAT definition of torture.

### *1.2.3 Definition of torture under international criminal law*

International criminal law is a branch of public international law aimed at prohibiting and prosecuting human rights violations, commonly viewed as serious atrocities.[80] Torture, under international criminal law, is often committed as part of international crimes such as genocide, crimes against humanity and war crimes. Initially, enforcement of international criminal law was done through *ad hoc* tribunals, which were established with a specific mandate and jurisdiction for the prosecution of

[75] Definition of torture under article 1 of CAT limits commission to state actors except where 'authorities or others acting in their official capacity knew or had reasonable grounds to believe that acts of torture or ill-treatment had been committed by private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such private actors in accordance with the Convention' Committee against Torture, GC 3 para 7.
[76] A Cullen 'Defining torture in international law: a critique of the concept employed by the European Court of Human Rights' (2003) 31 (1) *California West International Law Journal* 29.
[77] Committee against Torture, GC 3 para 7.
[78] As above; L McGregor 'Applying the definition of torture to the acts of non-state actors: The case of trafficking in human beings' (2014) 36 *Human Rights Quarterly* 211. See also A Clapham *Human rights obligations of non-state actors* (2006) 342. See also R McCorquodale & R La Forgia 'Taking off the blindfolds: Torture by non-state actors' (2001) 1 *Human Rights Law Review* 217.
[79] A Edwards *Violence against women under international human rights law* (2010) 246.
[80] DP Steward *International criminal law in a nutshell* (2014) 3.

crimes, which took place in specific territories during specific periods.[81] Examples of such *ad hoc* tribunals are the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL). It was only in 1998 with the adoption of the Rome Statute (which entered into force in 2002) that jurisdiction over international crimes was conferred onto a permanent international court as opposed to *ad hoc* tribunals, namely the International Criminal Court (ICC).[82] In this section, the definition of torture under international criminal law as defined in the statutes, and applied in the jurisprudence, of the ICTY, ICTR and ICC is investigated.

The Rome Statute lists torture as a crime against humanity and also as a war crime.[83] According to the Rome Statute, torture is a crime against humanity when committed as part of a widespread or systematic attack directed at any civilian population.[84] In this context, torture is defined as:

> The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the accused; except that torture shall not include pain or suffering arising only from or inherent in or incidental to, lawful sanctions.[85]

The similarities between the definition of torture under human rights law and international criminal law lie in the fact that both legal regimes require that there must be an act, which is the infliction of pain,[86] and that the act must be carried out for a prohibited purpose. A slight difference with regard to the purposive element is that the international criminal tribunals have adopted different approaches as to whether the purposive element required under international criminal law is similar to the one which is envisaged under CAT.[87]

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[81] WA Schabas *The UN international criminal tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 3.
[82] International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court UN Doc A/CONF.183/9 of 17 July 1998, which entered into force on 1 July 2002.
[83] As above.
[84] Rome Statute article 7(1).
[85] Rome Statute article 2(2). However, the Rome Statute does not define war crime of torture.
[86] It is important to note that while CAT requires infliction of severe pain and suffering, ICCPR does not require severity.
[87] For instance, in the case of *Prosecutor v Akayesu* (note 37 above) the CAT definition of torture was imported with all its elements as a result of which the ICTR held that when committed with the requisite intention or purpose, rape can amount to the crime of genocide or torture. Similarly, in

The major definitional difference between international human rights law and international criminal law is that the former requires the third element of 'official capacity' while the latter does not. This difference was captured by the Trial Chamber of the ICTY in the case of *Prosecutor v Kunarac.*[88] In this case, the Trial Chamber made reference to two cases of the United States of America in which a distinction between torture under human rights law and international humanitarian law (IHL) was made. In *Re Filartiga*, the American Court of Appeals of the Second Circuit held that 'deliberate torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights…'[89] The same court in the subsequent case of *Kadic v Karadzi* held that in the *Filartiga case*, it had applied customary international human rights law, which proscribed torture only 'when committed by state officials or under color of law'.[90] It added that in that case, the claim was based on the Alien Tort Claims Act under which atrocities, such as torture are actionable regardless of state participation to the extent that such acts were committed in pursuit of genocide or war crimes.[91] The Trial Chamber found the approach adopted by the American Court of Appeals instructive and adopted it. As far as IHL is concerned, the Trial Chamber enumerated three essential elements of torture as:

> Infliction, by act or omission of severe pain or suffering
>
> The act or omission must be intentional
>
> The act must be committed with the view to obtain information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground,

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*Prosecutor v Zdravko Mucic aka "Pavo" Hazim Delic, Esad Landzo aka "Zenga", Jeznil Delilac* Case No. IT-96-21-Abis (ICTY Appeal Chamber), 8 April 2003, (*Prosecutor v Mucic*) para 470, the purposes referred to in CAT were regarded as representative and applied to find the accused guilty of the war crimes of torture.

[88] *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* Case No.IT-96-23 & IT-96-23/1-A (ICTY Trial Chamber), 12 June 2002, (*Prosecutor v Kunarac*) paras 473 & 474.

[89] *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (United States Court of Appeals for the Second Circuit) 30 June 1980. http://homepage.ntlworld.com/jksonc/docs/filartiga-630F2d876.html [accessed 31 October 2015].

[90] In the context of the American legal system, to act under the colour of law means to act beyond the bounds of legal authority, but in such a manner that the unlawful acts were done while the official was purporting or pretending to act in the performance of his official duties. See http://www.lectlaw.com/def2/u002.htm [accessed 17 January 2015]. See also *Kadic v Karadzi* 70F.3d 232 (1995), paras 240-241 and 244-2445.

[91] *Kadic v Karadzi* (note 90 above) paras 243-245.

against the victim or a third person.[92]

It follows therefore that while the official capacity of the perpetrator is a requirement under CAT, international criminal law does not require same. The Trial Chamber of the ICTY in the case of the *Prosecutor v Kvocka*, considered this element to be inconsistent with the principle of individual criminal responsibility for international crimes as detailed in international humanitarian law and international criminal law.[93] Justification for this distinction lies in the differences between international human rights law and international criminal law. One such difference is that international human rights law creates obligations for the state while international criminal law focuses on individual criminal responsibility.[94] Because of the peripheral role played by the state under international criminal law, the Trial Chamber of the ICTY in *Prosecutor v Kunarac* observed that the limitation of torture to state-actors in CAT is influenced by the fact that CAT is a human rights instrument and therefore not binding on the Tribunal as the accused persons were charged under international criminal law in which prosecution is based on individual criminal responsibility for violation of IHL, which does not depend on participation of the state.[95]

The ICTY in the case of *Prosecutor v Kunarac* warned that there should be a distinction between torture as a human rights violation and torture as an international crime.[96] The Trial Chamber emphasised that the distinctions lie mostly in the structural differences between these two bodies of law, namely that human rights law is aimed at protecting citizens from state-organised or state-sponsored violence and that the state itself is the ultimate guarantor of the rights protected, for which it has duties and responsibilities, while IHL focuses on individual criminal responsibility in which individuals and not states, are called to account.

These differences notwithstanding, it is important to note that human rights treaty

[92] *Prosecutor v Kunarac* (note 88 above) para 483.
[93]*Prosecutor v Miroslav Kvocka et al* Case No IT-98-30/1-T (ICTY Trial Chamber) 2 November 2001 para 139.
[94] In the cases of *Prosecutor v Delalic* (note 87 above), and *Prosecutor v Furundzija* (note 4 above), the ICTY noted that the CAT definition is not binding in all cases as article 1(1) explicitly states that the said definition is for purposes of 'the present convention' being CAT.
[95] *Prosecutor v Kunarac* (note 88 above) para 470.
[96]As above.

bodies have at times been confronted with communications, which involve the violation of IHL.[97] The European Commission has approached such cases by confining itself only to the violation of human rights, while the Inter-American Court of Human Rights (Inter-American Court) has applied IHL directly in communications, which involve the violation of both human rights and IHL. Hailbronner argues that the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) have an even greater opportunity to infuse the broad provisions of the African Charter on Human and Peoples' Rights (African Charter) with IHL standards and thereby provide a measure of justice to victims.[98] One of the justifications advanced in advocating for human rights treaty bodies to deal with the violation of IHL is that human rights do not generally cease to be applicable in times of an armed conflict.[99]

Taking into account that there are differences between torture as a human rights violation and torture as a violation of IHL, this research focuses on torture as a human rights violation. Therefore, although jurisprudence of international criminal tribunals and prohibition of torture under IHL is referred to every now and then, the differences between these two legal systems are borne in mind and the research assesses domestic implementation of international human rights standards against torture, as understood under international human rights law.

## 1.3 Problem statement

The problem, which has been identified by this study is that despite a comprehensive international legal framework to which Lesotho is a party, torture continues to take place in Lesotho; more so within security institutions. Factors, which have been

[97] M Hailbronner 'Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights' (2016) 16 (2) *African Human Rights Law Journal* 340. See also F Viljoen 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in J Kleffner & E de Wet (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 333.

[98] Hailbronner (note 97 above) 363.

[99] (As above) 342. See also *Democratic Republic of Congo v Uganda* Case No. TT 216-20 (ICJ), 19 December 2005, paras 179 &180 in which the ICJ held that Uganda was an occupying power in the DRC and therefore had an obligation to respect both international human rights law and international humanitarian law during the armed conflict in the DRC. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia* Case No. 276/1970 (ICJ) 21 June 1971.

identified as contributing to the high incidence of torture in Lesotho are weak national legal and institutional frameworks, which do not incorporate international human rights standards against torture and also contain immunities and amnesties for its perpetrators,[100] political instability, which contributes to reluctance on the part of the state to enact anti-torture legislation, failure of police officers to investigate allegations of torture, failure of the public prosecutors to prosecute suspects of torture, and failure of the courts of law to impose appropriate sanctions against perpetrators of torture and to award appropriate remedies to victims of torture.

The problem of non-implementation of international human rights standards against torture has several facets to it. These are failure to prevent acts of torture before they actually happen, failure to effectively investigate allegations of torture and punish perpetrators thereof, failure to provide appropriate and adequate redress to victims of torture, and failure to submit state reports to relevant human rights treaty bodies on measures taken against torture.[101]

### *1.3.1 Failure to prevent torture*

In chapter 4, reports compiled by several human rights organisations, as well as court cases highlight the magnitude of torture, as well as the severity of the acts committed by members of the security forces in Lesotho. The incidents and statistics of torture illustrate that Lesotho has failed to prevent torture. Factors, which have contributed to Lesotho's failure to prevent torture, are highlighted in chapter 3, in which Lesotho's legal and institutional frameworks are benchmarked against standards contained in the international legal framework. In this study, it is illustrated that unlike other jurisdictions in which torture is prevented through specific anti-

[100] For instance, the Amnesty Bill of 2016, which is discussed in chapter 3 of this thesis.

[101] Lesotho acceded to the ICCPR on 9 September 1992. In terms of article 40, the initial report was due in September 1993 and thereafter when the HRC so requests. Lesotho's initial report was submitted five years later in May 1998. No subsequent reports have been submitted to the HRC. Lesotho acceded to CAT on 12 November 2001. In terms of article 19, its initial report, which was due in 2002, is fifteen years overdue. Lesotho ratified CEDAW on 22 August 1995. Its initial report, which was due in 1996, was submitted sixteen years later in 2012. A subsequent periodic report under CEDAW was in terms of article 18 (2) due in 2016, but it has not yet been submitted and is therefore one year overdue. Lesotho ratified the African Charter on 10 February 1992. Article 62 mandates state parties to submit periodic reports every two years. The initial report was submitted on 1 August 2000 and currently Lesotho has eight overdue reports.

torture legislation or included in other penal laws, in Lesotho none exists. Freedom from torture is provided for as a fundamental human right in the Constitution,[102] and listed as one of the elements of war crimes and crimes against humanity in sections 94 and 95 of the Penal Code, respectively. However, neither the Penal Code nor the Criminal Procedure and Evidence Act prohibit torture as a distinct crime. As a result, there are no specific legislative or administrative measures put in place to prevent torture.

Lesotho's failure to prevent torture is amplified by the fact that over and above the absence of legislative measures to prevent torture, there are no effective administrative measures aimed at preventing torture. A number of international human rights instruments mandate states to establish independent visiting bodies vested with the mandate to monitor the treatment of detainees and conditions of detention facilities.[103] Justification for the establishment of such bodies is succinctly captured by the Open Society Justice Initiative Report of 2011 in which it is observed that the risk of torture is higher in detention facilities, such as police cells and correctional institutions, and that independent visiting bodies should ensure that conditions, which pose the risk of torture are dealt with before torture actually takes place.[104] Although the Prisons Proclamation of 1957 and the Basutoland Prison Service Rules of 1957 provided for the establishment of a visiting committee whose main mandate would be to have access to and monitor all places of detention and also detect human rights abuses in prison,[105] such committees were never appointed. The Proclamation has been repealed and replaced by the Correctional Service Act of 2016,[106] while the Prisons Service Rules remain in force pending adoption of new rules or regulations under the Correctional Service Act. A setback with the Correctional Service Act is that it does not provide for the establishment of

[102] Constitution of Lesotho1993, section 8.
[103] For instance, Robben Island Guidelines adopted in terms of the African Commission Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) 2002, Robben Island Guideline 40 cites the prevention of mechanisms independent of the detention and enforcement authorities as one of torture prevention mechanisms.
[104] Open Society Justice Initiative 'Pre-trial detention and torture: why pre-trial detainees face the greatest risk' *A global campaign for pre-trial justice report* (2011) 11.
[105] Prisons Proclamation No.30 of 1957 section 31(2) (a) read with The Basutoland Prison Rules of 1957 part C.
[106] Correctional Service Act No.3 of 2016.

any structures aimed at the prevention of torture and other human rights abuses in the correctional institutions at all.

While the prison authorities have allowed a number of independent organisations and bodies, such as the Office of the Ombudsman, the International Committee of the Red Cross (ICRC), the African Commission on Human and Peoples' Rights (ACHPR),[107] and the Transformation Resource Centre (TRC) to access places of detention, such as the Maseru Central Prison, they have done so on the basis of practice as there is no written law, which authorises such access. The absence of a law, which gives independent organisations and bodies access to prisons, poses a risk to the sustainability of the said practice.

Other administrative measures linked to torture prevention include education and the dissemination of information on the inherent right to freedom from torture. This obligation includes the training of law enforcement personnel and the review of interrogation rules and instruction methods.[108] Members of the LMPS, LDF and LCS undergo human rights training during recruitment, as well as during service.[109] However, the high occurrence of torture in Lesotho begs the question whether in practice the training is offered as it is reflected in the training manuals.

### *1.3.2 Failure to prohibit and punish torture*

The second facet of the problem of torture in Lesotho is impunity. Despite the number of civil cases of allegations of torture, especially by the police and army officers, there are very few criminal cases in which perpetrators of torture are prosecuted. Several factors are attributed to the impunity of perpetrators of torture. The main factor is the absence of anti-torture legislation. While the Constitution protects the right to freedom from torture as an absolute right, there is no criminal

[107] African Commission Mission Report on the joint promotion mission to the Kingdom of Lesotho 3-7 September 2012 http://www.achpr.org/promo...achpr54_misrep (ACHPR Mission Report), which indicates that there were cases of torture of inmates by correctional officers in 2012.
[108] CAT article10.
[109] A Dissel, T Masuku M Tshehlo & S Tait 'The police as friend and helper to the people: Assessing the Lesotho Mounted Police Service performance in terms of the Southern African Police Chiefs Cooperation Organisation (SARPCCO) Code of Conduct' *African Policing Civilian Oversight Forum* (2011) 11.

law, which proscribes torture and prescribes punishment for its commission.[110] Because there is no law under which perpetrators are held accountable specifically for the commission of torture, they end up not being prosecuted. If prosecuted, upon conviction perpetrators of torture are not given a sentence, which takes into account the heinous nature of the offence of torture.

Closely linked to the absence of anti-torture laws, is the lack of political will by those in power in Lesotho to enact it and in the meantime to use the Penal Code and common law to prosecute law enforcement officials who are implicated in acts of torture. This reluctance leads one to question whether the lack of prosecution is because there is no law under which the perpetrators would be charged, or whether there is no desire at all to prosecute perpetrators of torture because it is accepted as an interrogation or punishment technique. The absence of anti-torture legislation does not only affect the implementation of the obligation to prohibit torture, but negatively affects the entire justice system: from investigation, prosecution, punishment of perpetrators of torture to redress for its victims. Consequently, it encourages members of the security forces to commit torture with impunity. Although not ideal, members of the security forces who commit torture could be investigated and punished under other provisions of the Penal Code, which proscribe violent offences, such as murder, or assault, such is hampered by the exclusive vesting of investigation powers in the police and lack of similar powers in other oversight bodies, such as the Police Complaints Authority and Office of the Ombudsman, which are independent of the LMPS.

Due to the loopholes in the Penal Code and the absence of specific anti-torture legislation, the obligation to investigate allegations of torture is also compromised. Although national human rights oversight bodies, such as the Office of the Ombudsman, the Police Complaints Authority and the Military Police established to deal with allegations of human rights violations by law enforcement agents exist in Lesotho, these bodies do not have full investigative powers and therefore refer the reported cases to the police for investigation. Because majority of the cases involve

[110] As illustrated in chapter 3 of this thesis, the Penal Code Act makes reference to torture, but does not criminalise it as a distinct crime.

the police, they do not provide prompt and impartial investigation of allegation of torture.[111] Consequently, Lesotho fails to implement the obligation to investigate allegations of torture and to punish its perpetrators. The failure is exacerbated by amnesty laws.[112]

### *1.3.3 Failure to provide redress to victims of torture*

The third facet to the problem of Lesotho's implementation of its international human rights obligations against torture is with regard to the redress for victims of torture. When interpreting this obligation, the Committee against Torture has stipulated that redress does not only refer to monetary compensation, but entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[113] However, the reported cases of torture show that in Lesotho, redress focuses exclusively on monetary compensation and nothing is put in place for the restitution and rehabilitation of the victims of torture,[114] including guarantees by the perpetrators that such acts would not be repeated.

In a newspaper interview, the former Minister of Law and Constitutional Affairs, Mophato Monyake, stated that the government budgets around four million Maloti (M4,000 000.00) per annum for compensation of victims of torture.[115] This amount constitutes about ten percent of the Ministry's budget.[116] It therefore shows that a lot of money is spent on the compensation of victims of torture yet there are no mechanisms put in place for its prevention or punishment of its perpetrators. Hence, when addressing whether payment of damages to victims of police brutality has a deterrent or preventive effect, the South African Constitutional Court in the case of

[111] In the case of *Evloev v Kazakhstan* Communication 441/2010 (Committee against Torture), 5 November 2010, UN Doc CAT/C/51/D/441/2010 para 4, the Committee against Torture held that the investigation of the allegations of torture by the same institution where the alleged torture is committed does not lead to impartial investigation; Robben Island Guideline 40.
[112] See note 14 above.
[113] Committee against Torture GC 3 para 2; *Bendib v Algeria* Communication 376/2009 (Committee against Torture), 8 November 2013, UN Doc CAT/C/51/D/376/2009 para 6.7.
[114] For instance, in all the cases before the courts of Lesotho referred to in chapter 4 of this thesis, only monetary compensation was awarded to victims of torture and no other means of redress, including rehabilitation and reform of the national legal system to include criminalisation of torture were ordered by the Courts.
[115] About 300,000 USD
[116] As reflected in the budget speech for 2014/2015 delivered on 20 February 2014.

*Fose v Minister of Safety and Security,* held that 'it would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement',[117] instead of budgeting for the infringement.

### *1.3.4 Failure to submit state reports on measures taken against torture*

As far as torture is concerned, the importance of the state reporting process is that it enables states to review their laws on torture and to be aware of areas, which need reform, to compile statistics so as to track the crime of torture and lastly, to benefit from the treaty bodies' concluding observations as to what measures may be put in place to effectively implement obligations against torture.[118] However, despite having ratified a number of international human rights instruments, which contain obligations against torture, Lesotho has failed to submit state party reports to relevant oversight bodies, such as the HRC, Committee against Torture, CEDAW Committee and African Commission to mention but a few.[119]

The human rights treaty bodies which review state party reports have emphasised that the reports must contain, amongst others, statistics on reported cases of torture, investigations conducted, prosecutions done, punishments imposed as well as remedies awarded.[120] Statistics play an important role in assessing the human rights situation in any given country.[121] If Lesotho complied with its reporting obligations by compiling and supplying statistics on torture, this would highlight the seriousness of torture in Lesotho and also help those in charge to design the type of interventions, needed to deal with the problem. Due to a lack of statistical data on many human rights violations, the few state party reports which Lesotho has submitted to human

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[117] *Fose v Min of Safety and Security (*1997) 3 SA 786 (CC) para 72.
[118] HRC, General Comment 30 'Reporting obligations of states parties under article 40 of the Covenant' 18 September 2002, UN Doc CCPR/C/21/Rev.2/Add.12; ICESCR Committee General Comment 1 'Reporting by state parties' 27 July 1981, UN Doc E/1989/22.
[119] Note 101 above.
[120] CRC Committee, *Concluding observations on the second to fourth periodic report of Brazil* 30 October 2015 UN Doc CRC/C/BRA/CO/2-4 para 38; HRC *Concluding observations on the second periodic report of Thailand* 25 April 2017 UN Doc CCPR/THA/CO/2 para 47; CMW Committee, *Concluding observations on Jamaica in the absence of a report* 23 May 2017 UN Doc CMW/C/JAM/CO/1 para 35.
[121] TB Jabine & RP Claude 'Exploring human rights issues with statistics' in TB Jabine & RP Claude (eds.) *Human rights and statistics: getting the record straight* (1992) 5.

rights treaty bodies have been criticised as inconclusive.[122] Due to lack of statistics, Lesotho has not been able to reflect on the status of torture in Lesotho and to assess factors, which impede the effective implementation of international human rights standards against torture.

## 1.4 Central assumption

In the light of the background and the problem discussed above, the thesis of this research is that failure to implement international human rights standards against torture is responsible for Lesotho's weak legal and institutional frameworks against torture. The weak legal and institutional frameworks have resulted in a high rate of torture, impunity for perpetrators of torture (most of who are members of the security institutions) and a lack of redress for victims of torture.

The legal framework is weakened by the fact that while the right to freedom from torture is guaranteed as a fundamental human right in the Constitution, there is no legislation, which criminalises torture and as a result acts, which amount to torture are prosecuted as common law crimes, such as murder and assault. This approach is inconsistent with Lesotho's international human rights obligations as it fails to highlight the gravity and heinous nature of the offence of torture in Lesotho. The Penal Code Act[123] lists torture as an element of war crimes and crimes against humanity.[124] Thus, it prohibits torture as an international crime and does not cover the human rights obligation to criminalise torture as a distinct crime.[125]

Lesotho's institutional framework is also weakened by the absence of an anti-torture law. The Office of the Ombudsman and the Police Complaints Authority do not have a clear mandate to receive, investigate and prosecute cases of torture. Furthermore, as far as torture is concerned, the functions of these two institutions overlap and both have limited financial and human resources. Absence of a functioning Human Rights

[122] For instance, CEDAW Committee, *The combined initial to fourth report of the Kingdom of Lesotho*, 11 October 2011, UN Doc CEDAW/C/LSO/1-4.
[123] Penal Code Act 2010.
[124] Penal Code Act sections 94 & 95.
[125] CAT article 4.

Commission also weakens the institutional framework.[126] Issues relating to torture, which can be best dealt with by the Human Rights Commission remain in the hands of the existing institutions and bodies, whose effectiveness is questioned in chapter 3.

## 1.5 Research questions

The main question, which this research seeks to investigate, is the extent to which Lesotho has complied with obligations against torture as contained in customary international law, as well as international human rights instruments to which it is a party. This question is divided into the following sub-questions:

1. What standards and obligations does international human rights law impose on states as far as torture is concerned?
2. What are the legal and institutional frameworks against torture in Lesotho and do these frameworks adhere to the standards and obligations created by international human rights law?
3. What are the challenges or problems, which inhibit the effective implementation of international human rights standards against torture in Lesotho?
4. What is the effect of the failure to implement international human rights standards at the domestic level?
5. What means can be put in place in Lesotho towards the effective implementation of the international human rights standards against torture?

## 1.6 Research objectives

The general objective of this research is to evaluate the extent to which Lesotho has implemented international human rights standards, which oblige states to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims.

[126] Sixth Amendment to the Constitution Act 2011 and Human Rights Commission Act 2016, provided for establishment of the Human Rights Commission. However, at the time of submission of this thesis the Human Rights Commission had not been established.

The specific objectives are:

1. to highlight through the analysis of international human rights instruments, human rights standards against torture and states' obligations in relation thereto;
2. to illustrate the place of international law in the legal system of Lesotho and to recommend the ways in which international standards against torture can be incorporated into the legal system of Lesotho;
3. to examine the laws and institutions in Lesotho so as to evaluate the extent to which they implement the international human rights obligations against torture and to identify the challenges, which inhibit the effective implementation of the said standards;
4. to analyse the practice of torture in Lesotho so as to highlight its extent occasioned by political instability and the failure to domesticate international human rights standards against torture; and
5. to draw conclusions from the research done and to make recommendations as to the means, which Lesotho may employ towards the effective domestic implementation of international human rights standards against torture.

## 1.7 Scope and limitations

In examining the legal and institutional frameworks in Lesotho and benchmarking same against the international standards against torture, this research adopts a human rights approach. It is well appreciated that torture is not solely a human rights issue, but that it also has political, cultural and moral dimensions. From a political perspective, torture may sometimes be resorted to as a means to a political end. In some cases, due to political reasons, governments are reluctant to investigate allegations of torture and to prosecute its perpetrators.[127] The cultural dimension of torture can be inferred from the fact that in the Sesotho culture, there are sayings or idioms, which condone torture, especially of criminals and of children.[128] In its concluding observations on Lesotho's state party report submitted in 2001, prior to

[127] See analysis of the practice of torture in Lesotho in chapter 4 of this thesis.
[128] For instance, a Sesotho saying that '*Lesholu ke ntja le lefa ka hlooho ea lona*' meaning assaulting a thief is justified as he has to pay for the wrong he has done.

the enactment of the Children's Protection and Welfare Act, the Committee on the Rights of the Child, which is a body established to oversee implementation of CRC, raised a concern that:

> … the practice [corporal punishment] continues to be widespread in schools and in the family, in the care and juvenile justice system and generally in society. The Committee is concerned in particular that corporal punishment of children is accepted among the public at large.[129] … [and that] incidents of violence, including beatings, committed against children by law enforcement officials and the lack of investigation or criminal justice response to such incidents.[130]

The anecdotal statistics on incidents of torture make it clear that torture has become an imbedded culture in the law enforcement agencies in Lesotho. From a moral perspective, several arguments are advanced that it would be justifiable to subject a suspect to torture in order to get information, which is necessary to avert danger to more people.[131]

While these political, cultural and moral arguments cannot be ignored, this research is limited to discussions of freedom from torture as an absolute human right and will therefore not consider arguments regarding whether there are exceptional circumstances in which torture may be justified. This study is limited to the assessment of the implementation of existing standards dictated by customary international law and treaty law, which emphasise total prohibition of torture.

Both international human rights law and IHL proscribe torture and provide standards and obligations for its prohibition. However, as indicated in the definition of torture earlier in this chapter, there are fundamental distinctions between these two systems of law in that human rights law invokes state responsibility while humanitarian law, which is enforced through international criminal law, invokes individual criminal responsibility. This research is limited to the implementation of standards prescribed under international human rights law under the auspices of the UN and AU. The sub-

[129] CRC Committee, *Concluding Observations on the initial report of Lesotho* 18 July 2001, UN Doc CRC/C/15/Add.147 para 31.
[130] As above para 33.
[131] D Luban 'Liberalism, torture and the time bomb' in SP Lee (ed) *Intervention, terrorism and torture: Contemporary challenges to just war theory* (2007) 249.

regional level, represented by the Southern African Development Community (SADC), is excluded because SADC instruments do not contain specific standards on torture except in relation to extradition, which is considered in chapter 3 of this thesis. Despite its main focus being international human rights standards, the research refers to international humanitarian law and jurisprudence of international criminal tribunals in areas where the two systems take inspiration from each other with regard to the definition of torture, the scope of application of its prohibition and states' obligations in relation thereto.

Almost all international human rights instruments, which prohibit torture, also contain provisions regarding CIDT. However, this research is limited to the discussion of standards against torture as defined in article 1(1) of CAT and does not cover acts, which fall short of the elements stipulated therein. While discussion on the definition of torture has revealed that torture can take place in different settings, this research is limited to the discussion of torture as it takes place within the law enforcement institutions, such as police stations, correctional institutions and military detention centres in Lesotho.

## 1.8 Methodology

The research was conducted through a desktop study, which employed descriptive, normative and comparative analytic techniques. This approach was adopted in light of the practical nature of the research and the importance of addressing the findings of the study. The recommendations made at the end of the study are based on this analysis. The analytical approach was adopted in order to determine the relationship between international law and the legal system of Lesotho. The descriptive analysis enabled the identification of obligations against torture as contained in international human rights instruments. It also enabled the review of Lesotho's domestic laws relating to prevention, prohibition and punishment of torture.

The domestic legal and institutional frameworks were benchmarked against the international human rights standards through a normative approach. The national laws, policies, guidelines and training manuals for law enforcement officials on

interrogation techniques and the arrest of suspects were also analysed using a normative approach from a human rights perspective.

Examples were drawn from other jurisdictions, where relevant, in the analysis of Lesotho's legal and institutional frameworks, thus engaging a comparative approach in relation to this aspect of the study. A pragmatic stance was adopted in the use of jurisprudence of national and international courts, as well as international human rights treaty bodies for formulating conceptual and theoretical frameworks on torture in Lesotho. In the concluding chapter of this thesis, a prescriptive approach is adopted through which specific recommendations on how Lesotho should implement the international standards against torture are made.

## 1.9 Literature review

This study is situated within the broader area of international human rights law. Its specific focus is on international human rights standards against torture and the domestic implementation of such in Lesotho; that is, the study takes inspiration from research in three areas of law: international law, human rights law and domestic laws of Lesotho. The research seeks to extrapolate the major debates surrounding the implementation of international law at the domestic level, including the debate on whether individuals are subjects and/or beneficiaries of international law, as well as the monist/dualist theories on incorporation of international law into domestic legal systems. The research also extrapolates the debate regarding states' obligations against torture, including the enactment of anti-torture legislation, non-refoulement and reparation for victims of torture.

In order to address the debates stipulated above and in the quest to address the problem of torture in Lesotho, the study draws from works of eminent international law and human rights scholars and practitioners that the author of this thesis is aware of, such as Manfred Nowak, John Dugard, Frans Viljoen and Malcom Shaw who have done extensive research and have published on international law, human rights and states' obligations to protect human rights in general and obligations against torture in particular. Jurisprudence of international courts and tribunals, as

well as jurisprudence, general comments and concluding observations of human rights treaty bodies are also resorted to in order to interpret the scope and content of states' obligations against torture.

Little research has been done on torture in Lesotho and the domestic implementation of international human rights standards against torture in particular. This study therefore seeks to fill the gap between Lesotho's failure to implement international human rights standards against torture and political instability as factors responsible for the high incidence of torture in Lesotho. Because of the link between torture and the political history of Lesotho, the discussion draws inspiration from literature in the field of political science.

The literature review is divided into three thematic areas: the first theme is international standards against torture and their importance or relevance at the domestic level, the second theme covers literature, which addresses the problem of torture in Lesotho and the third theme deals with literature, which discusses the political history of Lesotho, which the study links to the occurrences of torture in Lesotho.

### 1.9.1 *International human rights standards against torture and their relevance to the domestic legal systems*

Dugard defines general international law principles and sources of international law. He identifies prohibition of torture as a peremptory norm from which no derogation is permitted.[132] Similarly, Shaw discusses basic international law principles such as states' obligations to protect human rights and states' responsibility regarding the violation of human rights.[133] He describes human rights treaties, including those against torture, as well as mechanisms in the form of treaty bodies, which are put in place to oversee such treaties. He also alludes to non-treaty mechanisms against torture, such as special rapporteurs. A similar approach is adopted by Starmer and Christou. Amongst others, they discuss the prohibition of torture in international law, the relevant international human rights instruments, monitoring bodies, relevant

[132] J Dugard *International law: A South African perspective* (2011) 46.
[133] NM Shaw *International Law* (2014) 194.

principles as well as relevant case law.[134] The basic principles of international law discussed in these books provide a conceptual framework for this research.

Ingles discusses how CAT and the Committee against Torture came into being, the role of the Committee in the development of CAT, as well as various aspects of the tension between state sovereignty and the implementation of international law.[135] Joseph, Mitchel and Gyorki give an overview of the HRC and the Committee against Torture.[136] They discuss the prohibition of torture through ICCPR, functions of the HRC, including receipt of state reports, interstate complaints and the HRC's general comments. They also discuss the substantive provisions of CAT, the functions of the Committee against Torture, as well as its procedures. The history discussed by Ingles, as well as the overview provided by Joseph, Mitchel and Gyorki, provide this research with the ideology for the adoption of CAT and how the Committee against Torture operates. These in turn provide the research with a theory base for arguing that Lesotho should implement standards contained in the international instruments it has ratified.

Viljoen and Odinkalu discuss substantive norms on torture in the African regional human rights system.[137] They discuss, amongst others, the norms stipulated in the African Charter, the African Women's Protocol, the African Children's Charter, as well as the procedures available in the African Commission and the African Court for both individuals and states. With Lesotho being a member of the AU and a party to these instruments, this work provides a background for the discussion of Lesotho's obligations against torture as contained in AU instruments.

Onkemetse discusses the philosophical framework of the relationship between international law and municipal law.[138] This work briefly makes an observatory remark on the two 'rival theories' of monism and dualism. While discussing the

[134] See generally QC Starmer & TA Christou *Human rights manual and sourcebook for Africa* (2005).
[135] C Ingelse *United Nations Committee against Torture: An assessment* (2001) 2.
[136] S Joseph et al *Seeking Remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies* (2006).
[137] F Viljoen & A Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* (2006).
[138] BT Onkemetse 'Giving effect to treaties in the domestic law of Botswana: modern judicial practice' (1997) 10 (2) *Lesotho Law Journal* 205.

Botswana dualist approach to international law, it concludes that in the absence of legislation, the practice of domestic courts applying international law to domestic disputes amounts to a 'closed-up' approach. Although the arguments made by Onkemetse are focused on Botswana and not Lesotho, because of similarities in the two legal systems,[139] his findings about the legal system of Botswana inform this research as far as the application of international law in Lesotho is concerned.

Wolfendale argues that the occurrence of torture in the military is linked to military training methods, which cultivate the psychological dispositions connected to crimes of obedience.[140] These arguments are used to determine the factors, which contribute to military torture in Lesotho.

The jurisprudence, general comments and concluding observations of treaty bodies, such as the Committee against Torture, HRC, African Commission and others also provide this research with insight regarding the definition of torture, states' general and specific obligations against torture as contained in specific international human rights instruments, as well as various means of implementing the provisions of those international instruments at the domestic level.

### *1.9.2 Torture in Lesotho*

So far, there have only been five unpublished academic writings on torture in Lesotho. This is in the form of academic dissertations by Lenka, Sechele, Makututsa, Tsoeunyane and Mothobi. However, unlike the current research, these dissertations are limited in focus. For instance, Lenka's PhD dissertation focuses on the LMPS' observance of general human rights during criminal investigations. He interrogates from a historical perspective, the extent to which the Lesotho Police observed human rights including freedom from torture and other CIDT. However, he does not focus on states' obligations against torture, which this present research does. Secondly, unlike the current research, Lenka limited his work to criminal investigations by the

[139] The legal systems of Lesotho and Botswana are similar in the sense that both countries share a common heritage of Roman Dutch Law, which they inherited from Britain during colonisation and have similar constitutional dispensations.
[140] J Wolfendale *Torture and the military profession* (2007).

Police Service while the current research examines the three law enforcement institutions, being the police, the military and correctional service.

Similarly, Sechele's LLM dissertation focuses on the implementation of standards against torture in the LDF exclusively.[141] Mothobi's work focuses on the effectiveness of the PCA in dealing with acts of torture committed by members of the Lesotho police services.[142] In a manner similar to Lenka and Sechele above, Makututsa[143] and Ts'oeunyane[144] limited their focus to investigation techniques. Makututsa discusses how torture may be a futile exercise due to the exclusionary rule in terms of which evidence obtained through torture must not be admissible in a criminal trial. Ts'oeunyane interrogates the admissibility of evidence obtained through torture. While these dissertations are limited in focus, they each become relevant for different aspects of this research.

Over and above the relevance of the above literature to this research, this research builds on the work they have already laid down by expanding the enquiry to include all other law enforcement agencies (LEAs) in Lesotho, as well as other human rights oversight bodies and by also analysing the substantive and procedural aspects of torture in Lesotho in line with the international human rights standards.

### *1.9.3 Lesotho's political history and its connection to the occurrence of torture*

From the Social Sciences, this study has reviewed the writings of Likoti,[145] Matlosa and Pule.[146] These are political scientists who have undertaken extensive research on the politics of Lesotho including political history, relations between the police and

[141] BA Sechele 'An analysis of the compliance by the Lesotho Defence Force with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' unpublished LLM dissertation University of Cape Town, 2008.
[142] M Mothobi 'Are suspects and detainees protected by law against torture by the police? Effects of Police Complaints Authority – A plea for reform' unpublished LLB dissertation National University of Lesotho, 2007.
[143] B Makututsa 'The impact of torture in crime investigation: case of Lesotho' unpublished LLB dissertation National University of Lesotho, 2006.
[144] M Tšoeunyane 'The fundamental human rights against torture and confessions in the Lesotho Legal system' unpublished LLB dissertation National University of Lesotho, 2006.
[145] FJ Likoti 'The implications of executive influence on the police service: a study of the Lesotho Mounted Police since independence' (1999) 2 (2) *Lesotho Law Journal* 201.
[146] K Matlosa & NW Pule 'The Military in Lesotho' (2001) 1 (2) *African Security Review* 62.

the executive as well as the civil-military relations. Although this literature focuses on the area of political science, it provides this research with the political context within which torture in Lesotho is committed. The current research contributes to the already existing body of literature by connecting the political instability to Lesotho's inability to implement international human rights standards against torture.

## 1.10 Chapter overview

The research is divided into five chapters. In chapter 1 the research is introduced, and a definition of torture, which is used throughout the thesis, is provided. The research questions to which the research seeks to respond and the methodology adopted to respond to those questions is stated. The scope and limitations of the research are highlighted and a review of the literature, which is relevant to the implementation of international human rights standards against torture in Lesotho, is provided. Lastly, an outline of how the research is structured is given.

In chapter 2, the international standards against torture as dictated by customary international law, as well as standards contained in human rights instruments in the form of binding treaties adopted under the auspices of the UN and AU are introduced. The discussion also extends to non-binding standards and principles adopted under these two systems because of their importance in providing interpretation, scope, content and practical measures for the implementation of the standards contained in the binding instruments.

In chapter 3, the legal and institutional frameworks against torture in Lesotho are discussed. The laws related to torture, as well as the institutions responsible for its prevention and punishment, are reviewed. The legal and institutional frameworks are then benchmarked against the international standards discussed in chapter 2.

In chapter 4, torture in practice is discussed. The discussion provides the context within which torture in Lesotho is committed. It links the occurrences of torture and Lesotho's failure to implement international standards to the country's political history. Cases, human rights reports and Lesotho's state party reports to various

treaty bodies in the light of Lesotho's obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims are also reviewed.

In chapter 5, the research is concluded. Conclusions are drawn from the preceding chapters as to where Lesotho stands as far as the implementation of the international standards against torture are concerned. Based on the conclusions drawn, recommendations are then made as to the legal, methodological and practical means that Lesotho may adopt towards the effective implementation of international human rights standards against torture.

# CHAPTER 2

# INTERNATIONAL HUMAN RIGHTS STANDARDS AND STATES' OBLIGATIONS IN RELATION TO TORTURE

## 2.1 Introduction

Brierly, Simpson and Dugard define international law as a body of rules and principles, which are binding upon states in their relations with one another.[147] These rules are divided into general rules and particular rules.[148] General rules are those that are binding on all states (such as customary international law), while particular rules are contained in treaty law in terms of which two or more states through a written instrument, agree on specific rules, which establish a relationship between them.[149] It must be noted, however, that some scholars, such as Olufemi argue that there are certain rules of customary law, which may be categorised as particular,[150] and D'Amato argues that treaties may also be sources of general international law.[151] For the purposes of this thesis, it suffices to note that human rights standards against torture are contained in both customary international law and treaty law. There are also non-binding resolutions, principles and other instruments also referred to as soft law, which have been adopted under the auspices of the UN and different regional and sub-regional organisations, such as the AU at the regional level and SADC at the sub-regional level, which contain states' obligations against torture. The non-binding soft law is discussed because of its persuasive nature, as well as its considerable moral and political authority.[152] Furthermore, some pieces of soft law provide guidelines for the implementation of the legally binding

[147]JL Brierly *The Law of Nations: An introduction to the international law of peace* (1967)1; G Simpson *The nature of international law* (2001)1; Dugard (note 132 above) 4.
[148] As above.
[149] As above.
[150] E Olufemi 'The nature of subjective element in customary international law' (1995) *International and Comparative Law Quarterly* 502; RB Baker 'Customary international law: A reconceptualisation' (2016) *Brooklyn Journal of International law* 439.
[151] A D'Amato 'Treaties as a source of general rules of international law' (1962) 3 *Harvard International Law Journal* 7.
[152] Burgers & Danelius (note 71 above) 7.

instruments.[153] At the centre of all the rules is an agreement that torture cannot be justified under any circumstances.[154] Despite this apparent consensus amongst states that torture must be prevented and prohibited and also that its perpetrators must be punished, statistics reported by various human rights organisations show that torture takes place in about 141 countries of the world,[155] states that commit it do not publicly admit nor report it and where they do, they under-report it or qualify it as something else other than torture.[156]

In this chapter, a detailed analysis of the international human rights standards against torture as contained in both customary international law and international human rights instruments to which Lesotho is a party is provided.[157] It is divided into five sections. In the first section, the historical evolution of international prohibition of torture is given. In the second section, the prohibition of torture under customary international law is set out. In the third section, UN standards against torture are discussed. In the fourth section, African human rights standards against torture are analysed. Standards adopted in the European and Inter-American systems are briefly referred to for comparative purposes only because the geographical situation of Lesotho – and it being a party to instruments adopted by the UN, AU and SADC – makes standards adopted by these organisations most relevant and create obligations, which directly bind Lesotho. This chapter is confined to standards adopted at the UN and AU levels only while SADC standards on extradition are considered in the next chapter. In the fifth section, a conclusion is given based on the analysis of standards carried out in the four sections. These standards and obligations form the benchmark against which Lesotho's laws and practices are assessed in the next chapters.

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[153] For instance, the Robben Island Guidelines consist of concrete guidance for African states on how to implement the provisions of the African Charter on prohibition and prevention of torture, as well as providing redress for victims.

[154] Nowak & McArthur (note 63 above); A Harel & A Sharon 'What is really wrong with torture?' (2008) 6 (2) *Journal of International Criminal Justice* 246.

[155] Amnesty International 'Torture in 2014: 30 years of broken promises' https://www.amnesty.org/en/documents/ACT40/004/2014/en/ [accessed 1 March 2016].

[156] L Hajar 'Does torture work? A socio-legal assessment of the practice in historical and global perspective' (2009) *Annual Review of Law and Social Science* 3; Human Rights Council 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (2011) *Annual Report of the UNHCHR,* UN Doc A/HCR/19/41 para 23.

[157] Because of the relationship between IHRL and IHL, states' obligations under IHL are also briefly discussed.

The discussion of the human rights standards in the third and fourth sections of this chapter (i.e. sections 2.4 and 2.5) are consolidated and summarised with reference to the four-tier obligations, namely the obligation to prevent and prohibit torture, to punish its perpetrators, to provide redress to its victims and to report on measures taken by states. However, different approaches are adopted in discussing the standards contained in different treaties because some have implicit (some confirmed through subsequent interpretation) while others contain explicit (and, in some cases, more detailed) obligations relating to torture. Hence, in the discussion of UN and African regional treaties in sections 2.4 and 2.5 below, the obligations to prevent, prohibit, punish and provide redress are, for some treaties (such as those with implicit and less detailed torture-related obligations), grouped as appropriate based on the treaty provisions under consideration, and, for other treaties (such as those with explicit and more detailed torture-related obligations), they are discussed separately. Also, the discussion under sections 2.4.1 and 2.5.1 goes beyond the four-tier obligations typology for some treaties, incorporating additional specific torture obligations set out in the treaties.

## 2.2 History of the prohibition of torture under international law

Both the UN and AU (including its predecessor, the Organization of African Unity (OAU)) have adopted a number of instruments, which contain standards against torture.[158] In this section, the history, which led to the adoption of these standards, is canvassed as it provides a framework for understanding the international human rights standards against torture. Historically, torture was accepted in criminal law as an indispensable tool through which the truth could be extracted from suspects, as a form of punishment to cleanse offenders and also as a deterrent to would-be offenders.[159] The early development of international law did not contain standards

[158] OAU: Fourth extraordinary session of the assembly of heads of state and government (8 - 9 September 1999) Sirte, Libya; AM Adejo 'From OAU to AU: New wine in old bottles?' (2001) 4 (1 - 2) *African Journal of International Affairs* 119.

[159] WP Nagan & L Atkins 'The international law of torture: From universal proscription to effective application and enforcement' (2001) 14 *Harvard Human Rights Journal* 92.

against torture.[160] The definition of international law itself placed emphasis on states as both participants and beneficiaries of international law to the exclusion of individuals.[161] As a result of the earlier acceptance of torture, human rights standards against it have a long and sordid history. When it became clear that torture was counterproductive, domestic laws were passed to limit its use. As far back as the 18th century, the French Declaration of the Rights of Man prohibited torture.[162] Although this Declaration did not use the term torture, article 9 thereof provided that 'if arrest shall be indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law'.[163]

Although efforts had been made to limit the use of torture at the domestic level in some countries such as France, at the international level, where an individual's rights were violated, only his or her state would have a right to lodge a complaint before an international tribunal.[164] Individuals' rights were occasionally considered for humanitarian purposes where a tyrannical state grossly ill-treated its national or religious minorities.[165] Even then, humanitarian intervention met fierce criticism on the grounds that intervening states did so for purposes of establishing spheres of influence or for economic or commercial advantage rather than the desire to alleviate human suffering.[166] The principles of state sovereignty and non-interference in internal affairs of states were often invoked to exclude international protection of human rights.[167]

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[160] T Buergenthal 'The normative and institutional evolution of international human rights' (1997) 19 (4) *Human Rights Quarterly* 703.

[161] Brierly (note 147 above); Simpson (note 147 above).

[162] French Declaration of the Rights of Man and the Citizen 1789, www.historyguide.org/intellect/**declaration**.html [accessed 11 February 2015].

[163] As above.

[164] *Jurisdiction of the Courts of Danzig (Precautionary claims of Danzig Railway officials who have passed into the Polish service against the Polish railway administration)* (1928) PCIJ Rep Ser. B No.15, 17-18; K Parlett *The individual in the international legal system* (2011) 67 who reviews the international claims tribunals operating in the 18th and 19th century and concludes that although the practice was haphazard, its weight supports characterisation of claims as inter-state rather than individuals against a foreign state; LB Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982-1983) 32 (1) *American University Law Review* 4.

[165] For instance, Treaty of Berlin 1890. See also Sohn (note 164 above) 5.

[166] D Shelton & PG Carozza *Regional protection of human rights* (2013) *3;* E Schmidt *Foreign Intervention in Africa: From the Cold War to the War on Terror* (2013) 3; LA Horvitz & C Catherwood *Encyclopaedia of war crimes and genocide* (2009) 211.

[167] AL Clunan 'Redefining sovereignty: Humanitarianism's challenge to sovereign immunity' in N Shawki & M Cox (eds) *Negotiating sovereignty and human rights: Actors and issues in contemporary*

The legacies of the two World Wars precipitated the establishment of international human rights standards, including standards against torture. The steps began inter alia with the establishment of a protection system of inhabitant national, ethnic, religious and linguistic minorities within the framework of the League of Nations.[168] However, due to policies of the countries involved, which failed to render constructive cooperation, this minorities protection system turned out to be unsuccessful. Consequently, deeply distressful various minority groups, in particular Jews, homosexuals and persons with disabilities were tortured and massacred by the Nazis during World War II.[169] Rising from the ashes of World War II, the international community established the United Nations with the mandate to address issues of aggression, peace and security, as well as the protection of human rights.[170] The protection of individuals' rights to life, dignity and freedom from torture became the principal aims of the UN.[171] According to Burgers and Danelius, the idea of human rights protection was based on the 'recognition that a human being does not exist for the benefit of the state, but that the state exists for the benefit of the human being'.[172]

Soon after its establishment, the UN adopted the Universal Declaration in 1948, the Geneva Conventions of 1949[173] and their Additional Protocols of 1977.[174] The

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*human rights politics* (2009) 7; Riesman WM 'Sovereignty and human rights in contemporary international law'(1990) *American Journal of International law* 868.

[168] P Hilport 'The League of Nations and the protection of minorities: Re-discovering a great experiment' (1990) 84 (4) *Max Planck Yearbook of United Nations Law* 87 who states that the League of Nations was given mandate to protect minorities who had been occasioned by border changes in Europe after World War I.

[169] See Buergenthal (note 160 above) 703.

[170] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, (UN Charter) preamble para 1; H Kelson *The law of the United Nations: A critical analysis of its fundamental problems* (1950) 13.

[171] UN Charter preamble reaffirms the UN's faith in fundamental human rights and freedoms; UN Charter articles 1(2), 1(3) 13(b), and 62(2); Dugard (note 132 above) 308.

[172] Burgers & Danelius (note 71 above) 1; GA O'Donnell 'Why the rule of law matters' (2004) 15 (4) *Journal of Democracy* 32.

[173] Geneva Convention for the Amelioration of the condition of the wounded and sick in armed forces in the field 12 August 1949 (1st Geneva Convention); Geneva Convention for the Amelioration of the condition of the wounded and sick and shipwrecked members of armed forces at sea 12 August 1949 (2nd Geneva Convention); Geneva Convention relative to the treatment of prisoners of war 12 August 1949 (3rd Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 (4th Geneva Convention). Lesotho ratified all four Geneva Conventions on 20 May 1968.

[174] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 and Protocol Additional to the

ICCPR and International Covenant on Economic Social and Cultural Rights (ICESCR) were adopted in 1966 and entered into force in 1979. The ICCPR, ICESCR and Universal Declaration are together referred to as the International Bill of Rights.[175]

Article 5 of the Universal Declaration provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. However, it neither defines torture nor gives examples of acts, which constitute torture. The prohibition of torture was later expanded by article 7 of the ICCPR, albeit still without a definition, as the definition of torture was only articulated by CAT in 1984. The standards contained in these instruments are discussed later on in this chapter. The Universal Declaration has laid a foundation for the prohibition of torture in international law and influenced other international instruments and national constitutions.[176] This great influence has elevated some of provisions of the Universal Declaration, especially civil and political rights such as freedom from torture, to the status of customary international law by satisfying two conditions, which are discussed in detail in the next section.[177]

## 2.3 Prohibition of torture under customary international law

Article 38 of the Statute of the International Court of Justice (ICJ) lists custom as one of the sources of international law.[178] It defines custom as 'a general practice accepted as law'.[179] Customary international law has two elements of *usus* (state practice) and *opinio juris* (the belief that such practice is required as a matter of law).[180] The prohibition of torture has been established to satisfy these two elements

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Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[175] As noted by Walts, 'there is no single, straight forward story about the origins, shape and content of the International Bill of Rights'. See SE Walts 'Universalising human rights: The role of small states in the construction of the Universal Declaration of Human Rights' (2001) 23 (1) *Human Rights Quarterly* 44.

[176] For instance, the European Convention on Human Rights, ICCPR and CAT specifically state that they were adopted in accordance with the Universal Declaration.

[177] H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 317.

[178] United Nations, *Statute of the International Court of Justice* 1946 (ICJ Statute).

[179] ICJ Statute article 38(1) (b).

[180] These two elements are well established as they have been confirmed and elaborated on in *SS Lotus (France v Turkey)* 7 September 1927 PCIJ Ser.A No.10 (*Lotus case*); *The Asylum case*

and is therefore part of customary international law.[181] It is also regarded as part of customary international law because it is contained in article 5 of the Universal Declaration, which has itself achieved the status of customary international law. [182]

Prohibition of torture is not only a principle of customary international law but has risen to the status of a peremptory norm in both human rights law and international humanitarian law.[183] A peremptory norm is defined by article 53 of the Vienna Convention on the Law of Treaties (VCLT) of 1969 as:

> a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

There is widespread support for the view that prohibition against slavery, genocide, racial discrimination, torture and denial of self-determination qualify as peremptory norms.[184] Prohibition of torture 'has the highest standing in customary [international] law and is so fundamental as to supersede all other treaties and customary laws (except laws that are also *jus cogens*)'.[185] The *jus cogens* status of the prohibition of torture under international criminal law has been confirmed by the ICTY in the *Furundzija* case as follows:

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*(Columbia v Peru)* 1950 ICJ Reports 395; *Rights of passage over Indian Territory (Portugal v India)* 1960 ICJ Reports 6 *(Rights of Passage case)*; *North Sea Continental Shelf cases* 1969 ICJ 3 para41; Dugard (note 132 above) 29; A Aust *Handbook of international law* (2005) 6; J Browlie *Principles of international law* (2003) 6.

[181] R Sifris *Reproductive freedom, torture and international human rights: Challenging the masculinisation of torture* 37; Burgers & Danelius (note 71 above) 100. See also NS Rodley & M Pollard 'Criminalisation of torture: States' obligations under the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 *European Human Rights Law Review* 115.

[182] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* 1980 ICJ Reports 1 in which the ICJ invoked the Universal Declaration and referred to the principles contained therein as fundamental principles legally binding on Iran with regard to deprivation of liberty and the imposition of physical constraints and conditions of hardship.

[183] Dugard (note 132 above) 43. L Juma 'The role of human rights in post-conflict situations in Africa' (2008) 2 (2) *Malawi Law Journal* 279. C Fournet 'The universality of the prohibition of the crime of genocide: 1948-2008' (2009) 19 (2) *International Criminal Justice Review* 132.

[184] E de Wet 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) 15 (1) *European Journal of International Law*, 97; A Bianchi 'Human rights and the magic of *jus cogens*' (2008) 19(3) *European Journal of International Law* 498.

[185] Human Rights Watch *The legal prohibition against torture* 1 June 2004 https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture [accessed 12 June 2016]; Commentary on article 26 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (note 5 above) para 5.

> …the fact that torture is prohibited by a peremptory norm of international law has effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimize any legislative, administrative or judicial act authorising torture…at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.[186]

From this reasoning, the following state's obligations are identified: the obligation not to enact any laws, nor take any administrative measures or judicial decisions, which authorise torture; the obligation to investigate allegations of torture, to prosecute suspects of torture, to punish those convicted of torture and also to extradite suspects of torture whom the state does not prosecute.[187] In the South African case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another,* the South African Constitutional Court held that international law prohibition against torture has the status of a peremptory norm and is thus law in South Africa, which binds the South African Police Service (SAPS) to investigate allegations of torture committed by Zimbabwean authorities against Zimbabwean nationals in Zimbabwe.[188] Similarly, article 139 of the 1999 Constitution of Switzerland provides that 'no Peoples' Initiative aimed at constitutional amendment may be in conflict with the norms of *jus cogens*'.[189]

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[186] *Furundzija* (note 4 above) paras 155 - 156.

[187] *Furundzija* (note 4 above) para 157. Failure to comply with these obligations amounts to violation of international law. See *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)* 2012 ICJ Reports para 113.

**[188]** *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (2015) 1 SA 315 (CC) 81 (SAPS v SALC); *Prosecutor-General of the Supreme Court v Desire Bouterse* LJN: AB1471 (Supreme Court of the Netherlands), 18 September 2001, www.internationalcrimesdatabase.org/case/1082 [accessed 4 January 2016]. In this case the Dutch court was confronted with the prosecution of the former military leader of Suriname Desire Bonterse for ordering extra-judicial killings of 15 people in Suriname in December 1982 in which one of the issues before court was whether prohibition of torture had attained the status of *jus cogens*

[189] See De Wet (note 184 above) 101 who illustrates that section 139 of the Constitution of Switzerland was the government's reaction to the people's proposal for constitutional amendment to include summary deportation of illegal asylum seekers. This proposal was rejected on the basis that deportation of people to countries in which they would be tortured violates a peremptory norm of non-refoulement.

Although both South Africa and Switzerland have Constitutions, which reaffirm the status of *jus cogens* norms, absence of such constitutional stipulations does not absolve states such as Lesotho which, as will be illustrated in the next chapter, do not make reference to the status of international law in their legal systems from being bound by rules of customary international law. It being a *jus cogens* norm, prohibition of torture gives rise to *erga omnes* obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims even in the absence of treaty ratification. Obligations *erga omnes* are defined as obligations, which a state owes to the entire international community.

The principle of obligations *erga omnes* in international law was first raised in the dictum of the ICJ in the *Barcelona Traction Case.*[190] With regard to the prohibition of torture, the principle was recognised by the ICTY in the *Furundzija* case in which it was stated that:

> … the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.[191]

## 2.4 UN standards against torture

As stated in the history of prohibition of torture, the UN was established in reaction to various atrocities, including torture, committed during World War II. The establishment of the UN also influenced change in international law as Dugard says that '[t]he experience compelled the state men to accept the need for a new world order in which the state was no longer free to treat its own nationals as it pleased'.[192] The UN Charter heralds this new world order in which the dignity and worth of the human person became paramount in international law and respect for treaty obligations became a way of ensuring this dignity, as well as other freedoms.[193] It

[190] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* 1970 ICJ Reports 32.
[191] *Furudnzija* (note 4 above) para 151.
[192] Dugard (note 132 above).
[193] UN Charter preamble para 1.

contains several articles, which establish its commitment to respect and protection of human rights and the need for states' cooperation to achieve such.[194] The Universal Declaration that was subsequently adopted accentuates this commitment. As far as prohibition of torture is concerned, as stated in section 2.2 above, the Universal Declaration prohibits torture in article 5. This prohibition has been further enshrined in other treaties and soft law, which contain general and specific standards against torture as discussed in detail below.

### *2.4.1 UN treaties*

Amongst the legally binding instruments adopted under the auspices of the UN to which Lesotho is a party (thus, other UN treaties relevant to the question of torture that Lesotho is not a party to are not considered), the following contain direct and indirect standards against torture: Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948,[195] Convention Relating to the Status of Refugees (Refugee Convention) of 1951 and Protocol Relating to the Status of Refugees of 1967,[196] International Convention on Eradication of Racial Discrimination (CERD) of 1965,[197] ICCPR, ICESCR Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, CAT, Convention on the Rights of the Child (CRC) of 1989,[198] Convention on the Rights of All Migrant Workers and Members of their Families (CMW) of 1990[199] and Convention on the Rights of Persons with Disabilities (CRPD) of 2006.[200] The human rights standards, as well as states' obligations contained in these treaties are discussed below in the order in which they were adopted by the UN.

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[194] UN Charter articles 1(3), 13(1) (b), 55(c) & 56.
[195] Convention on the Prevention and Punishment of the Crime of Genocide adopted by UN GA Res 260 on 9 December 1948. Lesotho acceded to it on 29 November 1974.
[196] Convention Relating to the Status of Refugees (UN Refugee Convention) was adopted by the United Nations Conference of Plenipotentiaries on 28 July 1951. Protocol Relating to the Status of Refugees was adopted by the UN GA Res. 2198 (XXXI) on 31 January 1967. Lesotho acceded to both the Convention and Protocol on 14 May 1981.
[197] Convention on the Elimination of all Forms of Racial Discrimination (CERD) was adopted by UN GA Res. 2106 (XX) on 21 December 1965. Lesotho acceded to it on 4 November 1971.
[198] Convention on the Rights of the Child was adopted by UN GA Res. 44/25 on 20 November 1989. Lesotho ratified it on 10 March 1992.
[199] Convention on the Rights of All Migrant Workers and Members of their Families (CMW) was adopted by UN GA Res. 45/158 of 18 December 1990. Lesotho ratified it on 16 September 2005.
[200] Convention on the Rights of Persons with Disabilities (CRPD) was adopted by UN GA Res. 61/106 on13 December 2006. Lesotho acceded to it on 2 December 2008.

#### *2.4.1.1 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948*

The Genocide Convention was adopted in reaction to the atrocities which had taken place during the World War II. Its preamble stipulates that it was adopted by state parties '[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity, and [b]eing convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required'.[201]

##### *(1) The link between genocide and torture*

The Genocide Convention defines genocide as killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births and forcibly transferring children, committed against particular groups being national, ethnic, racial or religious group with the intent to destroy such a group in whole or in part.[202] This definition links torture and genocide in that there are circumstances under which torture may amount to or result in genocide,[203] and also that in cases of genocide and mass atrocities, different forms of torture, as defined in article 1 of CAT, typically precede the killing of the targeted groups. For instance, the 1915 Armenian genocide was executed by armed roundups of political leaders, educators, writers and religious leaders who were taken from their homes, tortured, then executed by being hung or shot.[204] The 1933 Holocaust also involved different forms of psychological and physical torture against the Jews and other prisoners who were taken to different concentration camps before they were killed.[205] Genocide, which took place in Cambodia during the Pol Pot regime involved different forms of torture.[206] In the

[201] Genocide Convention preamble paras 2 & 3.
[202] Genocide Convention article II.
[203] *Prosecutor v Kaing Guek alias Duch* Case No.001/18-07-2007-ECCC/TC (Extraordinary Chambers Courts of Cambodia (ECCC)), 26 July 2010, para 28. In this case the accused was found guilty of the crime against humanity of torture (including one instance of rape) and other inhuman acts. He had authorised the torture of detainees at S21 detention facility during the Cambodian genocide.
[204] United to end genocide 'The Armenian Genocide' http://endgenocide.org/learn/past-genocides/the-armenian-genocide/ [accessed 6 September 2016].
[205] A Jones *Genocide, War Crimes and the West: History and Complicity* (2004) 14.
[206] People who opposed the regime were detained and tortured to death, subjected to excessive beatings, their tongues cut out and livers plucked out with pliers. See J Barber 'Less than human:

1994 Rwandan Genocide, the ICTR in *Prosecutor v Akayesu* held that rape, which had been committed as part of genocide, amounted to torture.[207] In *Bundesgerichtshof (BGH)*,[208] the German High Court held that because of the close connection between torture and genocide, the Court did not only have jurisdiction over genocide committed in Bosnia but also other violent crimes, such as torture, which took place as part of the genocide.[209] The close link between torture and genocide thus justifies an argument that the obligations, which the Genocide Convention confers on state parties, also include obligations against torture, which is committed with the intention to destroy in whole or in part, a group protected by the Genocide Convention.

*(2) The obligations to prevent torture that amounts to genocide and to punish its perpetrators*

The obligation to prevent and punish acts of genocide (including torture, which amounts to genocide) is contained in article I of the Genocide Convention, which confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law, which state parties must prevent and punish. It is reinforced by article III, which criminalises conspiracy to commit genocide, direct and public incitement to commit genocide and complicity in genocide. Article IV removes the defence of official capacity. States therefore have an obligation to prevent and punish all modes of participation in torture, which amounts to genocide. Article V requires state parties to enact laws in order to give effect to the obligations contained in the Convention. Articles VI and VII mandate state parties to prosecute persons charged with genocide, including torture, in competent national tribunals or by any competent international tribunals, which have jurisdiction over such persons,[210] to

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Torture in Cambodia' *A Licadho project against torture report* (2000) www.licadho-cambodia.org [accessed 11 June 2016]; B. Keirnan *Te Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khemer Rogue, 1975-79* (1996) 354; LD Wheeler 'Documenting genocide in Cambodia: one face after another' (28 February 1999) 45 *Chronicle of Higher Education* 38.

[207] *Prosecutor v Akayesu* (note 37 above) para 597.

[208] *Bundesgerichtshof (BGH)* is Germany's Highest Court of civil and criminal jurisdiction.

[209] WA Schabas 'National courts finally begin to prosecute genocide, the 'crime of crimes'' (2003) 1(1) *Journal of International Criminal Justice* 46.

[210] Genocide Convention article VI.

cooperate with extradition requests and not to consider genocide and related offences as political crimes for purposes of extradition.[211]

State parties' obligations to prevent and punish genocide were extrapolated by the ICJ in its *Advisory Opinion on Reservations to the Genocide Convention* in which the ICJ emphasised that article I contains two independent obligations, which although clearly linked, are also distinct from each other: the obligation to prevent genocide and the obligation to punish genocide.[212] In the case of *Bosnia and Herzegovina v Serbia and Montenegro,* in its decision of 26 February 2007, the ICJ held that Serbia had violated its obligation to prevent genocide as mandated by the Genocide Convention.[213] The ICJ further held that since the Genocide Convention is almost silent as to what the states have to do in order to fulfil their prevention obligation, such initiative may include educating communities about genocide and disseminating the Genocide Convention; drawing and publishing reports on any evidence or risk of genocide, including torture, in other countries, as well as enacting laws, which impose economic, diplomatic, military, travel or other sanctions on states, which are planning or attempting to commit genocide.[214]

With regard to the obligation to punish torture which amounts to genocide, article VI creates a two-pronged obligation to establish competent national courts or tribunals for the prosecution of perpetrators of genocide and to establish international tribunals in which perpetrators may be prosecuted. Ntouband argues that at first glance, the first leg of the obligation, which is the establishment of competent national tribunals, may seem to be limited to prosecution of genocide, which has been committed in the territory of the state concerned.[215] He argues that the principle of universal jurisdiction makes it possible for states to establish universal jurisdiction[216] to

[211] Genocide Convention article VII.
[212] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Reports 15.
[213] *Bosnia and Herzegovina v Serbia and Montenegro* 2007 ICJ Reports 43.
[214] As above.
[215] FZ Ntouband 'When to act: A state's obligations and responsibilities regarding genocide' 14 June 2013 *Sentinel Project* https://www.thesentinelproject.org/2013/06/14/when-to-act-a-states-obligations-and-responsibilities-regarding-genocide/ [accessed 25 August 2015].
[216] The principle of universal jurisdiction allows national courts to exercise criminal jurisdiction over foreign nationals alleged to have committed genocide against foreign nationals in foreign territories.

prosecute heinous crimes, such as genocide, even in the absence of a territorial or nationality link to them.[217]

The second leg of the obligation under article VI is the establishment of an international penal tribunal with jurisdiction over genocide and state parties' obligation to cooperate with such a tribunal. In *Bosnia and Herzegovina v Serbia and Montenegro*, the ICJ specified that the nature and content of the obligation to cooperate with an international tribunal includes the requirement to:

> …arrest persons accused of genocide who are in their territory, even if the crime of which they are accused was committed outside it and, failing the prosecution of them in the parties' own courts, that they will hand them over for trial by competent international tribunal.[218]

From the content of article VI, as well as the ICJ's statement above, it is clear that the obligation to prosecute perpetrators of torture amounting to genocide is first and foremost placed on states. Prosecution by international courts or tribunals exists as an alternative to complement the national efforts. The complementarity role that an international tribunal plays in the prosecution of genocide is best illustrated by cases, which followed the Rwandan genocide. The majority of the perpetrators were prosecuted by national courts in Rwanda, while only a few key role players were brought to the ICTR. [219] As illustrated in the ICJ decision in *Bosnia and Herzegovina v Serbia and Montenegro*, the complementarity role of international criminal courts and tribunals carries with it the obligation for states to cooperate with such international criminal tribunals.[220]

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MT Kamminga 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offences' (2001) 23 (4) *Human Rights Quarterly* 940.

[217] Ntouband (note 215 above).

[218] *Bosnia and Herzegovina v Serbia and Montenegro* (note 213 above) para 443; P Gaeta *The UN Genocide Convention: A Commentary* (2008) 478. RH Steinberg *Contemporary issues facing the International Criminal Court* (2016) 79.

[219] For instance, following the 1994 genocide in Rwanda, about 120 000 people were arrested and charged with the participating in the acts of genocide including torture. About seventy five of them were tried by the ICTR (those bearing greatest responsibility), about ten thousand were tried before national courts (those accused of planning the genocide or who had committed serious atrocities) and about twelve thousand community-based Gacaca courts tried about 1.2 million cases. See also Rome Statute article 17.

[220] *Bosnia and Herzegovina v Serbia and Montenegro* (note 213 above). See also MM El Zeidy *The principle of complementarity in international c*riminal law: origin, development and practice (2008)

While the normative standards, which create the obligation to cooperate with international tribunals, seem clear in theory, the practical implementation of such standards has faced challenges. For instance, Kenya, Djibouti, Malawi, Chad, Nigeria, the Democratic Republic of the Congo and South Africa[221] refused to comply with the ICC's arrest warrants against the Sudanese President, Omar Al Bashir,[222] who is charged with five counts of crimes against humanity of murder, extermination, forcible transfer, torture and rape; two counts of war crimes and three counts of genocide by killing, causing serious physical or mental harm and by deliberately inflicting on each targeted group conditions of life calculated to bring about the group's physical destruction;[223] acts of torture, which amounted to genocide in Darfur and other places in Sudan from 2003.[224]

*(3) The obligation to report on measures taken against torture that amounts to genocide*

Unlike other UN human rights treaties, the Genocide Convention does not establish a monitoring body and also does not contain a provision on periodic reporting on measures taken for its implementation.

*2.4.1.2 Convention Relating to the Status of Refugees (UN Refugee Convention) 1951*

The UN Refugee Convention was adopted by the UN shortly after the end of World War II. According to its preamble, it was adopted for purposes of aiding repatriation

303. See also A Falzon 'The principle of complementarity under international criminal law' unpublished masters thesis, University of Malta (2012).

[221] South Africa's failure to arrest Bashir was challenged nationally in the case of *Southern African Litigation Centre (SALC) v Minister of Justice and Constitutional Development and others* (2016) 2 All SA 365 (SCA) 15 March 2016. See also D Tladi 'Interpretation and international law in South Africa: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 321.

[222] O Bekou & D Birkett *Cooperation and the international criminal court: Theory and practice* (2016) 156.

[223] *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05/05-01/09.

[224] On 4 March 2009, the Pre-Trial Chamber I of the ICC issued an arrest warrant against Al-Bashir for crimes against humanity: ICC-02/05-01/09, 4 March 2009. On 12 July 2010 a second warrant of arrest for the crime of genocide was issued: ICC-02/-5-01/10. See T Dagne *The crisis in Darfur and the status of the north peace agreement* (2010) 7.

and resettlement of people who had been displaced by the war.[225] It defines a refugee as a person who due to a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country.[226] This definition was initially restricted to persons who had been displaced due to events, which took place during the war prior to 1951.[227] However, the 1967 Protocol Relating to the Status of Refugees (1967 Protocol) removed this restriction as the problem of displacement for various reasons spread around the world.[228]

*(1) Non-refoulement*

The UN Refugee Convention contains a number of obligations for state parties to protect refugees,[229] as well as the refugees' obligations towards host countries.[230] Particularly relevant to torture is the obligation not to return a refugee or an asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.[231] This obligation is embodied in the principle of non-refoulement.

In its Advisory Opinion,[232] the Office of the United Nations High Commissioner for Refugees (UNHCR),[233] characterised non-refoulement as a 'corner-stone of

[225] UN Refugee Convention Preamble para 3; Global Detention Project 'Migration related detention and international law' http://globaldetentionproject.org/law/legal-framework/international/treaties-and-protocols [accessed 17 June 2015].
[226] UN Refugee Convention article 1 (1).
[227] UN Refugee Convention article A (2); UNHCR 'Convention and Protocol relating to the status of refugees' December 2010 http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf [accessed 5 November 2015].
[228] As above.
[229] UN Refugee Convention articles 3-34 contain different obligations including non-discrimination, non-refoulement and others.
[230] UN Refugee Convention article 2, which provides generally that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.
[231] UN Refugee Convention article 33.
[232] UNHCR *Advisory Opinion on the extraterritorial application of Non-Refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, http://www.refworld.org/docid/45f17a1a4.html [accessed 7 November 2016].

international protection of refugees'.[234] It entails the duty not to expel, extradite or informally transfer a person to a state where there is a likelihood of persecution, including torture, or to deny such a person admission into their borders.[235] This obligation has been translated into the domestic laws of several countries, including Lesotho and used as a standard to determine deportation, expulsion or extradition.[236]

*(2) The obligation to report on measures taken against torture of refugees*

Article 35 of the UN Refugee Convention mandates state parties to provide the UNHCR or other UN bodies with information regarding conditions of refugees, implementation of the Convention and domestic laws governing refugees in each state party. Unlike other human rights treaties, article 35 does not require periodic reports on the basis of which the UNHCR would adopt concluding observations. In pursuit of its supervisory mandate under article 35, the UNHCR has adopted advisory opinions on several issues which affect refugees' right to freedom from torture. However, it has not issued any advisory opinions regarding states' obligations to fulfil the reporting obligations under article 35(2).

### *2.4.1.3 International Convention on the Elimination of All forms of Racial Discrimination (CERD) 1965*

The CERD mandates state parties to prohibit and eliminate racial discrimination in all its forms. It defines racial discrimination as:

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[233]Established by the UN General Assembly in 1950, that is, before the UN Refugee Convention. In terms of article 35 of the UN Refugee Convention and article II of the 1967 Protocol, it has a mandate to interpret states' obligations in relation to refugees.

[234] UNHCR Advisory Opinion (note 232 above) para 5.

[235] As above para 7.

[236] See chapter 3 of this thesis; *Immigration and Naturalisation Services v Cardoza Fon-Seca* Case No. 85-782 (Supreme Court of United States) 9 March 1987 paras 424 & 429 in which the Supreme Court said that after ratification of the UN Refugee Convention, the United State became bound by mandatory provisions of article 33 (1) not to return an alien to a country where his life or freedom would be threatened; South African Refugees Act 1998 section 2, which incorporates the non-refoulement obligation; *Ibrahim Ali Abubaker Tantoush v The Refugee Appeals Board and others* Case No.13182/06 (High Court of South Africa-TPD) 11 September 2007 para 74.

> …any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[237]

### *(1) The link between racial discrimination and torture*

As illustrated in chapter 1, one of the elements of torture is that severe pain or suffering must be inflicted for a prohibited purpose such as discrimination.[238] While CERD does not specifically mention torture in its text, it prohibits all acts of discrimination including violence,[239] and mandates states parties to guarantee 'the right to security of person and protection by the State against violence or bodily harm, whether inflicted by the government officials, or by any individual group or institution'.[240] Infliction of severe pain for purposes of racial discrimination as defined by CERD therefore, amounts to racist torture. Furthermore, 'discrimination of any kind can create a climate in which torture and ill-treatment of groups subjected to intolerance and discriminatory treatment can more easily be accepted'.[241] Because of this link, states' obligations under CERD are also relevant to prevent and prohibit racist torture, to punish its perpetrators and to provide redress to victims of racist torture.

### *(2) The obligations to prevent and prohibit racist torture*

Article 4 of CERD contains various means through which racist torture may be prevented. These include condemnation and criminalisation of dissemination of information or ideas which portray one race as superior to others as well as acts of

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[237] CERD article 1; CERD Committee has recommended for states parties to adopt this definition in their domestic legislations. See CERD Committee, *Concluding observations on the nineteenth to twenty-second reports of Germany,*15 May 2015, UN Doc CERD/C/DEU/CO/19-22 para 7: CERD Committee, *Concluding observations to the combined initial, second to fifth reports of Honduras,*13 March 2014, UN Doc CERD/C/HND/CO/1-6 para 9.

[238] CAT article 1(1).

[239] CERD article 4.

[240] CERD article 5(b).

[241] World Organisation Against Torture *Press Release:* 'The World Organisation Against Torture Welcomes both the Inclusion of the Issue of Torture in the WCAR Declaration and Programme of Action and the adoption of a follow up mechanism to the WCAR but deplores the watered-down language on racism' October 2001 http://www.omct.org/monitoring-protection-mechanisms/urgent-interventions/2001/10/d15465/ [accessed 15 June 2017].

violence, financing or incitement to commit such acts against any race or group of persons by individuals or public authorities or institutions. States' obligations under article 4 were elaborated on by the Committee on the Elimination of Racial Discrimination (CERD Committee)[242] in General Recommendation 32 and later reaffirmed in General Recommendation 35 to comprise of 'legislative, executive, administrative, budgetary and regulatory instruments…as well as plans, policies, programmes and…regimes'.[243] Similar obligations were identified with regard to article 5 which mandates state parties to prohibit and eliminate all forms of racial discrimination and also to guarantee 'the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution'.

*(3) Non-refoulement*

In General Recommendation 30, the CERD Committee recommended that state parties should '[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment'.[244]

*(4) The obligation to report on measures taken against racist torture*

Article 9 of CERD mandates state parties to submit reports on measures that they have taken to implement the provisions of CERD. Relevant to states' obligations to report on measures taken against racist torture, the Committee has continuously recommended states to include in the reports, 'recent, reliable and comprehensive statistical data' on the population of each state party as well as 'economic and social indicators disaggregated by ethnicity' to enable the Committee to assess enjoyment

[242] Established in terms of CERD article 8 to oversee its implementation.
[243] CERD Committee General Recommendation 32 'The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination' 24 September 2009 UN Doc CERD/C/GC/32 para 13; CERD Committee General Recommendation 35 Combating racist hate speech 26 September 2013 UN Doc CERD/C/GC/35 para 10.
[244] CERD Committee General Recommendation 30 'Discrimination against non-citizens' 4 May 2005, UN Doc HRI/GEN/1/Add.1 (CERD Committee, GR 30) para 27.

of human rights, (including the right to freedom from racist torture).[245] It has also recommended that the report must contain specific measures which states have taken to implement the Durban Declaration against racism, racial discrimination, xenophobia and related intolerance[246] and measures taken on discrimination against people of African descent.[247] States also have an obligation to ensure that the report as well as the Committee's concluding observations are readily and publicly available and accessible.[248]

*2.4.1.4 International Covenant on Civil and Political Rights (ICCPR) 1966*

The ICCPR was adopted by the UN General Assembly with the aim of protecting the inherent dignity of the human person.[249] State parties thereto recognise that in accordance with the principles declared in the Universal Declaration, human beings can only enjoy civil and political freedom, as well as freedom from fear and want if all human rights are protected.[250] It is based on the principles of equality and non-discrimination[251] and creates an obligation on states parties not to derogate from the prohibition of torture under any circumstances.[252]

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[245] CERD Committee *Concluding observations on the nineteenth to twentieth reports of Canada* 4 April 2012, UN Doc CERD/C/CAN/CO/19-20 paras 7 & 11 in which it specifically requested statistical data on the treatment of African Canadians in the criminal justice system. See also CERD Committee *Concluding observations on the sixteenth and seventeenth reports of El Salvador* 25 September 2014, UN Doc CERD/C/SLV/CO/16-17 para 9.

[246] CERD Committee *Concluding observations on the twentieth and twenty-first reports of Demark* 15 May 2015, UN Doc CERD/C/DNK/CO/20-21 para 24. See also CERD Committee *Concluding observations on the sixteenth and seventeenth reports of El Salvador* (note 245 above) para 26, Committee, *Concluding observations on the nineteenth to twenty-second reports of Germany* (note 237 above) para 20; CERD Committee, *Concluding observations to the combined initial, second to fifth reports of Honduras* (note 237 above) para 24.

[247]CERD Committee *Concluding observations on the twentieth and twenty-first reports of Demark* (note 246 above) para 25;, Committee *Concluding observations on the sixteenth and seventeenth reports of El Salvador* (note 245 above) para 27.

[248] Committee *Concluding observations on the sixteenth and seventeenth reports of El Salvador* (note 245 above) para 27; CERD Committee, *Concluding observations to the combined initial, second to fifth reports of Honduras* para 25.

[249] ICCPR preamble para 2.

[250] As above para 4.

[251] HRC, GC 31 para 10 in which the HRC emphasised that the rights applies to all individuals including asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of a particular state party.

[252] ICCPR article 4; HRC General Comment 5 'Article 4 Derogations' 31 July 1981, UN Doc HRI/GEN/1/Rev.6 (HRC, GC 5) which has been replaced by HRC, GC 29; see also HRC, General Comment 20, 'Article 7 Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment' 10 March 1992, UN Doc HRI/GEN/1/Rev.1 (HRC, GC 20). para 3; see also *Grille Mota v Uruguay* Communication 11/1977 (HRC) 29 July 1980, UN Doc CCPR/C/10/11/1977 para 14 in which the HRC held that Uruguay could not rely on national law to subject the author to torture; in *Frank*

Article 7 of the ICCPR specifically provides that '[n]o 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.' It differs from article 5 of the Universal Declaration in that it expands the prohibition of torture to medical and scientific experimentation without one's consent.[253] It must be noted however that unlike CAT, the ICCPR does not confine the commission of torture to people who do so in official capacity.[254] States' obligations in relation to article 7 were interpreted by the HRC first in General Comment 7 in 1984, which was later replaced by General Comment 20 in 1992, and in General Comment 31 in 2004.[255]

(1) *The obligation to prevent torture*

The ICCPR contains several measures which speak to prevention of torture. For instance, article 7 has been interpreted to impose the obligation to exclude evidence obtained through torture from criminal proceedings. Furthermore, article 10 mandates state parties to treat detained persons humanely, thus preventing torture of such persons. Specific measures which states have to take to implement this obligation are outlined below.

(a) Exclusion of evidence obtained through torture from criminal proceedings

Torture is often used to extract information from suspects in order to use such information in criminal proceedings. Therefore, exclusion of evidence obtained through torture eliminates the incentive for investigating officers to use torture as an

*Kitenge Baruani v Congo* Communication 1890/2009 (HRC), 27 March 2014 UN Doc CCPR/C/110/D/1890/2009 para 6.4 The HRC held that since article 7 allows no limitation even in situations of emergency, the ill-treatment meted on the author could not be justified as it violates both articles 4 &7 of the ICCPR.

[253] HRC, GC 20 in which the HRC stated that the prohibition is mostly important to people who are not capable of giving valid consent or those who are in detention or any form of imprisonment.

[254] *Eduardo Bleier v Uruguay,* Communication 030/1978 (HRC), 29 March 1982, UN Doc CCPR/C/15/D/30/1978 para 15 in which the HRC reiterated that the state had an obligation to investigate Bleier's whereabouts as well as the obligation to bring to justice any person found to be responsible for his death or disappearance and to pay compensation to him or his family for the injury, which he has suffered and lastly to ensure that similar acts do not take place in the future.

[255] HRC, GC 31 (note 6 above).

interrogation technique.[256] In *Sahadeo v Guyana,* the HRC held that 'it is important for the prevention of violations under article 7 that the law must exclude admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment'.[257] Similarly, in *Zhakhangir Bazarov v Kyrgyzstan*, the HRC held that the use of evidence obtained through torturing the author in a criminal trial against him violates article 7.[258]

(b) Protection of detained persons from CIDT

In General Comment 20, the HRC emphasised that article 7 cannot be interpreted on its own but in conjunction with article 10 which complements it.[259] Similarly, when interpreting article 10 in General Comment 21, the HRC reiterated that article 10 imposes positive obligations towards people who are particularly vulnerable because of being deprived of their liberty and complements for them the ban on torture and other CIDT in article 7.[260] In *Kouider Kerrouche v Algeria*, the HRC held that having found that the conditions in Mascara and Ghriss prisons violate article 7 in that they were overcrowded, lacked hygiene, lighting, ventilation and that inmates were not given adequate food and physical exercise, it also finds a violation of article 10.[261]

Measures, which state parties must take to protect detained persons from torture entail legislative,[262] administrative, judicial and other measures against torture and other CIDT,[263] dissemination of information, giving appropriate education and training to law enforcement officers, medical personnel and all persons who are involved in the custody or treatment of individuals who are arrested, imprisoned or

[256] T Thienel 'The admissibility of evidence obtained by torture under international law' (2006) 17 (2) *European Journal of International Law* 356.
[257] *Sahadeo v Guyana* Communication 728/1996 (HRC) 1 November 2001 UN Doc CCPR/C/73/D/728/1996 para 9.3.
[258] *Zhakhangir Bazarov v Kyrgyzstan* Communication 2187/2012 (HRC) 21 October 2016 UN Doc CCPR/C/118/D/2187/2012 para 6.4.
[259] HRC, GC 20 para 14; *Mulezi v Democratic Republic of Congo* 2004) AHRLR 3 (HRC 2004) para 5.3 in which the Committee held that the detailed account of treatment to which the author of the communication was subjected during detention shows that he was subjected to torture or ill-treatment and denied medical attention despite his loss of mobility in violation of both articles 7 & 10 of ICCPR.
[260] HRC, GC 21 para 3.
[261] *Kouider Kerrouche v Algeria* Communication 2128/2012 (HRC) 3 November 2016, UN Doc CCPR/C/118/D/2128/2012 para 8.
[262] HRC, GC 20 para 13. See also HRC, GC 31 para 13.
[263] HRC, GC 20 para 8.

detained.[264] To prevent torture of detained persons, state parties also have an obligation to ensure that detention facilities are officially recognised and that the names of all detainees and of personnel responsible for their detention are kept in registers, which are easily available and accessible to those concerned, including relatives of the detainees.[265] State parties are also mandated not to limit or restrict the rights contained in the Covenant. Where they decide to do so, they have an obligation to ensure that the laws, which restrict or limit any of the rights contained in the Covenant, are permissible under the Covenant.[266]

*(2) The obligation to prohibit torture*

The positive aspect of the obligations under article 2 is for state parties to take steps to ensure the realisation of the rights contained in the Covenant.[267] These steps include the enactment of national laws, as well as the establishment of competent judicial, administrative, legislative or other authorities, capable of determining the rights in the Covenant,[268] as well as enforcing the remedies when they are granted.[269] Article 2(2) mandates state parties 'to take the necessary steps, in accordance with [their] constitutional processes and with the provisions of the [ICCPR], to adopt laws or other measures as may be necessary to give effect to the rights recognised in the Covenant'.[270] Enactment of laws in the context of torture therefore implies that over and above the legal recognition or affirmation of the right to freedom from torture in the constitutions, states have a further obligation to proscribe through criminal law, acts of torture, whether committed by private persons or entities or by persons who do so in an official capacity.[271] Closely linked to the

[264] HRC, GC 20 para 10.
[265] HRC, GC 20 para 3.
[266] HRC, GC 31 para 18.
[267] MM Sepulveda Carmona *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 130.
[268] ICCPR article 2(3) (b).
[269] ICCPR article 2(3) (c).
[270] ICCPR article 2(2). See also GC 31 para 13; *Kouider Kerrouche v Algeria* (note 261 above); *Manojkumar Samathanam v Sri Lanka* Communication 2412/2014 (HRC) 28 October 2016 UN Doc CCPR/C/118/D/2412/2014;. See also HRC, *Concluding observations on the sixth periodic report of Italy* 1 May 2017 UN Doc CCPR/C/ITA/CO/6 para 19 in which the HRC recommended that Italy must incorporate the crime of torture into its domestic legal system.
[271] HRC, GC 31 para 8.

enactment of anti-torture laws, are the duties to investigate and prosecute allegations of torture.[272]

After consideration of communications brought before it, the practice of the HRC has gone beyond the award of a victim-specific remedy to include the general obligation for states to change their national laws to include prohibition of torture.[273] In *Kouider Kerrouche v Algeria,* the HRC reiterated that the state had to fulfil its obligation to bring its national laws into conformity with the Covenant.[274] Similarly, in *Roy Manojkumar Samathanam v Sri Lanka*, the HRC held that the harmonisation of the national legal system with the provisions of the ICCPR is a torture-prohibition measure, which Sri Lanka has to take in order to ensure that the acts of torture do not recur.[275]

*(3) The obligation to punish perpetrators of torture*

Over and above the prevention of torture and its prohibition through criminal laws, where the right to freedom from torture has been violated, states have an obligation to bring perpetrators of such acts to justice. That is, where complaints are lodged, they must be promptly and impartially investigated by competent authorities and appropriate redress must be awarded to the victims of such acts.[276] The establishment of competent courts and tribunals is essential because in its General

[272] As above; *Zhakhangir Barazov v Kyrgyzstan* Communication 2187/2012 (HRC) 21 October 2012, UN Doc CCPR/C/117/D/2187/2012 in which the HRC held that failure of the state party to investigate the author's allegation that he was subjected to torture while in police custody violates article 2(3); *Urmatbek Akunov v Kyrgyzstan* Communication 2127/2011 (HRC) 21 October 2016, UN Doc CCPR/C/111/D/2127/2011 para 10 in which failure to investigate was also held to be inconsistent with states' general obligations under article 2(3). A similar holding was made in *Manojkumar Samathanam v Sri Lanka* (note 270 above) para 10.
[273] HRC, GC 31 para 17.
[274] *Kouider Kerrouche v Algeria* (note 261 above) para 10. See also HRC, GC 31 paras 2 & 3 in which this obligation was linked with customary international law and other international instruments as obligations *erga omnes* which have to be performed in good faith in accordance with article 26 of the VCLT.[274] For further reading on the principle of good faith see S Rheinhold 'Good faith under international law' 2013 (2) *University College London Journal of Law and Jurisprudence* 40 who argues that the principle of good faith is a necessary limitation of state sovereignty; See also II Lukashuk 'New thinking by Soviet scholars: the principle *pacta sunt servanda* and the nature of the obligation under international law' 1989 (83) *American Journal of International Law* 513 who argues that good faith enhances state sovereignty because it does not only confer duties, but also rights *vis-a-vis* other states.
[275] *Roy Manojkumar Samathanam v Sri Lanka* (note 270 above) para 8.
[276] ICCPR article 2(3) (b); HRC, GC 20 paras 14 & 15.

Comment 31, the HRC reiterated that obligations contained in article 2 are binding on the state party as a whole and not just the executive or legislative branch of the state.[277] It stated that all branches of the government, being the executive, legislature, judiciary and other public and governmental authorities are in a position to engage the responsibility of the state party.[278]

*(4) The obligation to provide redress to victims of torture*

The obligation to establish competent authorities to investigate and determine allegations of torture is also tied to a further obligation to ensure that, where remedies are awarded, there are competent authorities to enforce the said remedies.[279] The obligation to provide a remedy for human rights violations is a peremptory norm of customary international law reinstated in article 2(3) of the ICCPR.[280] In *Lopez Burgos v Uruguay*, the HRC found that treatment of the complainant's husband, which resulted in a broken jaw during his arrest, amounted to torture in violation of article 7 of the ICCPR.[281] On this ground, the Committee held that Uruguay was under an obligation, pursuant to article 2(3) of the ICCPR, to provide effective remedies to the victim including immediate release, permission to leave Uruguay, compensation for the violation which he had suffered and to take steps to ensure that similar violations do not occur in the future.[282]

When deciding on what an effective remedy or full reparation entails, the HRC has taken the circumstances of each case into consideration. For instance, in *Roy Manojkumar Samathanam v Sri Lanka,* it held that in terms of article 2(3), full

[277] HRC, GC 31 para 4.
[278] As above.
[279] ICCPR article 2(3) (c).
[280] HRC, GC 29 para 11.
[281] *Sergio Euben Lopez Burgos v Uruguay,* Communication 052/1979 (HRC), 29 July 181, UN Doc CCPR/C/13/D/52/1979 para 13.
[282] *Kennedy v Trinidad and Tobago* Communication 845/1998 (HRC) 26 March 2002 UN Doc CCPR/C/74/D/845/1998 para 9. In this communication the state party was ordered to compensate the author, to consider his early release and to take measures to prevent similar violations in the future; *Kouider Kerrouche v Algeria (*note 261 above*)* para 10 in which the HRC held that the state party has an obligation to provide the author with an effective remedy in the form of full and effective investigation, as well as prosecution and punishment of his torturers; *Evans v Trinidad and Tobago* Communication 908/2000 (HRC) 21 March 2003 UN Doc CCPR/C/77/D/908/2000; *Teesdale v Trinidad and Tobago* (note 45 above) para 11, *Boodoo v Trinidad and Tobago* Communication 721/1996 (HRC) 2 April 2002 UN Doc CCPR/C/74/D/721/1996 para 8.

reparation would include the investigation into the allegations of torture, adequate compensation and ensuring that the legal framework complies with the ICCPR as a guarantee that such acts would not happen again.[283] In *Urmatbek Akunov v Kyrgyzstan*, it held that full reparation would entail the investigation of the allegations of torture, prosecution of those responsible, as well as provision of adequate compensation.[284] In *Zhakhangir Bazarov v Kyrgyzst,* it stated that full reparation would include quashing the author's conviction and if necessary holding a new trial as well as reimbursement for all court fines and legal costs, which he had incurred.[285] These cases show that the HRC has not fixed a single remedy for victims of torture. Rather,it focuses on the circumstances of each author and also on the legal framework of the state involved, in order for a remedy to be compatible with such circumstances.

*(5) Non-refoulement*

This obligation has been interpreted by the HRC through general comments and jurisprudence. In General Comment 31, the HRC stated that article 2 of the ICCPR imposes negative and positive obligations on state parties.[286] Relevant to the prevention of torture is the negative obligation to refrain from doing acts, which interfere with the enjoyment of the rights contained in the Covenant.[287] This includes an obligation not to extradite, deport, expel or otherwise remove a person from the state's territory where there are substantial grounds to believe that there is a real risk of irreparable harm, including torture in the country to which such a person is being transferred.[288]

The HRC has also invoked this obligation in a number of communications brought before it under both articles 2(3), which contains general states' obligations and article 7, which prohibits torture and CIDT. In *J.D. v Denmark* it stated that before returning a person to another country, a state party must take into account all

[283] *Roy Manojkumar Samathanam v Sri Lanka* (note 270 above) para 8.
[284] *Urmatbek Akunov v Kyrgyzstan* (note 272 above) para 10.
[285] *Zhakhangir Bazarov v Kyrgyzstan* (note 258 above) para 6.3.
[286] HRC, GC 31 para 6.
[287] As above.
[288] As above para 12.

relevant facts and circumstances, including whether the human rights situation in the country to which such a person is being returned would expose him/her to torture.[289] In *C. v Australia,* it held that the author's return to Iran would violate article 7 of the ICCPR because of the possibility of him being persecuted upon his return and because he would not be availed necessary psychiatric care in Iran, which he needs due to the torture and ill-treatment he suffered while detained in Australia.[290]

It must be noted, however, that the HRC has continuously stated that in order for states' obligations against expulsion under article 2(3) to be invoked, the risk of torture or CIDT must not only be assessed on the basis of the general human rights situation in a particular country, but must be real and likely to affect the intended returnee personally.[291]

*(6) The obligation to report on measures taken against torture*

Article 40 of the ICCPR mandates state parties to submit to the HRC, within one year of the Covenant's entry into force in respect of each state and thereafter when the Committee so requests, reports on measures they have taken to implement the Covenant.[292] With regard to reporting on measures against torture, the HRC has

[289] *J.D. v Denmark* Communication 2204/2012 (HRC), 26 October 2016, UN Doc CCPR/C/118/D/2204/2016 para 11.3

[290] *C. v Australia* Communication 900/1999 (HRC), 28 October 2002 UN Doc CCPR/C/76/D/900/1999 para 8.5.

[291] *Ernest Sigman Pillai v Canada* Communication 1763/2008 (HRC), 25 March 2011 UN Doc CCPR/C/101/D/1763/2008 para 11.4. In this communication, the HRC stated that in order to determine whether there was a real risk of the author being subjected to torture in Sri Lanka, the Canadian authorities ought to have investigated his allegations that he had been tortured before and that in the absence of such investigations, his removal from Canada would violate Canada's general obligation to respect the rights contained in the ICCPR. See also *A & B v Denmark* Communication 2291/2013 (HRC) 13 July 2016, UN Doc CCPR/C/117/D/2291/2013 para 8.6 in which the HRC held that despite the human rights situation in Pakistan, the facts placed before the HRC by the authors were not sufficient to conclude that the authors faced a 'personal and real risk' of ill-treatment if removed from Denmark to Pakistan. See also *Ali & Mohamed v Denmark* Communication 2409/2014 (HRC) 29 March 2016, UN Doc CCPR/C/116/D/2409/2015; *Y. v Canada* Communication 2314/2013 (HRC) 22 March 2016, UN Doc CCPR/C/116/D/2314/2013 paras 7.2 and 7.6 in which the HRC held that although the author has submitted that he is a Tamil from Northern Sri Lanka and a failed asylum seeker and there are reports of both Tamils and failed asylum seekers being subjected to torture in Sri Lanka, the author has failed to submit reliable information that upon his return to Sri Lanka, he personally, stands the real risk of being subjected to treatment contrary to articles 6(1) and 7 of the ICCPR. Therefore, his return was considered not to be a violation of articles 2(3) and 7.

[292] HRC, GC 1, replaced by HRC, GC 30. See also HRC, GC 2 paras 1- 3. With regard to torture the periodic report must contain the legislative, practical and judicial measures which the state adopted against torture, the progress made with regard to implementation of the specific obligations contained

requested state parties to provide in their reports, 'specific up to date information' including statistics of investigations done, convictions secured and the penalties which have been imposed on perpetrators of torture, [293] as well as other measures adopted to implement the obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims.[294]

*2.4.1.5 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966*

The ICESCR contains economic, social and cultural rights, most of which are also contained in the Universal Declaration. As stated previously in this thesis, the ICESCR is one of the pillars of the international Bill of Rights. It does not have a specific provision on torture although states' obligations against torture have been implied under the right to health which is contained in article 12 of the ICESCR.

*(1) The link between ICESCR right to health and torture*

The right to health under article 12 was interpreted by the Committee on Economic Social and Cultural Rights (ICESCR Committee),[295] to be closely related to and to include freedom from torture and other CIDT.[296] This relationship was reaffirmed by the UN Special Rapporteur on Torture in his report on torture in health settings wherein he stated that certain practices which take place in healthcare settings, such as compulsory detention for medical conditions, violation of reproductive rights, denial of pain treatment and ill-treatment of persons with psychosocial disabilities and those belonging to marginalised groups amount to torture as defined in article

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in the ICCPR to prevent torture, to prohibit it, to punish and its perpetrators and to provide redress to its victims. Lastly, it must also contain the challenges and factors which affect effective implementation of these obligations.

[293] HRC, *Concluding observations on the initial report of Bangladesh* 27 April 2017 UN Doc CCPR/BGD/CO/1 para 20.

[294] As above para 22 read with para 35. See also HRC, *Concluding observations on the second periodic report of Thailand* (note 120 above).

[295] Established by ECOSOC Res.1985/17 of 28 May 1985 with the mandate to monitor the implementation of ICESCR.

[296] ICESCR Committee, General Comment 14 'The right to highest attainable standards of health (art.12)' 11 September 2000, UN Doc E/C.12/2000/4 (ICESCR Committee, GC 14); L Beletsky *et al* 'Advancing human rights in patient care: The law in seven transitional countries'. *Open Society Foundations* (2013). See also Open Society Institute 'Health and Human Rights: a resource guide' (2013); *WHO Fact Sheet* 'Health and Human Rights. www.who.int.../Economic_social_cultural_rights [accessed 22 February 2016].

1(1) of CAT.[297] Therefore, states' obligations towards the ICESCR right to health also apply to torture.

*(1) The obligations to prevent and prohibit torture in realisation of the right to health, punish its perpetrators, and provide redress to its victims*

Article 2 of the ICESCR mandates state parties to take steps, to the maximum of available resources and without discrimination, to achieve progressively, the full realisation of the right to health, by all appropriate means, including the adoption of legislative measures.[298] When addressing what 'appropriate measures' under article 2 are, the ICESCR Committee stated that they include legislation,[299] judicial remedies,[300] administrative, financial, education and social measures.[301] In the context of torture, therefore, article 2 requires states to take immediate steps to prevent and prohibit torture, punish its perpetrators and provide redress to its victims in a non-discriminatory fashion. The scope of article 2 was further elaborated upon in General Comment 9, which addressed the domestic application of the ICESCR.[302] In the context of torture, states' obligations under article 2 as elaborated upon in General Comment 9 include modification of laws to give effect to states' treaty obligations to prevent and prohibit torture in the healthcare system[303] and for the Covenant to be applied by domestic courts.[304]

Article 4 also contains a torture prevention obligation in that it mandates state parties to refrain from unnecessarily limiting the rights – which includes the right to health − contained in the Covenant and other human rights instruments. Where such

[297] Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. 1 February 2013. UN Doc A/HRC/22/53 submitted at the twenty-second session of the Human Rights Council.
[298] ICESCR Committee, GC 20 para 2 in which the Committee reaffirmed the fundamentality of equality and non-discrimination; In ICESCR Committee, GC 3 paras 1-4 it was stated that the undertaking to take steps without discrimination are of immediate effect and not subject to progressive realisation.
[299] ICESCR Committee, GG 3 paras 1-4.
[300] As above para 4.
[301]As above para 7.
[302] ICESCR Committee, General Comment 9 'The domestic application of the Covenant'8 December 1998, UN Doc E/C.12/1998/28 (ICESCR Committee GC 9).
[303] As above para 3
[304] As above paras 4 & 14.

limitation is indispensable, states have an obligation to ensure that the limitation is compatible with the Covenant and done for purposes of promoting the general welfare of society in a democratic society.[305] In relation to freedom from torture, as a component of the right to health, the ICESCR Committee has stated that limitation clauses used to restrict movement or to detain persons with transmissible diseases, such as HIV/AIDS or to refuse medical treatment to persons opposed to government, amount to torture.[306] The Committee has also stated that where restrictions are indispensable, they must be proportional, for a limited duration and subject to review.[307]

*(2) The obligation to report on measures taken against torture*

Article 16 of the ICESCR mandates state parties to submit to the ICESCR Committee, reports, which outline measures adopted and the progress made in achieving observance of the rights contained in the Covenant. [308] States are expected to provide in such reports, measures they have adopted towards full realisation of the right to health including legislative, judicial, administrative and other measures taken to prevent and prohibit acts of violence. The reports have to contain *inter alia*, statistic on domestic violence,[309] and the steps which the state has taken to implement the Committee's recommendations made in previous reports.[310]

### *2.4.1.6 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979*

The CEDAW was adopted as a step towards the recognition of women's rights as human rights. Its adoption was based on the concern that despite an earlier

[305] ICESCR article 4.
[306] ICESCR Committee, GC 14 para 28.
[307] As above.
[308] ICESCR Committee, GC 1 paras 1-9 outlines the objectives of reporting under the ICESCR. In the context of torture, the objectives are to ensure that a state party undertakes a comprehensive review of national legislation, administrative rules and procedures as well as practice to prevent and prohibit torture in the healthcare systems, enable monitoring of progress and to identify areas in which the state needs assistance.
[309] ICESCR Committee, *Concluding observations on the sixth report of Cyprus* 28 October 2016 UN Doc E/C.12/CYP/CO/6 paras 32 & 49.
[310] As above para 49. See also ICESCR Committee, *Concluding observations on the combined fifth to sixth reports of Philippines* 23 October 2016 UN Doc E/C.12/PHL/CO/5-6 para 63.

international human rights framework, which prohibited discrimination on the basis of sex, women continued to suffer specific discrimination and disadvantages, which affected their access to food, health education and opportunities for employment.[311] Several studies had concluded that the human rights framework, which existed prior to the CEDAW, reflected a male perspective and consequently the violation of women's dignity remained invisible,[312] unrecognised, and when recognised, perpetrators often went unpunished and victims without redress.[313] It contains a number of general and specific obligations for the protection of women from violence, including torture within both the public and private spheres.

*(1) The obligations to prevent and prohibit gender-based torture, punish its perpetrators and provide redress to its victims*

Although the CEDAW does not contain explicit obligations against torture, the Committee on Elimination of Discrimination against Women (CEDAW Committee),[314] has defined violence directed against women simply because they are women or that which affects women disproportionately, namely gender-based violence (GBV) as '… a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men',[315] therefore falling within the purview of the CEDAW. Infliction of severe pain or suffering on a woman simply because she is a woman and for purposes listed in article 1 of CAT would therefore amount to gender-based torture (GBT).[316] Although GBT committed by individuals is not covered under CAT, it is covered by article 7 of the ICCPR, which does not limit the

[311] CEDAW preamble para 9.
[312] KD Askin & DM Koenig *Women and international human rights law* (2001) 3.
[313] R Cook 'State Responsibility under CEDAW' in R Cook (ed) *Human rights of women: national and international perspective* (1994) 228.
[314] Established in terms of article 17 of CEDAW to oversee its implementation.
[315] CEDAW Committee, General Recommendation 19 'Violence against women' 1992, UN Doc A//47/38 (CEDAW Committee, GR 19) para 1. See also *A.S v Hungary* Communication 2/2004 (CEDAW Committee) 29 August 2006, UN doc CEDAW/C/36/D/4/2006 para 11.4 in which the CEDAW Committee held that compulsory sterilisation without the patient's full and informed consent amounts to violence against women and violates article 16(1)(e) of CEDAW.
[316] CEDAW Committee, GR 19 para 7(b); LA Nessel 'Wilful blindness to gender-based violence abroad: United States' implementation of article 3 of the United Nations Convention against Torture' (2004-2005) 89 (71) *Minnesota Law Review* 95; J Green, R Copelon, P Cotter & B Stephens 'Affecting the rules of prosecution of rape and other gender-based violence before the International Criminal Tribunal for the former Yugoslavia: A feminist proposal and critique' (1994) 5 (2) *Hasting's Women's law Journal*172. See also *Prosecutor v Akayesu* (note 37 above).

commission of torture to state actors and by article 1 of the CEDAW as a form of discrimination. Furthermore, acts of GBT committed by individuals may be attributable to the state where it has failed to prevent them.[317] Because of this link therefore, states' general obligations contained in the CEDAW also apply to GBT.

*(1) The obligations to prevent and prohibit GBT*

State' overall obligation under the CEDAW is the elimination of all forms of discrimination against women so as to achieve substantive equality in the enjoyment of all human rights and fundamental freedoms.[318] Hence, states have the obligations to prevent and prohibit torture as it is a form of discrimination. With regard to GBT, article 2 generally mandates state parties to harmonise their national legal systems with the CEDAW. States' specific obligations under article 2 in the context of violence against women, were elaborated on by the CEDAW Committee in General Recommendation 19 in which it recommended that states must enact laws against family violence, abuse and rape, sexual assault and other gender-based violence. They must also compile statistics on the extent, causes and effects of violence, prevent and criminalise trafficking and sexual exploitation, and provide remedies to victims of all forms of gender-based violence, including domestic violence and sexual assault and harassment in the workplace.[319]

Articles 5, 11 and 12 of the CEDAW also mandate state parties to protect women against violence of any kind, whether it happens within the family, at the workplace

[317] CEDAW Committee, GR 19 para 11 makes examples of acts of violence against women such as family violence and abuse, forced marriage, dowry deaths, acid attacks, female circumcision, sexual harassment, compulsory sterilization or abortion, denial of reproductive health services, battering, rape and other forms of sexual abuse as forms of gender-based violence. Failure of states to prevent these acts or to punish their perpetrators may amount to such acts as being attributed to the state; BSN Khutsoane 'Gender-based violence and the Convention on the Elimination of All Forms of Discrimination against Women' in E Delport (ed.) *Gender-based violence in Africa: Perspectives from the continent* (2009) 5.

[318] CEDAW article 2.

[319]CEDAW Committee GR 19, para 24. See also *X and Y v Georgia* Communication 24/2009 (CEDAW Committee) 25 August 2015, UN Doc CEDAW/C/61/24/2009 paras 9.3 and 10 in which the Committee held X's husband's acts of rape and other forms of sexual and physical abuse against X and their daughter Y were attributable to the state because it failed to exercise due diligence to prevent such acts, to investigate the allegations and to punish the perpetrator. Similar holding was made in *M.W v Denmark* Communication 46/2012 (CEDAW Committee) 21 March 2016, UN Doc CEDAW/C/63/D/46 para 5.8.

or in any other area of social life. Measures to be taken by states in this regard include the adoption of legislation on sexual violence, abuses in the family and sexual harassment at the workplace, as well as the provision of support services to victims of gender-based violence.[320]

*(2) The obligation to report on measures taken against GBT*

Article 18 mandates state parties to submit periodic reports on measures they have adopted to implement the CEDAW at the domestic level.[321] With regard to reporting on GBT and other forms of violence against women, states are required to include in their reports, statistics on violence against women,[322] preventive and protective measures adopted against such violence and their effectiveness[323] as well as whether there exists at the domestic level, support services for women who are victims of violence.[324]

### *2.4.1.7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984*

CAT is the first legally binding instrument, which focuses entirely on torture. Its adoption was a reaction to the ongoing torture around the world, as well as the lack of a binding instrument with explicit provisions on torture at that time.[325] It is aimed at

[320] CEDAW Committee, General Recommendation 12 'Violence against women' 1989 preamble para 1.
[321] CEDAW Committee General Recommendation 1 'Reporting by states parties' Fifth Session 1986 and CEDAW Committee General Recommendation 2 'Reporting by states parties' Sixth Session 1987 address reporting in general while CEDAW Committee, General Recommendation 12 'Violence against women' Eighth Session 1989 para 1-4 and CEDAW Committee General Recommendation 19 'Violence against women' Eleventh Session 1992 para 24 indicate that with respect to violence against women, the periodic report must contain the legislative and other measures, statistical data as well as support services which states have put in place to address violence against women, including TBV.
[322] CEDAW Committee GR 12, such statistics should cover all forms of violence including sexual violence, abuses in the family and sexual harassment in the workplace.
[323] CEDAW Committee, GR 12; CEDAW Committee GR 19 para 24(v).
[324] CEDAW Committee GR 12.
[325] M Lippman 'The development and drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1994)17(2) *Boston College International and Comparative Law Review* 275. Lippman demonstrates that from time immemorial, including after its ban by the United Nations through the Universal Declaration, torture continued to be used as a device to detect and deter political opposition, to stem the rising of colonial unrest and to extract confessions from suspected terrorists. See also the European Commission's case of *Ireland v United Kingdom* (note 25 above); Human rights advocacy and the history of international human

strengthening the existing prohibition of torture and related offences by a number of supportive measures.[326] Unlike other international human rights instruments, which contain the right to freedom from torture in one or two articles, CAT focuses on torture and CIDT in all its articles. States' obligations are contained in the substantive articles 1 to16 as well as article 19, which mandates state parties to submit reports to the Committee against Torture.[327]

Articles 1 to 16 contain specific measures, which state parties must take in order to comply with the obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims. The core provisions in these sections focus on prohibition and punishment through criminal enforcement.[328] The scope and content of states' obligations under CAT as interpreted by the Committee against Torture,[329] as well as scholars and commentators of international and national law are traversed below taking into account their indivisibility, interdependence and interrelatedness.[330]

*(1) Obligation to incorporate definition of torture into national legal systems*

The definition of torture under CAT has been discussed thoroughly in chapter 1 of this thesis. From this definition, three main elements of torture were identified as the infliction of severe pain or suffering, for a prohibited purpose, such as extracting information or discrimination and thirdly, by a person who does so in an official capacity. The Committee against Torture through its General Comment 1, as well as concluding observations, has called upon states to incorporate this definition into their national legal systems.[331]

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rights standards http://humanrightshistory.umich.edu/problems/torture [accessed 16 September 2014]. See also Amnesty International 'Conference for the abolition of torture: Final Report' (1973).

[326] CAT preamble para 5; Burgers & Danelius (note 71 above) 1.

[327] Established in terms of CAT article 17 to oversee its implementation.

[328] CAT articles 4 - 9. See also LA Wendland *Handbook on state obligations under the UN Convention against Torture* Association for Prevention of Torture (2002)15. See also Nowak & McArthur (note 63 above) 1.

[329] Established by CAT article 17 to oversee the implementation of CAT.

[330] Committee against Torture, GC 2 para 3.

[331] Committee against Torture, GC 2; Committee against Torture, *Concluding observations on the initial report of Qatar*, 25 January 2013 UN Doc CAT/C/QAT/CO/2 paras 8 & 9 in which the Committee recognised 'Qatar's incorporation of the definition of torture as laid out in the Convention into domestic law'; Committee against Torture, *Concluding Observations on the second periodic report of Japan* 28 June 2013 UN Doc CAT/C/JPN/CO/2 para 7. The Committee raised its concern that Japan has not yet adopted a definition of torture which covers the elements of torture in article 1(1). See also

Although article 1 stipulates that the definition contained therein is without prejudice to any international or national law which may contain a definition with wider application,[332] the Committee against Torture has warned that 'serious discrepancies' between the CAT definition of torture and a domestic definition create actual or potential loopholes for impunity.[333] Hence, it encourages states to adopt a uniform definition in order to ensure the legitimacy of domestic norms.[334] The Committee has also observed that in some cases, although similar language as the one in CAT may be used, its meaning may be qualified by domestic law or by judicial interpretation.[335] It has highlighted that the benefits of implementing the definition of torture as it is in article 1 are that it directly advances the over-arching aim of preventing torture[336] and also to define its elements and penalties for its commission.[337] The definition also enables officials to track the offence of torture and the public to monitor states' implementation of its obligations against torture.[338]

*(2) Obligation to take legislative, administrative, judicial or other measures to prevent and absolutely prohibit torture*

Article 2(1) of CAT mandates state parties to take effective legislative, administrative and judicial measures to prevent torture. Article 2(2) provides for absolute prohibition of torture in that it restrains states from relying on any *exceptional circumstances whatsoever* to justify torture. It provides that not even a state of war or threat of war, internal political instability or any public emergency may be invoked to justify torture.

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Committee against Torture *Concluding Observations on the combined fifth and sixth periodic report of Poland* 23 December 2013, UN Doc CAT/C/POL/CO/5-6 para 7. The Committee raised its concern that despite its earlier recommendation, Poland has still not incorporated the provisions of CAT into its domestic law, including the definition of torture; Committee against Torture *Concluding Observations on the fourth periodic report of Italy* 16 July 2007, UN Doc CAT/C/ITA/CO/4 para 5 in which the Committee reiterated its earlier recommendation that Italy must incorporate the crime of torture into domestic law and adopt a definition, which covers all the elements contained in article 1 of CAT.

[332] CAT article 1(2).

[333] Committee against Torture, GC 2 para 9.

[334] As above.

[335] As above.

[336] As above para 11.

[337] As above.

[338] As above.

It also removes the defence of superior orders.[339] The three parts of states' obligations under article 2 were interpreted by the Committee against Torture in General Comment 2 in which it emphasised the wide-ranging nature of states' obligations under this article.[340] The interpretation has also been applied in the jurisprudence of the Committee against Torture as follows:

*(a) The obligation to prevent torture*

In General Comment 2, the Committee stated that first of all, article 2 contains the obligation to prevent torture, which entails several duties, including the duty to eliminate any legal or other impediments to the eradication of torture and CIDT, as well as the review of national laws and their alignment with the provisions of CAT.[341] The obligation to harmonise national legal frameworks with the provisions of CAT as a torture prevention mechanism has also been emphasised by the CAT Committee in its concluding observations.[342]

Other torture prevention measures identified by the Committee against Torture in General Comment 2 include alignment of state practice to conform to the provisions of CAT. Such alignment includes registration of detainees, informing detainees about their rights, affording detainees independent legal and medical assistance, enabling detainees to have contact with relatives, establishment of independent bodies to visit places of detention and availing victims of torture avenues for them to lodge their complaints about torture, ensuring that platforms, such as courts, which are established to examine and determine such complaints do so promptly and are impartial.[343]

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[339] The defence of superior orders is a defence mostly used by members of disciplined forces that a criminal conduct was ordered by a higher ranking officer or a person in authority. P Gaeta 'The defence of superior orders: statute of the international criminal court versus customary international law' (1999) *European Journal of International Law* 173. See also WA Schabas *An introduction to the International Criminal Court* (2011) 243.

[340] Committee against Torture, GC 2 paras 3 & 10 in which the Committee stated that states' obligations under article 2 extend to privately owned detention centres.

[341] As above para 4.

[342] Committee against Torture, *Concluding observations on the combined third and fourth periodic report of Sri Lanka* 8 December 2011 UN Doc CAT/C/LKA/CO/3-4 para 4 in which the Committee commended enactment of laws which comply with CAT and para 10 in which it recommended that Sri Lanka must align its anti-terrorism laws with CAT;

[343] As above para 13.

The Committee has further stated that while the provisions of CAT bind states and not individuals, the state shall be liable for acts of individuals wherein it has failed to investigate, prosecute and punish private actors.[344] Such acts include GBV, such as rape, domestic violence, FGM and human trafficking.[345] States' officials shall be regarded as the authors of such acts by way of complicity, consent or acquiescence.[346]

The Committee has also interpreted states' obligation to prevent torture under article 2 to include non-discrimination in that it requires special protection of people belonging to minority and marginalised groups who are at risk of being subjected to torture by reason of belonging to such groups.[347] Examples of factors, which would place people at the risk of torture, are race, colour, sex, ethnicity, age, religion, sexual orientation, transgender identity, disability, health and other status.[348]

*(b) Absolute prohibition of torture*

With regard to the second and third states' obligations to prohibit torture in absolute terms, the Committee against Torture has stated that the circumstances listed in article 2(2), which cannot be invoked to justify torture are not exhaustive.[349] It emphasised that the term 'any exceptional circumstances whatsoever' includes threats of terrorist acts, violent crimes, international or national armed conflict, protection of public safety or national emergencies of whatever nature.[350] The Committee thus dispelled arguments that torture could be justified in certain exceptional circumstances. The Committee stated that article 2 also prohibits the

[344] As above para 18.
[345] As above.
[346] As above.
[347] As above para 21.
[348] Committee against Torture, GC 2 para 21; *R.O. v Sweden* (note 64 above) in which the Committee against Torture considered that the author had failed to place facts to prove that she and her minor daughters should not be deported to Nigeria because there is a real and personal risk of their daughters being subjected to FGM because of their age and ethnicity. Although the author in this case had failed to satisfy the Committee in this regard, the Committee did, however, indicate that facts on age and ethnicity would be considered as factors, which would make the girls vulnerable to torture in the form of FGM if properly proven.
[349] Committee against Torture, GC 2 para 5.
[350] As above.

granting of amnesties and other procedures, which 'preclude or indicate unwillingness' to promptly and fairly prosecute and punish perpetrators of torture or CIDT.[351]

*(3) Non-refoulement*

Article 3 of CAT prohibits state parties from expelling, returning or extraditing a person to another state where there are substantial grounds for believing that he would be subjected to torture.[352] States' obligations under article 3 have been interpreted by the Committee against Torture in General Comment 1 and through jurisprudence.[353] In General Comment 1, the Committee stated that the non-refoulement obligation in article 3(1) must be read together with article 3(2), which states that the substantial grounds envisaged in article 3(1) must be determined on the basis of all relevant factors, including 'a consistent pattern of gross, flagrant or mass violation of human rights.[354] Unlike non-refoulement obligations under article 7 of the ICCPR, which also include the obligation not to expose a returnee to CIDT, the Committee against Torture has emphasised that article 3(1) prohibits exposure of a

[351] As above.
[352] CAT article 3(1).
[353]Committee against Torture, General Comment 1 'Implementation of article 3 of the Convention in the context of article 22 (Non-refoulement and communications)' 21 November 1997, UN Doc A/53/44, annex IX.
[354] CAT article 3(2); Committee against Torture, GC 2 para 1; *K.N. v Australia* Communication 649/2015 (Committee against Torture), 23 November 2016, UN Doc CAT/C/59/D/649/2015 para 7.3, *E.S. v Australia* Communication 652/2015 (Committee against Torture), 6 December 2016, UN Doc CAT/C/59/D/652/2015 para 9.4, *R.K. v Sweden* Communication 609/2014 (Committee against Torture), 11 August 2016, UN Doc CAT/C/58/D/609/2014 para 8.7. In all these communications, although it reached different conclusions, the Committee raised its concern about the consistent allegations of widespread use of torture and CIDT by both the military and the police in many parts of Sri Lanka since the end to the conflict in May 2009. See also *Tala v Sweden* Communication 43/1995 (Committee against Torture) 15 November 1996 UN Doc CAT/C/17/D/43/1996 paras. 10.1 - 10.5 in which the Committee held that the concerns raised in the report by the Human Rights Commission on the human rights situation in Iran, including executions, torture and CIDT were substantial ground for believing that the author would be subjected to torture if returned to Iran; *X.Y.Z. v Switzerland* Communication 697/2015 (Committee against Torture) 25 November 2016 UN Doc CAT/C/59/D/697/2015 paras 6.3-6.7. The author challenged Switzerland's decision to deport him and his family to Belgium on the grounds that Belgium is likely to extradite him to Rwanda where they are likely to be subjected to torture because of his fallout with the President of Rwanda. The Committee held that he had failed to provide substantial grounds for believing that there are human rights violations in Belgium, which substantiate his belief that Belgium would not act in accordance with article 3 of CAT when considering his extradition to Rwanda.

returnee to torture as defined in article 1 of CAT.[355] In the case of *G. R. B. v Sweden* in which the author alleged that she had been subjected to torture, including rape by members of Sendero Luminoso, a rebel group in Peru and was likely to be subjected to torture again if returned to Peru, the Committee held that states' obligations under article 3 are limited to acts, which are likely to be committed by state officials as only those qualify as torture under article 1.[356]

The Committee has, however, warned that the enquiry under article 3(2) should not be stopped at substantial grounds for believing that torture is likely, but the author or the person whose return is being considered, should go further and prove that the risk of torture is real and he is personally likely to suffer that risk. In the words of the Committee, the risk of torture must be real, personal,[357] and present.[358]

The requirement that the risk of torture must be personal has been dealt with in a number of communications in which the Committee against Torture has held that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist, which indicate that the individual concerned would be personally at risk.

In *R.O. v Sweden* the Committee held that although the author challenged her return to Nigeria due to fear of FGM on her daughters, she failed to prove that such risk

[355] Committee against Torture, GC 1 para 1; *Y.S. v Australia* communication 633/2014 (Committee against Torture) 15 November 2016, UN Doc CAT/C/59/D/633/2014 para 4.4 in which the Committee stated that states' restrictions against refoulement in article 3 are confined to torture as defined in article 1 and do not include CIDT. In *V. X. N. & H. N. v Sweden* Communications 130 and 131/1999 (Committee against Torture) 15 May 2000 UN Doc CAT/C/24/D130&131/1999, para 13.8 the Committee held that for purposes of article 3, the torture which an author is likely to be exposed to must be likely to be perpetrated by a person acting in an official capacity and not by private individuals; in *P.Q.L. v Canada* Communication 57/1996 (Committee against Torture) 17 November 1997, UN Doc CAT/C/19/D/57/1996, para 10.6 the Committee held that the obligations under article 3 are limited to an enquiry whether the author would be subjected to torture at the country of return and cannot be used for other determinations, such as whether the author is entitled to a residence permit under a country's domestic legislation.

[356] *G. R. B. v Sweden* Communication 83/1997 (Committee against Torture), 15 May 1998, UN Doc CAT/C/20/D/83/97.

[357] Committee against Torture, GC 1 para 7.

[358] As above.

was real, present and facing her daughters personally as she failed to prove that FGM is widely practised in her ex-husband's tribe and on children the same age as her daughters.[359] In *K.N. v Australia* the Committee held that despite the human rights situation in Sri Lanka, the author had failed to provide information, which shows that he personally stands the risk of torture if returned to Sri Lanka.[360]

In *Paez v Sweden,* the Committee held that although Sweden sought to deport the author because of his involvement in non-political criminal activities, it had failed to consider that prior to seeking asylum in Sweden, he was involved in political activity and also came from a family of political activists, which placed him at a personal risk of torture if returned to Peru.[361] In *A. S. v Sweden* the Committee took into account the author's conviction for adultery in Iran, and the fact that adultery is punishable by death in Iran and held that the conviction was to be considered as a ground, which exposed her personally to the risk of being stoned to death if she was returned to Iran.[362] In *Alan v Switzerland*, the Committee took into account that there was a substantial risk of the author being subjected to torture in Turkey because of his ethnic background, his alleged political affiliation, his history of previous detention and torture, and the fact that there is evidence that the police in Turkey are on the look-out for him.[363] In *Chipana v Venezuela,* the Committee held that the nature of offences cited by Peru in its request for extradition of the author to Peru, placed the author at risk of being subjected to torture since the Committee had received reliable information concerning torture of suspects of terrorism and treason and held that his

[359] *R.O. v Sweden* (note 64 above) paras 8.8 & 8.10.
[360] *K.N. v Australia* (note 354 above) para 7.7.
[361] *Paez v Sweden* Communication 39/1996 (Committee against Torture), 28 April 1997, UN Doc CAT/C/18/D39/1996 paras. 2.1, 2.3, 14.2 - 14.6 and 15.
[362] *A. S. v Sweden* communication 149/1999 (Committee against Torture), 24 November 2000, UN Doc CAT/C/25/D/149/1999 paras 8.7 & 9.
[363] *Alan v Switzerland* (note 58 above) paras 11.3, 11.4 & 12; *Kisoki v Sweden*, Communication 41/1996 (Committee against Torture) 8 May 1996, UN Doc CAT/C/16/D41/1996 paras. 9.1-9.7 in which the Committee said Sweden must refrain from returning the author to Zaire as there is a risk of being subjected to torture due to her political affiliation and activities, history of detention in the past and information from UNHCR that upon arrival at Kinshasa airport, deportees who are discovered to have sought asylum abroad undergo interrogation, detention and possibly ill-treatment; *Elmi v Australia* Communication 120/1998 (Committee against Torture), 14 May 1999, UN Doc CAT/C/22/D/120/1998 paras 6.6 to 6.9 in which the Committee considered the fact that previous detention and torture, execution of his family and his ethnicity exposed the author to torture if returned to Mugadishu.

return to Peru would violate article 3.[364] In *X v Switzerland,* the Committee held that despite the serious human rights violations in Sudan, the return of the author to Sudan would not be inconsistent with article 3 because he had failed to provide substantial grounds to prove that he would be personally at risk of being tortured if returned to Sudan.[365]

With regard to the requirement that the risk of torture must be present, in *X.,Y. & Z. v Sweden,* the Committee held that while the previous history of the authors being tortured is taken into account, it is used to determine whether there is a risk of torture at the time of the determination. In the present case, although Y had been subjected to torture before, the regime in the DRC had changed and there were no substantial grounds to prove that she and the other authors were at the risk of torture under the regime that was in power at the time of their return.[366] In *S. V. et al. v Canada* the Committee held that the author's frequent visits to Sri Lanka post his refuge in Canada was a clear indication that at the time of his return, he no longer faced any risk of being persecuted upon his return to Sri Lanka despite the human rights situation in Sri Lanka.[367] Similarly, in *A. L. N. v Switzerland,* the Committee held that the author had not established that he was at risk of torture in Angola since the political situation had improved since he left and there were peace negotiations going on at the time that the communication was brought before the Committee.[368]

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[364] *Chipana v Venezuela* Communication 110/1998 (Committee against Torture), 10 November 1998, UN Doc CAT/C/21/D/110/1998 para 6.4; *A. v The Netherlands* Communication 91/1997 (Committee against Torture), 13 November 1998, UN Doc CAT/C/21/D/91/1997 in which the Committee relied on information documented over the years that persons accused of opposition political activity are tortured and ill-treated in Tunisia and held that the author's return to Tunisia would be inconsistent with article 3; *Haydin v Sweden* Communication 101/1997 (Committee against Torture), 20 November 1998, UN Doc CAT/C/21/D/101/1997 para 6.4.

[365] *X. v Switzerland* Communication 38/1995 (Committee against Torture), 9 May 1997, UN Doc CAT/C/18/D/38/1995 para 10.6.

[366] X *., Y. and Z. v Sweden* Communication 61/1996 (Committee against Torture), 6 May 1998, UN Doc CAT/C/20/D/61/1996 paras11.1 to 11.5

[367] *S. V. et al. v Canada* Communication 49/1996 (Committee against Torture), 15 May 2001, UN Doc CAT/C/26/D/49/1996, para 9.6.

[368] *A. L. N. v Switzerland* Communication 90/1997 (Committee against Torture), 19 May 1998, UN Doc CAT/C/20/D/90/1997, paras 8.6 & 8.7; *K. N. v Switzerland Communication* 94/1997 (Committee against Torture), 19 May 1998, UN Doc CAT/C/20/D/94/1997, paras. 10.3 & 10.4; *J. U. A. v Switzerland* Communication 100/1997 (Committee against Torture), 10 November 1998, UN Doc CAT/21/D/100/1997, paras. 6.3-6.6; *H. D. v Switzerland* Communication 112/1998 (Committee against Torture), 30 April 1999, UN Doc CAT/C/22/D/112/1998, paras 6.3-6.7 in which the Committee held that the reasons, which had driven the author out of Turkey had since vanished and therefore his return was not a violation of article 3; *A. D. v The Netherlands* Communication 96/1997 (Committee against Torture) 12 November 1999, UN Doc CAT/C/23/D/96/1997, para 7.4 in which the Committee

The Committee has held further that the requirement of 'substantial grounds' in article 3 must not be interpreted to mean 'serious…in the sense of being highly likely to occur'.[369] It held that while there must be more than a mere possibility of torture, it does not need to be highly likely to occur to satisfy conditions of article 3. In *E. A. v Switzerland,* the Committee held that while there were serious human rights violations in Turkey, a foreseeable, real and personal risk of being subjected to torture must exist for the state to refrain from returning the author to Turkey, which in the present case had not been substantiated.[370]

An exception to the non-refoulement obligation is where the person granted asylum or refugee status is regarded as a danger to public interest.[371] The Committee has, however, warned that before applying this exception, the host country must carefully scrutinize the claim 'without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State'.[372]

*(4) The obligation to criminalise torture and related offences*

Article 4 mandates state parties to ensure that acts of torture are offences under criminal law of each state party. It creates a three-pronged obligation to criminalise torture, to prosecute alleged offenders and lastly, to impose appropriate penalties on those convicted of torture. The obligation to criminalise torture has been interpreted differently by different scholars. For instance, Burgers and Danelius with whom

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held that while it is aware of the human rights situation in Sri Lanka, it considers that, given the shift in political authority and the present circumstances, the author has not substantiated his claim that he will personally be at risk of being subjected to torture if returned to Sri Lanka at present.

[369] *E. A. v Switzerland* Communication 28/1995 (Committee against Torture) 10 November 1997, UN Doc CAT/C/19/D/28/1995, para 11.3.

[370] *E. A. v Switzerland* (note 393 above) para 11.5; *S. M. R. and M. M. R. v Sweden* Communication 103/1998 (Committee against Torture), 5 May 1999, UN Doc CAT/C/22/D/103/1998, para 9.7 in which the Committee held that although there were reports of mass violation of human rights in Iran, the authors had failed to establish that they face a foreseeable, real and personal risk of being tortured in Iran.

[371] In *Z. Z. v Canada* Communication 123/1998 (Committee against Torture), 15 May 2001, UN Doc CAT/C/26/D/123/1998, the Committee held that Canada had not violated article 3 and was justified in returning the author to Afghanistan upon his release from prison as he had been convicted for importing narcotics into Canada.

[372] *T. P. S. v Canada* Communication 99/1997 (Committee against Torture), 16 May 2000, UN Doc CAT/C/24/D/99/97, para 15.3.

Messineo agree, argue that article 4 does not mean that there must be a specific, separate offence corresponding to torture under article 1 of the Convention.[373] This argument fails to take into account the other provisions of CAT, as well as the concluding observations of the Committee against Torture. First of all, article 1 imposes an obligation on state parties to incorporate the definition of torture in their national legal systems. Secondly, in its concluding observations to Italy, Japan, and Poland, the Committee emphatically stated that article 4 requires states to incorporate the crime of torture into domestic laws and to adopt a definition of torture, which covers all elements contained in article 1 of the Convention.[374] The Committee repeated this stance in its dialogue with Ukraine.[375] Furthermore, article 4 of CAT mandates state parties to prosecute perpetrators of torture. Over and above the obligation to prosecute the offence, which takes place on the soil of state parties, article 5 of CAT goes a step further by providing for universal jurisdiction.[376] Therefore it would be impossible to implement article 4 in isolation without having a specific offence of torture.

*(5) The obligation to train law enforcement officers and review rules of interrogation*

Article 11 of CAT mandates state parties to keep their interrogation rules, instructions, methods, practice, as well as arrangements of custody and treatment of detained persons under systematic review with the aim of preventing torture. In *Elaiba v Tunisia*, the Committee stated that taking general measures to prevent torture does not comply with the obligations under article 11 in as much as article 11 requires the state to have measures in place that are specifically targeted at police officers with the aim of preventing them from committing acts of violence against individuals who have been arrested, detained or imprisoned.[377]

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[373] Burgers & Danelius (note 71 above); F Messineo 'Extraordinary renditions and state obligation to criminalise torture and prosecute torture in the light to the Abu Omar case in Italy' (2009) 7 (5) *Journal of International Criminal Justice* 1023.

[374] Committee against Torture *Concluding observation on the fourth periodic report of Italy, second periodic report of Japan* and *combined fifth to sixth periodic report of Poland* (note 341 above); *Report of the Committee against Torture* UN Doc A/62/44,2007.

[375] *Committee against torture dialogue with Ukraine* UN Doc CAT/C/SR.762, 2007 para 8.

[376] CAT article 5(3); *SAPS v SALC* (note 188 above). See also Nowak & McArthur (note 63 above).

[377] *Elaiba v Tunisia* Communication 551/2013 (Committee against Torture) 6 May 2016 UN Doc CAT/C/57/D/551/2013, para 7.4; *Hernandez Colmenarez and Guerrero Sanchez v Bolivarian Republic of Venezuela* Communication 456/2011 (Committee against Torture), 15 May 2015 para 6.7.

*(6) The obligation to investigate allegations of torture promptly and impartially*

Article 12 of CAT provides that where there is reasonable ground to believe that an act of torture has been committed, states are mandated to institute prompt and impartial investigation of such allegations.[378]Article 12 has three aspects: firstly, states must establish investigating authorities, secondly, such investigating authorities must be independent and impartial and thirdly, the investigations conducted must be carried out promptly. These three aspects were interpreted by the Committee against Torture through jurisprudence. With regard to the establishment of competent, independent and impartial investigating authorities, in *Abad v Spain,* the Committee held that the court's failure to identify and question any Guardia civil officers who might have taken part in torturing the author was an inexcusable incompetence since a criminal investigation must seek to determine both the nature and circumstances of the alleged acts and to establish the identity of the person who might have been involved in the said acts.[379] Similarly in *Elaiba v Tunisia* the Committee stipulated that '…a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who has been involved in them'.[380] In *Ristic v Yugoslavia,* the Committee held that by using a doctor who is not a forensic expert in investigating the death of a person alleged to have been subjected to torture, the state had violated its obligation under articles 12 and 13.[381] In *Alexander Gerasimov v Kazakhstan* the Committee noted that a preliminary examination of the author's complaints of torture was undertaken by the Department of Internal Security, which

[378] In *Abdulrahman Kabura v Burundi* Communication 549/2013 (Committee against Torture), 11 November 2016, UN Doc CAT/C/59/549/2013paras 3.4 & 7.4 the Committee held that Burundi had violated article 12 because although the author had complained to the authorities about his torture in June 2007 and again in November 2012, they failed to investigate them.
[379] *Abad v Spain* Communication 59/1996 (Committee against Torture), 14 May 1998, UN Doc CAT/C/20/D/59/1996 para 8.8.
[380] *Elaiba v Tunisia* (note 377 above) para 7.6. Similar holdings were made in *F.K. v Denmark* Communication 580/2014 (Committee against Torture) 23 November 2016 UN Doc CAT/C/56/D/580/2014 para 7.7 and *Dzemajl v Yugoslavia* Communication 161/2000 (Committee against Torture) 21 November 2002 UN Doc CAT/C/29/D/161/2000 para 9.4.
[381] *Ristic v Yugoslavia* Communication 113/1998 (Committee against Torture), 11 May 2001, paras 9.5 to 9.8.

is under the same chain of command as the regular police force and held that this could not lead to an impartial examination of such complaints.[382]

With regard to prompt investigations, in *Halimi-Nedzibi v Austria,* the Committee considered the delay of fifteen months before the investigation of allegations of torture as unreasonably long and in violation of article 12.[383] Similarly, in *M'Barek v Tunisia,* the Committee held that the state party had violated article 12 in that despite it being brought to its attention by several national and international organisations that the author's son had died as a result of torture; it was only after ten months that investigations were initiated.[384] The Committee held further that the magistrate who carried out the enquiry was not impartial and therefore articles 12 and 13 violated.[385]

In its General Recommendation 3 on the implementation of article 14, which mandates states to provide redress to victims of torture, the Committee against Torture stated that the investigation of allegations of torture is also a remedy to which victims are entitled.[386] It stated further that if those acting in official capacity knew or ought to have known about acts of torture, but fail to exercise due diligence to investigate them, the state bears responsibility to redress the victims of such acts.[387]

*(7) The obligation to enable victims to complain about torture*

In terms of article 13, states are mandated to ensure that there exists, at the national level, authorities with competence to examine complaints about torture promptly and impartially. This obligation is closely linked to the obligation to investigate under article 12. Therefore, states' obligation to ensure that authorities who examine

[382] *Alexander Gerasimov v Kazakhstan* Communication 433/2010 (Committee against Torture), 24 May 2012, UN Doc CAT/C/48/D/433/2010, para 12.4. See also *Keremedchiev v Bulgaria* Communication 257/2004 (Committee against Torture), 11 November 2008, UN Doc CAT/C/4/D/257/2004.
[383] *Halimi-Nedzibi v Austria* Communication 8/1991 (Committee against Torture), 18 November 1993, para 13.5.
[384] *Khaled M'Barek v Tunisia* Communication 60/1996 (Committee against Torture), 10 November 1999, UN Doc CAT/C/23/D/60/1996, paras 11.5 to 11.7.
[385] As above para 11.10.
[386] Committee against Torture, GC 3 para 16.
[387] As above para 7.

complaints of torture are impartial is similar to ensuring the impartiality of investigations in that the authority must not be under the same chain of command as the office, which is complained about.[388]

The second leg of states' obligations under article 13 is to ensure prompt examination of the complaint. In *Abdulrahman Kabura v Burundi* the Committee held that the state party had violated article 7 in that although the complaints about torture were brought to the attention of the judicial authorities on 27 June 2007, at the time of considering the communication in 2013, the judicial authorities had still not examined the complaint in violation of both articles 12 and 13 of CAT.[389]

The third leg of the obligation is that the victims, witnesses and members of their families must be protected against further ill-treatment or intimidation, which they may face because of having lodged the complaint. In *Gerasimov v Kazakhstan*, the Committee held that the state party's failure to protect the author against torture and ill-treatment including forced psychiatric evaluation following his complaint was a violation of article 13. Similarly, the state party was found to have violated article 13 in *Abdulrahm Kabura v Burundi* because following his release from prison, the author and members of his family received threats and were intimidated, which he reported, yet the state failed to do anything to protect them from such.[390]

*(8) The obligation to provide redress to victims of torture*

Article 14 mandates state parties to provide redress for victims of torture and to the victim's dependents where the victim has died as a result of torture. In General Comment 3,[391] the Committee considered that the term 'redress' in article 14 encompasses the concepts of 'effective remedy' and 'reparation'.[392] It emphasised further that the comprehensive reparative concept entails restitution, compensation,

[388] See *Alexander Gerasimov v Kazakhstan* (note 382 above).
[389] *Abdulrahman Kabura v Burundi* (note 378 above), para 7.5. The link between articles 12 and 13 was also made in *Dmytro Slyusar v Ukraine* (note 59 above) para 9.3.
[390] *Abdulrahm Kabura v Burundi* (note 378 above) para 7.5.
[391] Committee against Torture, GC 3 (note 9 above).
[392] Committee against Torture, GC 3, para 2; *Bendib v Algeria* (note 113 above), *Evloev v Kazakhstan* (note 111 above) and *Gerasimov v Kazakhstan* (note 382 above).

rehabilitation, satisfaction and guarantees of non-repetition.[393] In *Gerasimov v Kazakhstan* the Committee held that this remedy does not and should not under domestic law, be dependent upon a conviction in criminal proceedings.[394]

According to the Committee against Torture, the obligation to provide redress under article 14 is two-fold: procedural and substantive. The procedural obligation is to enact legislation and establish complaints mechanisms, investigation bodies and institutions capable of determining the right to and to award redress for a victim of torture and other CIDT. The state also has to ensure that such mechanisms and bodies are effective and accessible to all victims.[395] In *Abdulrahman Kabura v Burundi* the Committee recalled its concluding observations to the state party in which it was urged to take legislative, administrative and judicial measures to prevention torture.[396] It held that in order to ensure that these acts do not recur, investigation and action must be brought against those responsible.[397]

The substantive obligation enjoins state parties to ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[398] This aspect of states' obligations under article 14 was applied in *Abdulrahman Kabura v Burundi.*[399] In this case the author submitted that since he reported his torture to the authorities, he has not received any compensation or rehabilitation. The Committee recalled that article 14 does not only recognise the right to fair and adequate compensation, but also requires state parties to ensure that a victim of torture obtains redress, which should encompass a number of measures, such as restitution, compensation and guarantees of non-repetition.[400] It held that in the particular case the author ought to have received treatment and rehabilitation for the trauma and physical effects of the

[393] Committee against Torture GC 3, para 2.
[394] *Gerasimov v Kazakhstan* (note 382 above) para 12.8.
[395] Committee against Torture, GC 3 para 5.
[396] *Abdulrahman Kabura v Burundi* (note 378 above) para 7.3.
[397] As above para 7.6; *Salem v Tunisia* Communication 269/2005 (Committee against Torture) 7 November 2007 UN Doc CAT/C/23/D/269/2005 para 16.8.
[398] As above.
[399] *Abudulrahman Kabura v Burundi* (note 378 above) para 7.6.
[400] As above; *Gerasimov v Kazakhstan* (note 382 above) para 12.8 in which the Committee held that redress should cover all harm suffered, including restitution, compensation, rehabilitation of the victim and measures to guarantee that those acts do not recur.

torture.[401] The Committee emphasised that measures for appropriate redress must be based on the circumstances of each case.[402] In General Comment 3, the Committee also emphasises the importance of victim participation in the redress process, and that restoration of the dignity of the victim is the ultimate objective in the provision of redress.[403]

*(9) The obligation to prohibit use of torture-induced evidence in official proceedings*

Article 15 of CAT mandates state parties to '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'. Torture is mostly used as an interrogation technique to extract confessions and evidence of commission of a criminal offence. These materials are used by police officers to secure convictions. Therefore, rejection of such evidence negates the entire investigation process and would therefore discourage the police from resorting to torture during their investigation.[404] This obligation is an important step towards the prevention of torture, as the Special Rapporteur on Torture has stated that effective prevention of torture and ill-treatment requires that any incentive to use such abuse to assist investigations be eliminated.[405]

In *Abdulrahman Kabura v Burundi,* the author submitted that he was subjected to torture as a result of which he made incriminating statements against himself. These statements were used to keep him in detention for a period of two months and twenty days and to open a case of attempted murder against him.[406] The Committee held that by using those statements in the judicial proceedings in the course of which

[401] *Abdulrahman Kabura v Burundi* (note 378 above) para 7.6.
[402] As above.
[403] Committee against Torture, GC 3 para 4.
[404] JD Mujuzi 'The admissibility in Namibia of evidence obtained through human rights violations' (2016) 16 *African Human Rights Law Journal* 412.
[405] Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, JE Mendez' 10 April 2014 UN Doc A/HRC/25/60 paras 21 & 63.
[406] *Abdulrahman Kabura v Burundi* (note 378 above) para 3.7.

the author was released on bail, the state party had violated its obligations under article 15.[407]

*(10) The obligation to prevent other acts of CIDT*

In terms of article 16, state parties are mandated to prevent acts of cruel, inhuman and degrading treatment or punishment which do not amount to torture as defined in article 1(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 *Abdulrahman Kabura v Burundi* the Committee held that the conditions in which the author was detained violated the state party's obligation under article 16. These conditions were detention in a 12-square metre cell with no windows and light, deprivation of food and water and sleeping on the floor in a cell in appalling sanitary conditions.[408]

*(11) The obligation to report on measures taken against torture*

Article 19 of CAT mandates state parties to submit within one year of the CAT's entry into force for a particular state, and every four years thereafter, 'reports on measures they have taken to give effect to their undertakings under [CAT]…'[409] The report must contain legal and institutional frameworks as well as case law which affect implementation of CAT, statistics on 'complaints, inquiries, indictments, proceedings, sentences' and factors which inhibit full implementation of states' obligations under CAT.[410]

### *2.4.1.8 Convention on the Rights of the Child (CRC) 1989*

[407] As above para 7.7.
[408] As above para 7.8; *Kirsanov v Russian Federation* (note 66 above) para 12 in which the conditions of the temporary confinement ward, which had no bedding and toiletry items, no toilet and sink, cold shower and denial to walk outside were held to be a violation of article 16 of CAT as the acts did not fit the definition of torture under article 1.
[409] The form and content of the periodic reports are outlined in the 'General guidelines regarding the form and contents of periodic reports to be submitted by state parties' 2 June 1998, UN Doc CAT/C/14/Rev.1.
[410] As above para 3; see also CAT Committee *Concluding observations on the initial report of Pakistan* 1 June 2017, UN Doc CAT/C/PAK/CO/1 para 6 in which the Committee raised concern that the report does not contain information with regard to criminal proceedings against police officers alleged to have committee torture.

The CRC was adopted by the UN General Assembly in 1989 as an instrument specifically dedicated to the protection of children's rights. Article 19 provides for the protection of all children from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. Specifically referring to torture, article 37 provides that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[411] The Committee on the Rights of the Child (CRC Committee),[412] has emphasised the complementary nature of articles 9 and 37.[413]

In General Comment 13, the CRC Committee defined violence as 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation including sexual abuse'.[414] It interpreted physical violence to include corporal punishment and all forms of torture and CIDT.[415] In the context of the CRC, torture refers to violence against children, which is inflicted for purposes of extracting a confession, punishing children for unwanted behaviour, or to force children to engage in activities against their will.[416] The Committee stated further that typically this type of violence is inflicted by the police and law enforcement officers, as well as other non-state actors who have power over the children.[417] In General Comment 8, it noted that corporal punishment and other CIDT are widely accepted and mostly practised in schools, care centres, residential homes, police custody and justice institutions.[418] The CRC contains states' obligations against torture.

[411] CRC article 37 (1).
[412] Established by CRC article 43 as a body responsible to oversee its implementation.
[413] CRC, General Comment 18, CEDAW General Recommendation 31 'Harmful practices' 14 November 2014 (CRC, GC 18); CRC, GC 18; UNICEF 2014 'Fulfilling obligations under the Convention on the Rights of the Child and its Optional Protocols' https://www.unicef.org/crc/index_30208.html [accessed 8 January 2016].
[414] CRC, General Comment 13 'The right of the child to have his or her best interest taken as a primary consideration (art. 3, para 1)' 29 May 2013, UN Doc CRC/C/GC/14 (CRC, GC 13) para 4.
[415] CRC, GC 13 para 22 (a).
[416] As above para 25.
[417] As above para 26.
[418] CRC, General Comment 8 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28 para 2; and 31 *inter alia*)' 2 June 2006, UN Doc CRC/C/GC/8 para 1 & CRC, GC 13 para 3(i).

*(1) The obligations to prevent and prohibit torture of children*

With regard to states' obligations to protect children from torture by preventing and prohibiting it, the CRC mandates states to adopt legislative and administrative measures.[419] While the national laws may provide general protection of rights for all citizens, including children, the Committee has emphasised the need for the adoption of children-specific laws, which must reflect the principles of non-discrimination,[420] best interest of the child,[421] the child's inherent right to life and the child's right to express opinion in matters affecting him/her.[422]

The protection of children from discrimination is particularly relevant to the prevention of torture because certain children may be more vulnerable to torture on the grounds of discrimination.[423] The Committee has emphasised that the obligation to eliminate violent and humiliating punishment of children is an immediate and unqualified state obligation, which is linked to states' obligations under other human rights treaties, such as ICCPR, CAT and the African Charter.[424]

With regard to the adoption of legislative measures aimed at the prevention and prohibition of torture, the Committee re-emphasised the need for state parties to review their existing laws and harmonise them with the standards contained in the CRC.[425] It stated that:

> The Committee urges States parties, as a matter of urgency, to enact or repeal their legislation as necessary in order to prohibit all forms of violence, however slight, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention and in particular articles 19, 28 and 37 (a) and taking into account

[419] CRC article 4. See also CRC, GC 8 paras 30 to 37 and CRC, GC 18 para 55.
[420] CRC, General Comment 5 'General Measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44 para 6)' 2003 (CRC, GC 5) para 12.
[421]CRC, GC 8 paras 38 to 43 and CRC, GC 13 para 13.
[422] CRC, GC 5 para 22.
[423] CRC, GC 13 para 26 states that children in conflict of the law, children in street situations, minorities and indigenous and unaccompanied children, who are marginalised, disadvantaged and discriminated against are often victims of different forms of torture and CIDT.
[424] As above paras 22 & 25.
[425] CRC Committee, *Report of the twenty-eighth session, Geneva* 28 September to 12 October 2001, UN Doc CRC/C/111 (CRC Committee Report of 28th Session) para 713.

articles 2, 3, 6 and 12, as well as articles 4, 5, 9, 18, 24, 27, 29 and 39.[426]

The CRC Committee has stated further that it is essential for domestic laws to be harmonised with the CRC, that the CRC be directly applied and enforceable in domestic courts and to prevail over national laws.[427]

Administrative measures for prevention and prohibition of torture have been interpreted to include awareness-raising, guidance and training in accordance with the principle of the best interest of the child,[428] education of children and adults alike on the laws, which prohibit corporal punishment,[429] monitoring and evaluation,[430] submission of state party reports as required under the CRC,[431] ratification of the Optional Protocols to CRC, CRPD and CAT,[432] providing an adequate budget for legislation and all other measures adopted to end violence against children,[433] enforcing law and judicial procedures in a child-friendly way, and empowering women and girls.[434]

Apart from the general comments adopted by the CRC Committee, the scope and content of states' obligations against torture has been elaborated upon in the Optional Protocols to the CRC. These Protocols provide guidelines on the prevention and prohibition of violence and torture against children. The Optional Protocol on the involvement of children in armed conflict mandates state parties to take measures, which ensure that individuals under the age of 18 do not take a direct part in armed conflicts.[435] Exclusion of children from direct participation in armed conflicts reduces their risk of being tortured either by the commanders of the armed group in which

[426] CRC Committee, Report of the twenty-eighth session para 701. See also CRC, GC 8 para 7 and CRC, GC 13 para 41 (d).
[427] CRC, GC 5 paras 2, 19 & 20.
[428] CRC, GC 8 paras 38 - 43.
[429] As above paras 44 - 49.
[430] As above paras 50 - 52.
[431] As above para 53.
[432] CRC, GC 13 para 41 (a).
[433] As above para 41 (e).
[434] CRC, GC 18 paras 61 - 69.
[435] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted by UN GA Res. A/RES/54/263 of 25 May 2000, article 1.

they would be recruited or by the opposition armed group.[436] The Optional Protocol on the sale of children, child prostitution and child pornography requires states to provide legal and other support services to child victims and specifically calls for international cooperation to prevent and punish these abuses.[437] It therefore reinforces states' obligations to prohibit torture and also to punish those who perpetrate it against children.

*(2) The obligations to punish perpetrators and provide redress to victims of torture*

The CRC mandates state parties to provide redress where the rights of the child have been violated. The CRC Committee has interpreted this obligation to entail the establishment of effective, child-sensitive procedures of complaints, which are accessible to the children and their representatives.[438] These complaints procedures must be independent and have the power to order appropriate reparation, including compensation, as well as physical and psychological recovery, rehabilitation and integration as mandated by article 39 of CRC.[439] The Committee also reminded state parties of the need to punish perpetrators of torture and to provide appropriate redress, which is suitable to the circumstances of the children who are victims of such violence.[440]

*(3) The obligation to report on measures taken against torture*

Article 44 mandates state parties to report on the measures they have adopted to implement the CRC and to make their reports widely available to the public in their own countries. The state also has the duty to ensure that the report is accessible in that it is translated into languages understood by the public, and is in forms accessible to children and persons with disabilities.[441] As far as reporting on torture is concerned, the CRC Committee requests states to provide detailed statistics on

[436] UN GA Secretary General 'Promotion and protection of the rights of children: impact of armed conflict on children' 26 August 1996, UN Doc A/51/150 paras 11, 67, 91, 94, 212 and 213.
[437] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by UN GA Res. A/RES/54/263 of 25 May 2000 article 3(3).
[438] As above para 24.
[439] As above.
[440] CRC Committee, Report of the twenty-eighth session (note 425 above) para 716.
[441] As above.

reported cases of torture of children, the number of prosecutions as well as punishments which have been imposed on perpetrators of such acts.[442]

#### *2.4.1.9 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990*

The CMW was adopted with the aim of protecting migrant workers and members of their families from exploitation and human rights violation.[443] It defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.[444] Article 10 of the CMW provides that no migrant worker or member of his or her family shall be subjected to torture or CIDT.

##### *(1) The obligations to prevent and prohibit torture, punish its perpetrators, and provide redress to its victims*

States' obligations with regard to the implementation of the CMW have been interpreted and elaborated on by the Committee on Protection of Migrant Workers (CMW Committee),[445] in General Comment 1 in which it stated that there is a need for legal protection of migrant workers from exploitation, which they face particularly because of being foreigners.[446] Particularly related to torture, the Committee noted with concern that women migrant workers are more vulnerable to abuse, including gender-based violence.[447] Based on the vulnerabilities it identified, the Committee recommended that state parties should take appropriate measures to prevent torture by disseminating information on the rights of migrant workers, pre-departure training

[442] CRC Committee, *Concluding observations on the second to fourth periodic report of Brazil* (note 120 above).
[443] CMW preamble.
[444] CMW article 2(1).
[445] Established in terms of article 72(1)(a) of CMW as its supervisory body.
[446] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment 1 'Migrant domestic workers', 23 February 2011, UN Doc CMW/C/GC/1 (CMW, GC 1).1 para 7.
[447] As above.

of the workers, as well as co-operation between the worker's state of origin, state of transit (if any) and state of employment. [448]

In General Comment 2, which deals with the rights of migrant workers in an irregular situation and members of their families,[449] the Committee noted that an estimated 10-15% of the world's international migrants are in an irregular situation, which makes them vulnerable to abuse and torture because many states increasingly resort to repressive measures, such as criminalisation of irregular migration, as well as administrative detention and expulsion as a way of deterring migrant workers and members of their families from entering or staying on their territory without authorisation.[450] The Committee noted that the criminalisation of irregular migration fosters and promotes public perceptions that migrant workers and members of their families are illegal, second class individuals and unfair competitors for jobs and social benefits, thus fuelling anti-immigration public discourses, discrimination and xenophobia.[451]

It listed a number of obligations which state parties have under the CMW and other international human rights instruments. Although these obligations do not explicitly refer to torture, if complied with, torture would be prevented. These are the obligations to (1) eliminate discrimination which is contained in the laws, as well as that which, although not formally or legally recognised, exists or has an impact on migrant workers,[452] (2) protect migrant workers and members of their families against violence, physical injury, threats and intimidation by public officials, private individuals, groups or institutions,[453] (3) protect migrant workers against arbitrary arrest and detention and where detention is indispensable, to prescribe by law circumstances under which, as well as the period for which, a migrant worker in an

[448] As above paras 28 & 29 & 33 - 44.
[449] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment 2 'Rights of migrant workers in an irregular situation and members of their families', 28 August 2013 UN Doc CMW/C/GC/2 (CMW, GC 2) para 3; the CMW article defines a migrant worker in an irregular situation as one who has not been authorised to enter, to stay and to engage in a remunerated activity in the state of employment pursuant to the laws of that state and to international agreements to which that state is a party.
[450] CMW, GC 2 paras 1 & 2.
[451] CMW, GC 2 para 2.
[452] CMW article 7; CMW, GC 2 paras 18 & 19.
[453] As above para 21.

irregular situation may be arrested,[454] (4) protect migrant workers from inhuman treatment by providing them with adequate sanitary, bathing and shower facilitates, adequate food, drinking water, communication with relatives and access to qualified medical personnel,[455] and (5) protect all migrants against refoulement and collective expulsions as such may expose them to torture in the country of return.[456]

The CMW Committee stipulated the following as specific means to address states' obligations to prevent and prohibit torture of migrant workers, to punish its perpetrators and also to provide redress to its victims:

(a) adoption and implementation of legislation prohibiting acts of violence;
(b) effectively investigating cases of abuse and violence;
(c) prosecution and punishment of those responsible with appropriate punishments;
(d) adequate reparation to victims and members of their families;
(e) human rights training for public officials;
(f) effective monitoring of the conduct of state agents; and
(g) regulation of the conduct of private persons and entities with the view to prevent acts of violence.

In exceptional circumstances in which a migrant worker has been detained, state parties have an obligation to:

a) inform authorities of his or her country of origin without delay of the arrest or detention of the migrant worker concerned, if he or she so requests;
(b) facilitate any communication between the person concerned and the said authorities;
(c) inform the person concerned without delay of this right, as well as of rights under other applicable treaties;

[454] CMW article 16; CMW, GC 2 paras 23 - 35.
[455] CMW, article 17; CMW, GC 2 para 36.
[456] CMW article 22; CMW, GC 2 paras 11 & 50.

(d) correspond and meet with representatives of the said authorities and make arrangements with them for his or her legal representation;[457]

(e) promptly bring the detained person before court;[458]

(f) give the detained person access to an interpreter (if necessary) and ensure that he or she gets information about his or her rights in the language that he or she understands;[459] and

(g) ensure availability of enforceable right to compensation and the right not to be expelled while compensation is being considered.[460]

*(2) The obligation to report on measures taken against torture*

Article 73 of the CMW mandates state parties to submit reports for consideration by the CMW Committee on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention. The initial report has to be submitted within one year of the Convention's entry into force and the periodic reports have to be submitted every five years thereafter and when the CMW Committee so requests. With regard to reporting on torture and other CIDT, the Committee recommends that the state party report must contain information on the situation of migrant workers in the state party as well as disaggregated data on 'incidents of xenophobia, ill-treatment and violence directed at migrant workers and members of their families'.[461] The report must also contain 'the number of migrant workers who have been arrested, detained and expelled for immigration-related infractions, the reasons for their detention and expulsion, the length of their detention as well as detention conditions'.[462]

[457] CMW article 16 (7); Committee GC 2 para 30.
[458] CMW, GC 2 para 33.
[459] As above para 34.
[460] As above para 35.
[461] CMW Committee, *Concluding observations on Jamaica in the absence of a report* (note 120 above).
[462] As above para 36.

### *2.4.1.10 Convention on the Rights of Persons with Disabilities (CRPD) 2006*

The CRPD is aimed at promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity.[463] It is based on the principles of respect for inherent dignity, individual autonomy, non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women, respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[464]

#### *(1) The obligations to prevent and prohibit torture*

Article 15 of the CRPD provides that no one shall be subjected to torture or other CIDT, including medical or scientific experimentation. It places a duty on state parties to take effective legislative, administrative and judicial measures to prevent and prohibit torture and other CIDT of persons with disabilities on equal basis with others. This entails an obligation to effectively and promptly investigate allegations of torture and other CIDT and to ensure that persons who are at the risk of torture have access to independent complaint mechanisms and 'legally entitled to remedies' including compensation.[465] The Committee on the Rights of Persons with Disability (CRPD Committee),[466] in its concluding observations has stated that states' obligations under article 15 include refraining from 'protective custody' which has the effect of violating freedom of movement.[467] Article 4 of the CRPD requires that the measures adopted must be based on the principle of non-discrimination. In the context of torture, states are obliged to modify or abolish discriminatory laws, policies

[463] CRPD Article 1.
[464] CRPD article 3.
[465] CRPD Committee, *Concluding observations on the initial report of Jordan* 15 May 2017 UN Doc CRPD/C/JOR/CO/1 para 32.
[466] Established in terms of CRPD article 34 to monitor implementation of CRPD.
[467] CRPD Committee, *Concluding observations on the initial report of Moldova* 15 May 2017, UN Doc CRPD/C/MDA/CO/1 paras 31 & 32.

or practices,[468] and also to train professionals and staff working with people with disabilities on the prohibition of torture.[469]

*(2) The obligation to report on measures taken against torture*

In terms of article 35 of the CRPD, state parties are required to submit to the CRPD Committee, within two years after the CRPD's entry into force with respect to each state and thereafter every four years, a comprehensive report on measures taken to implement the CRPD. It mandates the state to indicate in the initial report, all legislative, administrative and judicial measures, as well as factors and challenges which inhibit full implementation of the CRPD.[470] With regard to subsequent reporting on torture, the CRPD Committee has stated in its concluding observations that the report must contain information on how the state has implemented the recommendations in previous reports including the recommendation to prevent torture by developing effective investigation and monitoring systems,[471] investigating of allegations of torture as well as establishment of independent complaint mechanisms with mandate to adjudicate on cases and to award remedies to persons with disabilities who are victims of torture and other CIDT.[472]

### *2.4.2 UN soft law*

Apart from the legally binding treaties discussed above, the UN has also set standards against torture in other non-binding instruments, which are also referred to as soft law or consensus documents.[473] Although non-binding in nature, soft law is

[468] CRPD article 4(1) (b).
[469] CRPD article 4(1) (i).
[470] CRPD article 35(5).
[471] CRPD Committee, *Concluding observations on the initial report of Moldova* para 31 read with para 64; CRPD Committee, *Concluding observations on the initial report of Jordan* para 32 read with para 69
[472] As above.
[473] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975); Standard Minimum Rules for the Treatment of Prisoners (1957 as amended in 1977); Code of Conduct for Law Enforcement Officials (1979); Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); Basic Principles on the Independence of the Judiciary (1985); Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1987); Body of

persuasive, provides guidelines for the implementation of the legally binding instruments and also provides evidence of the existence of customary international law. The focus of this section is on the *Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture) 1975* because it is specific on torture and also defines it.[474] The Declaration also confirmed the absolute nature of the obligation against torture and provides for redress to victims of torture. Lippman however, argues that in 1975, its drafters had not appreciated that by the time of its adoption, torture 'had become a central mechanism of political control', which would make it unrealistic to rely on domestic legal systems to prevent and prohibit it.[475] According to Ingles, when torture continued to take place despite states' commitment in the Declaration, the government of Sweden took a step further and sponsored a binding treaty, hence, the Declaration became a basis from which CAT would be adopted later in 1984.

## 2.5 Prohibition of torture in the African human rights system

The African human rights system first functioned under the auspices of the OAU and currently functions under the AU.[476] Both the OAU and AU have respect and protection of human rights as their core objectives and principles.[477] The instruments adopted under their auspices, which contain obligations against torture are: OAU Convention governing specific aspects of refugee problems in Africa (OAU Refugee

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Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988); Basic Principles for the Treatment of Prisoners (1990); Basic Principles on the Role of Lawyers (1990); Guidelines on the Role of Prosecutors (1990); Rules for the Protection of Juveniles Deprived of their Liberty (1990); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1990); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990); Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991); Declaration on the Protection of All Persons from Enforced Disappearance (1992); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (1999) and Basic Principles and Guidelines on the right to a remedy and reparations for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Impunity Principles) (2005).

[474] The UN Declaration on the Protection of all Persons from being subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, UN GA Resolution 34/52 UN Doc A/10408 (Declaration against Torture) 9 December 1975.

[475] Lippman (note 325 above) 303.

[476] The OAU was established in 1963 in Addis Ababa and was replaced by the AU in 2002

[477] OA Charter article II and Constitutive Act of the AU articles 3 & 4.

Convention),[478] African Charter,[479] African Charter on the Rights and Welfare of the Child (African Children's Charter),[480] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[481] African Youth Charter,[482] African Charter on Democracy, Elections and Governance[483] and AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (AU IDP Convention).[484] The discussion also considers the AU Guidelines on Measures for Prohibition and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment (Robben Island Guidelines/RIGs) which is soft law.[485]

### *2.5.1 African regional treaties*

#### *2.5.1.1 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) 1969*

One of the main reasons, which precipitated the establishment of the OAU, was the problem of refugees occasioned by civil wars and liberation struggles in Africa in the 1960s.[486] The OAU Refugee Convention was adopted in 1969 to alleviate the suffering of refugees and also to address the friction between African states, which had been caused by the increasing number of refugees, as well as individuals and groups who would seek refuge only to carry out subversive acts against their own states while in the country of refuge.[487] It defines a refugee in similar terms as the UN Refugee Convention.[488] Because many refugees in Africa were also driven out of

[478] OAU Convention Governing Specific Aspects of Refugee Problems in Africa, adopted by Assembly of Heads of State and Government on 10 September 1969. Lesotho acceded to it on 18 November 1988.
[479] African Charter on Human and Peoples' Rights adopted by the OAU Assembly on 27 June 1981. Lesotho acceded to it on 10 February 1992.
[480] African Charter on the Rights and Welfare of the Child adopted on 1 July 1990, Lesotho ratified in on 27 September 1999.
[481] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted on 7 November 2003. Lesotho ratified it on 26 October 2004.
[482] African Youth Charter adopted on 2 July 2006, Lesotho ratified it on 31 May 2010.
[483] African Charter on Democracy, Elections and Governance adopted on 30 January 2007, Lesotho ratified it on 25 June 2010.
[484] AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted on 23 October Lesotho ratified it on 19 January 2012.
[485] Robben Island Guidelines (note 103 above).
[486] OAU Refugee Convention preamble.
[487] OAU Refugee Convention preamble.
[488] OAU Refugee convention article I (1).

their countries during the fight against colonisation, the OAU Refugee Convention added another group of refugees to this definition, being:

> …every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

*(1) Non-refoulement*

Article II (3) of the OAU Refugee Convention contains the non-refoulement obligation in that it mandates state parties not to reject from their frontiers, return or expel a person from their territory as a result of which such a person shall be compelled to return to or remain in a territory in which his life, integrity of person or liberty would be threatened on grounds set out in article I. Some scholars have suggested that the OAU Refugee Convention expands states' non-refoulement obligations beyond the UN Refugee Convention in that it does not contain the security exception in article 33(2) of the former and also that the latter applies at the states' frontiers while the former does not explicitly provide so.[489] These arguments have, however, been countered by Sharpe who illustrates that the exceptions in article 1(4)(f) & (g) of the OAU Refugee Convention in terms of which protection from refoulement ceases when one commits a non-political offence is similar to the security exception in article 33(2) of the UN Refugee Convention.[490] She argues further that with regard to application at the frontiers, state practice, as well as recorded views support an argument that asylum applies immediately when one presents himself or herslef at the borders of a particular state. Therefore that particular state's non-refoulement obligation under the UN Refugee Convention is triggered at that very moment.[491]

[489] R Murray 'Refugees and the internally displaced persons and human rights: The African system' (2005) 24 (2) *Refugee Survey Quarterly* 57; G Abi-Saab 'The admission and expulsion of refugees with special reference to Africa' (2008) 8 *African Yearbook of International Law* 90.
[490] M Sharpe 'The 1969 Refugee Convention: Innovations, misconceptions and omissions' (2012) 58 (1) *McGill Law Journal* 106.
[491] As above 107.

*(2) The obligation to report on measures taken against torture*

States' reporting obligations under the OAU Refugee Convention are similar to those outlined under the UN Refugee Convention in that states are not required to submit periodic reports but to furnish the secretariat of the OAU with 'information and statistical data on the condition of refugees, implementation of the Convention' as well as laws relevant to refugees in that particular country.[492] This obligation has not been elaborated upon.

### *2.5.1.2 African Charter on Human and Peoples' Rights (African Charter) 1981*

The African Charter is the main human rights instrument on the African continent. When celebrating the 30th anniversary of the African Charter, the African Commission on Human and Peoples' Rights (African Commission),[493] stated that the African Charter helped to steer Africa from the age of human wrongs into a new age of human rights.[494] Article 5 contains the right to dignity as well as freedom from torture and other CIDT.[495] With regard to the definition of torture under article 5, the African Commission has adopted the CAT definition of torture.[496] On this basis it has held that acts such as 'whipping and beating with sticks' do not amount to torture, but to other CIDT.[497] It has further stated that all the rights contained in the African Charter generate 'at least four levels of duties for a state…namely, the duty to respect, protect, promote and fulfil these rights'.[498] In the context of torture, these obligations have been interpreted as follows:

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[492] OAU Refugee Convention article VII

[493] Established in terms of African Charter article 30.

[494] African Commission 'The Charter is 30 years old' www.achpr.org/instruments/achpr/30th-anniversary [accessed 22 November 2016].

[495] The practical implementation article 5 is set out in detail in the Robben Island Guidelines (note 103 above).

[496] *Abdel Hadi & Others v Republic Sudan* Communication 368/09 (ACHPR) 22 October – 5 November 2013 paras 70-73 in which the Commission held that acts, such as rabbit jump, heavy beatings with water hoses, inflicted by police officers with the purposes of extracting confessions from the victims, as well as punishment for deaths of the policemen who were killed when a scuffle ensued at an IDP camp, were of such a threshold of severity as to amount to torture; *Egyptian Initiative for Personal Rights v Egypt* Communication 334/06 (ACHPR) 2011 para 162; *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 245/2002, (2006) AHRLR 128 (ACHPR 2006) para 180.

[497] *Interights, ASADHO & Others v DRC* Communication 274/03 & 282/03 (ACHPR) May 2014 para 61.

[498] *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 44.

*(1) The obligations to prevent and prohibit torture*

With regard to states' obligations to prevent and prohibit torture, the obligation to respect requires state officials to refrain from inflicting torture and other CIDT. [499] In *Malawi African Association & Others v Mauritania*, the African Commission found a violation of article 5 in that during their time in custody, a number of detainees were beaten, forced to make statements, deprived of the opportunity to sleep, some were held in solitary confinement, denied food, kept in chains, locked in overpopulated cells lacking in hygiene and denied access to medical care.[500] Some were burnt using different objects, while others were buried in sand and left to die a slow death.[501] Electric shocks were administered to their genital organs and they had weights tied on them.[502] Other detainees' heads were plunged into water until they almost suffocated and their eyes were smeared with pepper.[503] They were also subjected to a so-called 'jaguar' position, which was carried out by tying the victim's wrists to his feet and then suspending him from a bar facing upside down.[504] Women were raped.[505] The state party did not deny any of the alleged acts. The African Commission held that taken together or in isolation, these acts are proof of widespread use of torture and CIDT in violation of article 5 of the African Charter.[506] That is, by inflicting pain on the victims, the state had violated its general obligation to refrain from interfering with their right to freedom from torture.

When interpreting the obligation to protect human rights in the *SERAC* case, the African Commission stated that, 'the state is obliged to protect rights-holders against other subjects by legislation and provision of effective remedy'.[507] The obligation to adopt legislative measures to give effect to the rights contained in the Charter is

[499] In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria,* 2001 AHRLR 75 (ACHPR 1994) para 79, the Commission emphasised that article 5 does not only prohibit torture, but also cruel, inhuman or degrading treatment.
[500] *Malawi African Association & Others v Mauritania* (2000) AHLR 149 (ACHPR 2000) para 12.
[501] As above para 10.
[502] As above para 22.
[503] As above para 23.
[504] As above para 20.
[505] As above.
[506] As above paras 84 - 102.
[507] *SERAC v Nigeria* (note 498 above) para 46.

expressed in article 1 of the African Charter, which provides that '[t]he member states of the Organization of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'. The obligation to prohibit torture is therefore two-pronged: firstly, to recognise the right to freedom from torture, for instance in the Constitution and secondly, to adopt laws, which criminalise torture. This has been confirmed in the *Commission Nationale des Droits des L´home et des Libertés v Chad* in which the African Commission held that the obligation under article 1 to recognise rights contained in the Charter also includes states' obligation to protect the rights against violation by third parties.[508] It held that by failing to ensure security in Chad, which failure resulted in a civil war, characterised by massive killings and torture, the government of Chad violated articles 1 and 5 of the African Charter.[509]

The torture prevention obligation in the African Charter is reinforced by article 27, which prohibits states from derogating from any of the rights contained in the Charter including article 5. Article 27(2) provides that '[the] rights and freedoms of each individual shall be exercised with due regard to rights of others, collective security, morality and common interest'. This means that the right to freedom from torture cannot be derogated from, in as much as its exercise neither violates the rights of others nor collective security, morality and common interest. Rather, it is the violation of this freedom, which would have a negative impact on the rights of its victims, collective security, morality and common interest.

Non-derogability of rights contained in the African Charter was illustrated in the case of *Gunme and others v Cameroon.* In this case, the complainants were 14 individuals who had brought the communication on their behalf and on behalf of the people of Southern Cameroon against the Republic of Cameroon.[510] The communication alleged violations of several provisions of the African Charter,

[508] *Commission Nationale des Droits de L´home et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 20.
[509] As above paras 21 - 28.
[510] *Gunme and others v Cameroon* Communication 266/2003(African Commission) 26th Activity Report para 1.

including freedom from torture in article 5.[511] It contained details of victims who were subjected to torture, amputations and denial of medical treatment by law enforcement officers of the Republic of Cameroon. The state's response to this communication was that members of rebel groups were involved in acts of terrorism, killing law enforcement officers, vandalising state properties and also stealing weapons and ammunition.[512] The African Commission held that 'even if the state was fighting the alleged terrorist activities, it was not justified to subject the suspects to torture, cruel, inhuman and degrading treatment and found the state to have violated article 5 of the African Charter.[513] The Commission's view was based on the fact that the African Charter does not allow derogation from any of the rights contained therein. A similar stance was taken in *Commission Nationale des Droits de L'home et des Liberts v Chad* referred to above.[514] In *Media Rights Agenda v Nigeria*, the Commission held that:

> …the African charter does not contain a derogation clause. Therefore the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in article 27(2).

*(2) The obligation to provide redress to victims of torture*

States' obligation to provide redress to victims of torture has been interpreted by both the African Commission (in the context of article 5 of the African Charter) and the African Court on Human and Peoples' Rights (African Court).[515] The African Commission stipulated that in the context of torture, redress entails 'adequate,

[511] As above para 18. The complainants alleged systematic violation of the rights of the people of Southern Cameroon, including arbitrary arrests, detentions, torture, punishment, maiming and killings of persons who were advocating for self-determination of Southern Cameroon.
[512] As above para 113.
[513] As above para 114.
[514] *Commission Nationale des Droits de L'home et des Liberts v Chad* (note 508 above) para 21.
[515] African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress of Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf [accessed 4 December 2016]; See also Consolidated application of *Tanganyika Law Society and another v The United Republic of Tanzania* Application 009/2011) and *Reverend CR Mtikila v The United Republic of Tanzania* Application 011/2011 (African Court on Human and Peoples' Rights) 14 June 2013.

effective and comprehensive' remedy which has the effect of changing social and political factors which enable the practice of torture such as 'restitution, compensation, rehabilitation, satisfaction - including the right to the truth, and guarantees of non-repetition'.[516]

*(3) The obligation to report on measures taken against torture*

Article 62 mandates state parties to submit a report to the African Commission every two years after entry into force of the Charter with respect to a particular state.[517] As far as states' obligations against torture are concerned, the initial report must contain all legislative or other measures, which states have adopted with the aim of implementing the Charter obligations to prevent and prohibit torture, to prosecute and punish its perpetrators and to provide redress to victims of torture.[518] The subsequent reports must also contain information on how the Commission's recommendations in relation to torture have been implemented.[519]

### *2.5.1.3 African Charter on the Rights and Welfare of the Child (African Children's Charter) 1990*

The African Children's Charter[520] is the first comprehensive regional instrument specifically dedicated to the protection of the rights of an African child.[521] It was adopted by members of the OAU having noted with concern 'that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters,

[516] African Commission GC 4, paras 8 - 10; See also *Mtikila & Others v Tanzania* (note 515 above) para 124. See also O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights' *African Human Rights Law Journal* (2015) 15, 323.
[517] The African Commission has formulated guidelines as to the form and content of both initial and subsequent periodic reports submitted under article 62 of the African Charter – African Commission *Guidelines for national periodic reports* 1989.
[518] African Commission *Concluding observations on the cumulative periodic reports (2nd, 3rd, 4th and 5th) of the Republic of Angola* 30 July – 4 August 2012 para 38 in which the Commission raised a concern that the report did not contain information on the legislative or institutional measures to criminalise torture and to prosecute and punish its perpetrators.
[519] African Commission *Concluding observations on the 3rd periodic of the Republic of Cameroon* 7-14 March 2014 recommendation xxxviii 12.
[520] African Charter on the Rights and Welfare of the Child 1990.
[521] BD Mezmur 'The African Committee of experts on the rights and welfare of the child: an update' (2006) 6 (2) *African Human Rights Law Journal* 549.

armed conflicts, exploitation and hunger'.[522] State parties also noted that because of these factors and the physical and mental immaturity of children, they need special safeguards and care.[523] Amongst arguments advanced for the adoption of this Charter was that the CRC did not cater for the specific needs of African children, as Africa was not well represented during its drafting.[524] While some scholars have criticised the reasons advanced for the justification of adopting a separate African children's instrument from the CRC,[525] Mezmur argues that the two instruments complement each other and that the African Children's Charter gives the CRC specific application within the African context.[526] It contains guidelines, such as best interest of the child principle, which are meant to guide, protect and promote the rights and welfare of children.[527]

Article 16 of the African Children's Charter provides for protection against child abuse and torture. It has been interpreted by the African Committee of Experts on Rights and Welfare of the Child (ACERWC)[528] in two communications.[529] In *Michelo Hansungule and Others (on behalf of the children of Northern Uganda v The Government of Uganda,*[530] the government of Uganda was alleged to have violated a number of provisions of the African Children's Charter on the right to life, right to education, right to health and right to freedom from violence, including sexual abuse

[522] African Children's Charter preamble para 4.
[523] As above.
[524] During drafting of the CRC, only Egypt, Morocco and Senegal were represented and it was argued that the CRC did not address issues, which affected African children, such as apartheid in South Africa then, internal displacement and harmful traditional practices, such as FGM; Mezmur, (note 521 above) 549.
[525] D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127; D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179.
[526] Mezmur (note 521 above) 550.
[527] African Children's Charter article 4.
[528] ACERWC is established in terms of article 32 of the African Children's Charter as a body responsible to oversee its implementation. For a detailed discussion on the mandate of ACERWC, see Mezmur (note 521 above). See also BD Mezmur 'Still an infant or a toddler? The work of the African Committee of Experts on the Rights and Welfare of the child and its 8th ordinary session' *African Human Rights Law Journal* (2006) 6 (2) 258.
[529] At the time of this research, the ACERWC had finalised only four communications, three of which had been decided upon while in *Institute for Human Right and Development in Africa v The Government of Malawi* Communication 001/2014 the parties reached an amicable settlement.
[530] *Michelo Hansungule and Others (on behalf of the children on northern Uganda v The government of Uganda* Communication 1/2005 (ACERWC) 15-19 April 2013.

of the children of Northern Uganda who were recruited into the Ugandan Defence Force (UDF) and into the rebel group Lord's Resistance Army (LRA). The ACERW found that there had been a violation of article 22 of the African Children's Charter, as there was evidence that upon rescuing children from the LRA, some of them were recruited into the UDF.[531] However, with regard to the violation of article 16, the ACERWC found that the evidence before it did not disclose violation of article 16, as the allegations of sexual exploitation and abuse of the children by members of the UDF could not be substantiated.[532]

In *Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la defense des droits de l'homme (Senegal) v Government of Senegal,*[533] the ACERWC held that the Republic of Senegal had violated several provisions of African Children's Charter including article 16. The communication concerned about 100 000 children (commonly known as *talibes*) aged between 4 and 12 years who were forced to beg in the streets. These children were sent by their parents to live in Quaranic schools in the urban cities of Senegal to receive religious education because of the difficulty of getting access to government schools in Senegal. The complainants alleged that in these schools, children were subjected to various forms of torture and CIDT. They slept in overcrowded rooms or outside, did not have adequate food and had no access to clean water and sanitation.[534] They were also forced by their instructors to work as beggars in the streets and were required to bring back a daily quota in the form of sugar, rice or money.[535] Failure to meet the daily quota or an attempt to flee from the training centre resulted in physical assault and harsh punishment of the children by their instructors. The complainants submitted further that despite the existence of laws in Senegal which prohibited these acts, only ten cases had been brought before the domestic courts and very lenient punishments were imposed on convicted instructors.[536]

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[531] As above para 66.
[532] As above para 78.
[533] *Centre for human rights (University of Pretoria) and La Recontre Africaine pour la defense des droits de l'homme (Senegal) v Government of Senegal* Decision 003/Com/001/2012 (ACERWC) 15 April 2014.
[534] As above para 8.
[535] As above para 3.
[536] As above para 4.

The ACERWC held that this treatment amounts to the violation of article 16. It relied on jurisprudence of the African Commission, as well as the CAT definition of torture. For instance, in *Curtis Francis Doebbler v Sudan,* the African Commission held that 'there is no right for individuals, and particularly the government to apply physical violence on individuals for offences. That would be tantamount to sanctioning state-sponsored torture…'[537] It also referred to *International Pen and Others v Nigeria,*[538] in which it was held that inhuman and degrading treatment include actions which humiliate the individual or force him to act against his will or conscience. The ACERWC considered that treatment, such as taking the children into a room in which they were stripped of their shirts, and beaten with electric cables or clubs could rise to the level of torture as defined under article (1) of CAT and therefore violates article 16.[539]

*(1) The obligations to prevent and prohibit torture*

With regard to states' obligations to protect children from torture, article 16 provides that state parties shall '[t]ake specific legislative, administrative, social and educational measures to protect the child from all forms of torture… while in the care of a parent, legal guardian or school authority or any other person who has the care of the child'.[540] The obligation to take legislative measures to give effect to provisions of the African Children's Charter is also contained in article 1. Article 16(2) contains the 'protective measures', which must be taken to prevent and prohibit torture of children to include:

> establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

This obligation was re-emphasised in *Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la Defense des Droits de l'Homme*

[537] *Curtis Francis Doebbler v Sudan,* (2003) AHRLR (ACHPR 2003) para 42.
[538] *International Pen and Others v Nigeria* (note 499 above).
[539] *Centre for Human Rights and another v Senegal* (note 533 above) paras 65 & 68.
[540] African Children's Charter art.16 (1).

*(Senegal) v Government of Senegal,* wherein the ACERWC held that the African Children's Charter mandates state parties to protect children from abuse and torture and requires states to adopt legislative, administrative, social and educational measures, including the establishment of special monitoring units to provide the children and those in whose care the children are, with necessary support.[541] States are also obliged to undertake other forms of investigation, treatment and follow up of instances of child abuse and neglect.[542] The ACERWC has also referred to these and other obligations in its concluding observations on Lesotho's initial report.[543] It has emphasised that state parties have an obligation to ensure full domestication of CAT and to harmonise domestic laws with provisions of the African Children's Charter.[544]

Other torture prevention measures include wide publication of the laws, which protect women and children against sexual abuse and FGM,[545] training of judicial police officers and magistrates on appropriate sanctions to be imposed on perpetrators of child abuse,[546] encouraging and establishing denunciation mechanisms,[547] investigating and prosecuting of allegations of torture[548] as well as providing free access to legal assistance, psychological and medical therapy, and treatment of children who are victims of torture and CIDT.[549]

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[541] *Centre for Human Rights and another v Senegal* (note 533 above) para 63.
[542] As above para 68.
[543] ACERWC, *Concluding observations to the government of Lesotho on its initial report on the implementation of the African Charter on the Rights and Welfare of the Child* 26th Ordinary Session, 16 - 19 November 2015 para 5.
[544] ACERWC, *Concluding Recommendations on the Republic of South Africa initial Report on the status of implementation of the African Charter on the Rights and Welfare of the Child* para 36.
[545] ACERWC, *Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child'* 16th Session, 16-19 November 2009, para on article 21.
[546] As above para on article 24.
[547] As above para on article 16.
[548] ACERWC, *Concluding Observations on South Africa's initial report* para 54.
[549] ACERWC, *Recommendations and Observations to the Government of Liberia by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child*, 23rd Session, para E.

*(2) The obligations to punish perpetrators of torture and provide redress to victims of torture*

States' obligation to punish perpetrators of torture and to provide victims with redress were invoked in *Centre for human rights (University of Pretoria) and La Recontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal.* The ACERWC held that despite the fact that these acts were allegedly committed by the instructors acting in their private capacity, they are, however, attributable to the state because although there are legislative and social initiatives to protect the rights of children in Senegal in general, the government failed to take specific administrative and judicial measures to protect the *talibes* against their instructors.[550] In this regard, the ACERWC relied on General Comment 2 of the Committee against Torture, which states that:

> Where states authorities or others acting in an official capacity or under the colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state actors and they fail to excise due diligence to prevent, investigate, prosecute or 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 reasonable under the Convention for consenting to or acquiescing in such impermissible act.[551]

*(3) The obligation to report on measures taken against torture*

State parties are expected to submit reports on their implementation of the Charter to the ACERWC in terms of article 43 of the African Children's Charter.[552] These reports are to be submitted two years after the Charter enters into force with respect to each state party and thereafter every three years.[553] With regard to the protection of children from torture and abuse, the ACERWC has stipulated in its concluding

[550] As above.
[551] As above para 66.
[552] The ACERWC has adopted *State parties reporting guidelines* of 2015 which outline the form and content of both the initial and periodic reports submitted in terms of article 43 of the African Children's Charter.
[553] African Children's Charter article 43.

observations on state reports that the report must contain statistical data on child abuse and rape.[554]

#### *2.5.1.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) 2003*

According to its preamble, the Protocol was adopted because of the concern that despite ratification of the African Charter, and other international human rights instruments by majority of African states and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continued to be victims of discrimination and harmful practices.[555] It was therefore adopted to complement the African Charter and to reinforce states' obligations for protection of women's rights.[556] Prior to the adoption of the Protocol, the African Charter had been criticised as ineffective, inadequate[557] and also reinforcing stereotypes about the African women's place being confined within the family.[558] The Protocol protects women against violence[559] and explicitly calls upon states to prohibit harmful traditional practices, such as FGM,[560] which had for a long time been justified by those who practise it as part of African culture or tradition.[561] It thus

[554] ACERWC, *Recommendations and observations sent to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Implementation Report of the African Charter of the Rights and Welfare of the Child*, 15th Session, 16 - 19 March 2010. See also ACERWC, *Recommendations and observations to the Government of Guinea by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child*, 1st Extraordinary Session, para 8.

[555] African Women's Protocol preamble para 12.

[556] MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1(1) *African Human Rights Law Journal* 41; DM Chirwa 'Reclaiming (wo)manity: the merits and demerits of the African Protocol on women's rights' (2006) *Netherlands International Law Review* 95.

[557] Centre for Reproductive Rights 'The protocol on the rights of women in Africa: An instrument for advancing reproductive and sexual rights' (February 2006) www.reproductiverights.org [accessed 4 December 2016].

[558] African Charter article 18(3); Chirwa (note 558 above) and C Heyns 'The African human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679.

[559] African Women's Protocol articles 1(j), 3(4) and 4.

[560] In *R.O. v Sweden* (note 64 above), the Committee against Torture held that FGM amounts to torture.

[561] African Women's Protocol article 5; Centre for Reproductive Rights 2006 (note 557 above).

provides protection to women in Africa beyond CEDAW.[562] It also protects women against sexual violence, which takes place in private.[563]

Although the Protocol does not make explicit reference to protection against torture, the UN Special Rapporteur on Torture has stated that acts of violence and CIDT can escalate to torture if committed for purposes prohibited under article 1(1) of CAT and with participation of persons who do so in an official capacity.[564] Therefore, protection from violence and ensuring that women are treated with dignity, translates to prevention of torture. The correlation between respect for women's dignity under article 3 of the Protocol, their protection from violence and torture was also made in the case of *S.A. (represented by Redress and another) v Democratic Republic of Congo.*[565] The Commission held that the rape of S.A. by a member of the Respondent state's army amounted to torture in violation of article 5 of the African Charter,[566] violated her integrity protected by article 4 of the Protocol,[567] violated the state's obligation under article 11 to protect her against gender-based violence[568] and was a form of discrimination.[569]

The other link between sexual violence against women and torture is that there are circumstances in which sexual violence amounts to torture.[570] Research reflects that globally, especially in situations of armed conflict, rape and other forms of sexual abuse are resorted to by both the state actors (members of security forces) and non-state actors (members of rebel groups).[571] Although in most armed conflicts sexual

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[562] A Iyanuolu 'The challenge of culture for the rights of women in Africa: A critical analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' unpublished LLM thesis University of Cape Town 2008.
[563] F Viljoen 'Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 (11) *WAS & LE JCR & SOC JUST* 21.
[564] Committee against Torture, GC 2 outlines circumstances in which acts of private individuals may be attributed to the state.
[565] *S.A. (represented by Redress and another) v Democratic Republic of Congo* communication 502/14 (African Commission), 18 November 2016.
[566] As above para 35.
[567] As above para 53.
[568] As above para 54.
[569] As above paras 59 and 64.
[570] See African Commission Resolution 284 'Suppression of sexual violence against women in the Democratic Republic of Congo' adopted at the 55th Ordinary Session 28 April to 12 May 2014.
[571] SP Tunamsifu 'The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal*, 476; Report of the United Nations Secretary-General on Conflict-Related Sexual Violence S/2016/361 to

violence is perpetrated against men and women, as well as boys and girls, often women and girls suffer this abuse far more than men and boys.[572] For instance, Kitharidis argues that women in the Democratic Republic of Congo (DRC) 'have been the victims of a 'war within a war' as the number of rapes and other forms of sexual violence soar in the region'.[573] OHCHR reports that from January 2010 to December 2013, more than 3 635 cases of sexual assault were reported in the DRC, with the majority of these cases being victims of the *Forces Armées de la République Démocratique du Congo* (FARDC) and over 1 200 rapes committed in the context of military operations against armed rebels in North and South Kivu.[574] In Nigeria, Boko Haram[575] has used sexual violence, including rape, forced marriages and forced pregnancies as some of its tactics in the terror campaign against the Nigerian state.[576] This has resulted in the majority of women rescued from the terrorist group's camps testing HIV positive, some pregnant and others already having born children resulting from rape, sexual violence and forced marriages to members of Boko Haram.[577] In the case of *Prosecutor v Akayesu,* Trial Chamber 1 of the ICTR held that where rape is committed for purposes of intimidation,

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the United Nations Security Council on 20 April 2016, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_361.pdf [accessed 21 October 2016].

[572] DA Lewis 'Unrecognised victims: sexual violence against men in conflict settings under international law' (2009) 27 *Wisconsin International law Journal* 1. E Rehn & EJ Sirleaf *Women, war and peace: The independent experts' assessment on the impact of armed conflict on women and women's role in peace-building* (2002) 10.

[573] S Kitharidis 'Rape as a weapon of war: Combating sexual violence and impunity in the Democratic Republic of the Congo, and the way forward' (2015) 15 *African Human Rights Law Journal* 450; Human Rights Watch *The war within the war: Sexual violence against women and girls in Eastern Congo* (2002); S Meger 'Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo' (2010) 28 *Journal of Contemporary African Studies* 119.

[574] OHCHR *Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (2010). OHCHR *Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo* (April 2014) 9; Tunamsifu (note 571 above) 476; T Elbert *et al Sexual and gender-based violence in the Kivu provinces of the Democratic Republic of Congo: Insights from former combatants* (2013) 37.

[575] The Nigerian terror group Jama'atu Ahlis Sunna Lidda'awati WatJihad – people committed to the propagation of the Prophet's teachings and jihad; CE Attah 'Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian antiterrorism laws' (2016) 16 *African Human Rights Law Journal* 388.

[576] Attah (note 575 above) 10.

[577] Human Rights Watch 'Those terrible weeks in their camps: Boko Haram violence against women and girls in North-East Nigeria' 2 http://www.hrw.org [accessed 5 February 2017]; O Akukwe 'Chibok girls, Boko Haram and Jihad of the penis' http://www.nigerianbulletin.com/ [Accessed 5 February 2017]; 'Boko Haram's rescued sex slaves tell their horror stories' http://www.thedailybeast.com/articles/2015/05/06/boko-haram-horror-stories-told-by-rescued-girls-in-nigeria.html [accessed 5 February 2017].

degradation, humiliation, punishment, control or destruction and 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, then such rape constitutes torture.[578] The African Women's Protocol contains states' obligations to prevent and prohibit these acts, to punish those who commit them, to provide redress to the victims and to report measures, which they have taken to implement these obligations to the African Commission.

*(1) The obligations to prevent and prohibit torture*

State parties to the African Women's Protocol undertake to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.[579] Because violence against women, including that which amounts to torture, has been categorised as a form of discrimination, measures to prevent discrimination also apply to the prevention and prohibition of torture against women. The Protocol mandates state parties to implement this general obligation through various means, such as:

- Inclusion and effective enforcement of the principle of equality between men and women in their national constitution and other legislation;
- Enactment and effective implementation of legislative/regulatory measures that curb all forms of discrimination, particularly harmful practices that endanger the health and well-being of women;
- Integration of a gender perspective in policy decisions, legislation, development programmes and all other spheres of life;
- Corrective and positive action in areas where discrimination continues to exist; and
- Modification of social and cultural practices with a view to eliminating discriminatory and harmful traditional practices and support for initiatives directed at eradicating all forms of discrimination against women.[580]

States' obligations under article 2 of the Protocol in the context of torture have been interpreted by the African Commission in the case of *S.A. v Democratic Republic of*

[578] *Prosecutor v Akayesu* (note 37 above) para 597.
[579] African Women's Protocol article 2.
[580] Equality Now *A guide to using the African Women's Protocol for legal action* (2011) 9.

*Congo*[581] in which it held that states have an obligation to refrain from any acts of violence, which impair women's equality,[582] to respond to discriminatory practices such as gender-based violence and to reform laws and institutions to ensure that such acts do not recur.[583]

Article 5 mandates state parties to raise public awareness regarding harmful practices and 'to adopt legislative measures backed by sanctions', against all forms of FGM, its sacrification, medicalisation and para-medicalisation as well as other practices in order to eliminate them.[584] It also contains an obligation to protect women who are at risk of being subjected to harmful practices, or all other forms of violence, abuse and intolerance.[585]

(2) *The obligation to punish perpetrators of torture*

Articles 4 and 5 mandate state parties to punish perpetrators of violence against women, including those who perform FGM.[586] States are also mandated to establish mechanisms and accessible services for effective information.[587] In the case of the DRC, Kitharidis observes that although Congolese criminal law contains sanctions for such acts, there is no practical implementation of the laws because of a weak justice and penal systems, as a result of which rape and sexual violence against women is widespread in the region.[588] In Nigeria, Attah has criticised the Nigerian anti-terrorism law for failing to address sexual terrorism; that is, to punish sexual violence as a form of terrorism.[589] The failure to punish perpetrators of sexual violence also leads to breach of the obligations to provide redress to victims of such violence by the state party.[590]

[581] *S.A. (represented by Redress and another) v Democratic Republic of Congo* (note 565 above).
[582] As above para 62; *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* Communication 323/2006 (ACHPR) 3 March 2011, para 165.
[583] As above paras 65 & 107.
[584] African Women's Protocol article 5 (a) and (b).
[585] African Women's Protocol article 5(d).
[586] African Women's Protocol article 4(e) and article 5(b).
[587] African Women's Protocol article 4(f)
[588] Kitharidis (note 573 above) 456.
[589] Attah (note 575 above) 385.
[590] Tunamsifu (note 571 above).

*(3) The obligation to provide redress to victims of torture*

Article 25 mandates state parties to ensure the provision of an appropriate remedy to women whose rights under the Protocol are violated. Appropriate remedy in this regard can be inferred from article 4, which mandates state parties to establish mechanisms for 'effective information, rehabilitation and reparation for victims of violence against women.'[591] Article 5 also mandates state parties to 'provide necessary support to victims of harmful practices through basic services, such as health services, legal and judicial support, emotional and psychological counselling, as well as vocational training to make them self-supporting'.

The obligation to provide remedies to victims of violence, including torture, is coupled with the obligation to ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or any other competent authority provided for by law.[592] In *S.A. (represented by Redress) and another v Democratic Republic of Congo,* the Commission held that the DRC had an obligation under article 25 to provide the victim with an effective remedy as ordered by the domestic courts.[593]

*(4) The obligation to report on measures taken against torture*

Article 26 enjoins state parties to ensure the implementation of the Protocol at the national level and to reflect such in their periodic reports submitted to the African Commission in terms of article 62 of the African Charter. Measures adopted to implement the Women's Protocol are covered under part B of the report submitted in terms of article 62. The form and content of part B of the report are guided by the reporting guidelines adopted by the African Commission specifically for reporting under the African Women's Protocol.[594] With regard to reporting on torture and violence against women, the report has to contain disaggregated data on the number

[591] African Women's Protocol article 4(f).
[592] African Women's Protocol article 25(3).
[593] *S.A. (represented by Redress and another v Democratic Republic of Congo* (note 565 above) paras 75 & 107.
[594] African Commission Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, May 2010.

of victims of torture as well as legislative and administrative measures, institutions, policies and programmes, public education and other measures which the state has adopted to implement its obligations under the Women's Protocol to protect women against violence including sexual violence, human trafficking, domestic violence and others.[595]

#### *2.5.1.5 African Youth Charter 2006*

According to its preamble, the African Youth Charter is guided by visions of the AU on Africa's integration, inherent dignity and inalienable rights afforded to all members of the human family as set out in various international human rights instruments, as well the Millennium Development Goals (MDGs).[596] It focuses on the youth, whom it defines 'as every person between the ages of 15 and 35 years'.[597] Article 18(2) of the African Youth Charter mandates state parties to ensure that youth who are in detention, imprisonment or rehabilitation are not subjected to torture or other CIDT.

##### *(1) The obligations to prevent and prohibit torture*

In terms of article 1 of the Africa Youth Charter, state parties have an obligation to adopt legislative or other measures to give effect to the provisions of the Charter, including preventing and prohibiting torture of the youth in any form of detention. Article 28 of the African Charter tasks the African Union Commission to oversee interpretation and implementation of the Charter. However, so far the Africa Union Commission has not issued any guides on interpretation or implementation of article 18.

##### *(2) The obligation to report on measures taken against torture*

The African Youth Charter does not contain reporting obligations. It tasks the African Union Commission to collaborate with states and NGOs to develop best practices for

[595] As above; see also African Commission, *Concluding observations and recommendations on the eighth to eleventh periodic report of the Republic of Kenya* 16-25 February 2016 paras 34 & 64.
[596] African Youth Charter preamble paras 2 to 9.
[597] African Youth Charter preamble last para.

youth policy formulation and implementation,[598] but does not require state parties to submit periodic reports on their implementation of the provisions of the Charter.

*2.5.1.6 African Charter on Democracy, Elections and Governance (ACDEG) 2007*

ACDEG was adopted by the AU in 2007 and entered into force in February 2012. It highlights the significance and interrelatedness of good governance, popular participation, rule of law, human rights and also confirms that insecurity, instability and violent conflicts in Africa are caused by unconstitutional changes of governments.[599] It links democracy and respect for human rights across its provisions.[600] The ACDEG also mandates the state parties to implement its provisions in accordance with a number of principles, including 'respect for human rights and democratic principles'.[601] Although the ACDEG does not have a specific provision on torture, it mandates generally that state parties shall commit themselves to promotion of democracy, rule of law and human rights;[602] and ensure that citizens enjoy fundamental freedoms and human rights, taking into account their universality, interdependence and indivisibility.[603] This thus imposes obligations against torture as illustrated in the next section.

*(1) The obligations to prevent and prohibit torture, punish its perpetrators, and provide redress to its victims*

The specific obligations imposed on state parties are: to take all necessary measures to strengthen organs of the AU, to promote and protect human rights and to fight impunity and endow the said AU organs with the necessary resources.[604]

State parties are also enjoined to eliminate all forms of discrimination based on political opinion, gender, ethnic, religious and racial grounds, as well as any other

[598] African Youth Charter article 28.
[599] ACDEG preamble paras 1 and 9, which also make reference to articles 3 and 4 of the Constitutive Act of the AU.
[600] ACDEG article 2(1).
[601] ACDEG article 3(1).
[602] ACDEG article 4.
[603] ACDEG article 6.
[604] ACDEG article 7.

forms of intolerance.[605] As illustrated under the UN Genocide Convention, CERD and CEDAW, discrimination on the basis of ethnicity, race and even gender has in some instances amounted to acts of violence, which fit under article 1(1) of CAT. Therefore, by mandating state parties to root out all forms of discrimination, the ACDEG partly provides standards with which states must comply in order to protect individuals against torture.

Article 14 of the ACDEG mandates state parties to strengthen and institutionalise constitutional civilian control over the armed and security forces to ensure consolidation of democracy and constitutional order. Although this article does not specifically refer to torture, it will be illustrated in the next chapter of this thesis that failure by the civilian authority to exercise control over the armed forces has led to the incidences of torture in Lesotho. Therefore, by mandating state parties to ensure civilian control over armed forces, the ACDEG sets the standards to prevent torture.

Means of implementation of the obligations contained in the ACDEG are contained in article 44, which provides that state parties shall take appropriate measures, including legislative, executive and administrative actions to harmonise their national laws and regulations with the ACDEG. The legal framework must include laws, which prohibit violence, which give civilian authority power to control the armed forces and also prescribe punishment for violation of such laws. Implementation of these laws would therefore be a torture prevention measure.

*(2) The obligation to report on measures against torture*

The ACDEG vests the mandate to coordinate and evaluate its implementation in the African Union Commission. However, such evaluation does not involve periodic reporting by state parties. Rather, the African Union collaborates with other institutions of the AU such as the African Commission, Pan-African Parliament, Peace and Security Council and others, to deal with allegations of torture during unconstitutional changes of governments.[606]

[605] ACDEG article 8.
[606] ACDEG article 45.

#### *2.5.1.7 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (IDP Convention) 2009*

The IDP Convention is the first international instrument to focus on internally displaced persons. It was adopted in order to address the situation of internally displaced persons whose numbers and vulnerability are increasing in Africa.[607] It defines IDPs as:

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violation of human rights or natural or human-made disaster, and who have not crossed an internationally recognised state border.[608]

It mandates state parties to refrain from and to prevent the displacement of persons within their territories and also to protect IDPs whose displacement could not be prevented.[609] Article 9 mandates state parties to protect the rights of IDPs, regardless of the cause of displacement by refraining from, and preventing arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other CIDT,[610] sexual and gender-based violence in all its forms,[611] and starvation.[612]

##### *(1) The obligations to prevent and prohibit torture, punish its perpetrators, and provide redress to its victims*

States' obligations to prevent and prohibit torture, as well as the obligation to punish its perpetrators can be inferred from the general obligation for state parties to incorporate standards contained in the Convention into their domestic laws by enacting or amending relevant legislation on the protection and assistance of IDPs in accordance with international law.[613] In particular, state parties are mandated to

[607] IDP Convention preamble paras 1 & 2.
[608] IDP Convention article 1(k).
[609] IDP Convention article 3.
[610] IDP Convention article 9(1) (c).
[611] IDP Convention article 9(1) (d).
[612] IDP Convention article 9(1) (e).
[613] IDP Convention article 3(2).

criminalise and punish acts of displacement, which amount to genocide, war crimes or crimes against humanity,[614] and to hold members of armed groups criminally responsible for their acts.[615] States are also obliged to take primary duty and responsibility for providing protection of and humanitarian assistance to IDPs within their territory or jurisdiction without discrimination of any kind.[616]

In the event that the state has failed to prevent torture of IDPs, article 12 of the Convention enjoins such a state to provide persons affected by displacement with effective remedies through the establishment of an effective legal framework to provide just and fair compensation and other forms of reparation. Although the article makes reference to compensation for damages, which have been incurred as a result of displacement, it can be argued that it also includes compensation for torture, which resulted in displacement or took place during the displacement, whether caused by the government officials or by third parties.

*(2) The obligation to report on measures against torture*

Article 14 of the IPD Convention establishes a Conference of state parties as a body to oversee implementation of its provisions. With regard to reporting on torture, it provides that states should include in their reports submitted in terms of article 62 of the African Charter, legislative and other measures they have taken to implement the IDP Convention, thus including article 9 which mandates states to protect IDPs from torture.[617] The report therefore has to follow the form and content discussed under the African Charter above.

### *2.5.2 African regional soft* law

The focus of this thesis in relation to African regional soft law is on the AU Guidelines and measures for the prohibition and prevention of torture, cruel and inhuman or

[614] IDP Convention article 4(6).
[615] IDP Convention article 7(4).
[616] IDP Convention article 5(1).
[617] See Press release by the Special Rapporteur on refugees, asylum seekers, internally displaced persons and migrants in Africa on the occasion of the IDP Convention's entry into force, 6 December 2012 http://www.achpr.org/press/2012/12/d137/ [accessed 26 May 2017].

degrading treatment or punishment (Robben Island Guidelines or RIGs), adopted by the African Commission in 2002 in the Gambia and came into force in 2008.[618] Another relevant soft law which has been stated in section 2.5.1.2(2) above and hence not discussed under this section is African Commission General Comment 4 that deals with the obligation to provide redress.

The aim of the Robben Island Guidelines is to operationalise article 5 of the African Charter.[619] The Guidelines were adopted as a result of a suggestion by the Association for Prevention of Torture (APT) in October 2000 that there should be a workshop aimed at drawing concrete measures for the implementation of article 5.[620] The Guidelines do not create new obligations, but provide practical means through which obligations against torture contained in the African Charter and other international human rights instruments must be implemented.

The Robben Island Guidelines address the implementation of states' obligations, which are divided into three main categories of obligations: (1) to prohibit torture; (2) to prevent torture and (3) to provide redress to victims of torture.

*(1) The obligation to prohibit torture*

In terms of the Robben Island Guidelines, states' obligation to prohibit torture entails the duty to ratify regional and international human rights instruments on torture and to ensure that they are implemented at the domestic level through both legal and institutional mechanisms;[621] to promote and support cooperation with international mechanisms;[622] to criminalise all acts, which fit the CAT definition of torture in national laws, and to pay particular attention to gender- and age-based forms of

[618] Robben Island Guidelines (note 103 above).
[619] Robben Island Guidelines preamble para 7.
[620] African Commission 'special mechanisms' http://www.achpr.org/mechanisms/cpta/about/ [accessed 5 December 2016].
[621] Robben Island Guideline 1 encourages ratification of the Protocol to the African Charter on the establishment of the African Court, CAT, ICCPR, ICESCR and the Rome Statute.
[622] Robben Island Guideline 2 encourages promotion and support of the African Commission, Special Rapporteur on arbitrary, summary and extrajudicial executions in Africa and Special Rapporteur on the rights of women in Africa.

torture and ill-treatment;[623] to confer jurisdiction on national courts to try the crime of torture[624] and to impose appropriate penalties on those convicted of torture;[625] to recognise torture as an extraditable offence and to ensure expeditious extraditions in accordance with international standards;[626] to recognise non-derogability of torture,[627] and non-refoulement.[628]

In order to implement the obligation to prohibit torture in accordance with article 1, read with article 5 of the African Charter, the Robben Island Guidelines enjoin state parties to combat immunity and to ensure that those responsible for acts of torture and CIDT are subject to legal processes.[629] They thus have to restrict immunity laws, consider extradition requests expeditiously, accommodate the difficulties of proving ill-treatment suffered while in custody into the laws of evidence;[630] and establish readily accessible and fully independent complaints and investigations procedures for allegations of torture, which must be investigated promptly, impartially, effectively and in accordance with international standards.[631]

*(2) The obligation to prevent torture*

The Robben Island Guidelines set several procedural and substantive safeguards, which states must put in place in order to prevent torture. These include guaranteeing a detainee the right to have his or relative notified of the detention, the right to independent medical examination, access to an independent lawyer and the right to be informed of all these rights in a language understood by the detainee.[632] In order to prevent torture during the investigation of crimes, the Robben Island

[623] Robben Island Guidelines 4 & 5.
[624] Robben Island Guideline 6.
[625]Robben Island Guideline 12.
[626] Robben Island Guidelines 7 & 8.
[627] Robben Island Guideline 9 states that circumstances, such as war, threat of war or internal political instability or any other public emergency must not be invoked to justify torture or CIDT; Robben Island Guideline 10 rules out notions, such as necessity, national emergency, public order and ordre public from being invoked as justifications; Robben Island Guideline 11 nullifies the defence of superior orders from being a justifiable defence for commission of torture.
[628] In terms of Robben Island Guideline 15, states are reminded of the duty not to expel or extradite a person to a country where he or she faces the risk of being subjected to torture.
[629] Robben Island Guideline 16(a).
[630] Robben Island Guideline 16(a).
[631] Robben Island Guidelines 17, 18 &19.
[632] Robben Island Guidelines 20 & 31.

Guidelines enjoin states to establish regulations by which investigating officers are expected to abide.[633] States are also expected to ensure that criminal investigations are conducted by people who are subject to codes of criminal procedure;[634] that the detained people are immediately informed of the reasons for their detention and charges against them[635] and are promptly brought before courts and given a chance to be represented by lawyers of their own choice.[636] The right to challenge the lawfulness of the detention must also be guaranteed.[637] As a means of discouraging investigators from committing torture, the Robben Island Guidelines encourage proper keeping of interrogation records, including the names and identity of people present during interrogation,[638] and exclusion of evidence, obtained through torture, from being admissible in judicial proceedings.[639]

The Robben Island Guidelines also take cognisance of the fact that there is a high risk of torture in detention facilities. Therefore, in order to prevent torture in detention facilities, they provide that states should take steps to ensure that detained people are treated in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners.[640] These standards include reducing overcrowding and holding pre-trial detainees separately from convicted detainees and also holding women, children and other detainees in separate appropriate facilities.[641]

In order to ensure that these international standards are observed at all times, states are also encouraged to establish oversight mechanisms, which are independent from the detention and law enforcement authorities and give them mandate to receive, investigate and take appropriate action on allegations of torture;[642] supporting the independence of the judiciary and encouraging medical and legal professions to be

[633] Robben Island Guideline 21 provides that such guidelines must be guided by the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, adopted by UN GA Res.43/173 of 1988
[634] Robben Island Guideline 22.
[635] Robben Island Guidelines 25 & 26.
[636] Robben Island Guideline 27.
[637] Robben Island Guideline 32.
[638] Robben Island Guideline 28 also encourages the use of video or audio to tape interrogations.
[639] Robben Island Guideline 29
[640] Robben Island Guideline 37; UN Standard Minimum Rules for the Treatment of Prisoners UN ECOSOC Res. 2076 (LXII) of 1977.
[641] Robben Island Guidelines 35-37.
[642] Robben Island Guideline 40.

concerned with matters relating to torture prevention and prohibition,[643] to establish, strengthen and support national human rights institutions, such as the Human Rights Commissions and Ombudsman and to give them a mandate to visit places of detention and to address general issues of torture and CIDT.[644] The Robben Island Guidelines also list training of law enforcement and health personnel, as well as the public at large about the absolute prohibition of torture as a mechanism for its prevention.[645]

*(3) The obligation to provide redress to victims of torture*

The Robben Island Guidelines set out different forms of redress to victims of torture including protection of victims and witnesses of torture from intimidation or reprisal arising from the reporting or investigation,[646] monetary compensation, appropriate medical care and rehabilitation, as well as social rehabilitation and support.[647] Such reparation should also take into account the community perspective in terms of which, the families and communities whose member has been subjected to torture must be regarded as victims and therefore also entitled to rehabilitation.[648]

## 2.6 Conclusion

In this chapter, specific international human rights standards against torture have been set out. Through the discussion of the history of the international prohibition of torture, it has been illustrated that torture was not always proscribed at the international level, but that horrendous atrocities, which led to World Wars I and II pushed statesmen to realise that the protection of human rights is key to international peace and security and also that such protection should not be left in the hands of individual states, but that there should be international cooperation.

[643] Robben Island Guidelines 38 and 39.
[644] Robben Island Guideline 41.
[645] Robben Island Guidelines 45 and 47. In this regard states also have an obligation to support the NGO and media efforts on awareness raising about torture and CIDT.
[646] Robben Island Guideline 48.
[647] Robben Island Guideline 49 provides that victims of torture are entitled to the remedies regardless of whether there has been or could be a successful criminal prosecution.
[648] Robben Island Guideline 50.

The international cooperation for the protection of human rights was embraced in the form of multilateral treaties adopted under the auspices of the UN and at regional levels, including in the African region under the auspices of the OAU, which was later replaced by the AU. The massive ratification of international human rights instruments has been described by Conforti as transfer of protection of human rights from the national to the international sphere.[649] Gross violations of human rights are now considered to be matters of international, rather than exclusive domestic concern.[650] Inclusion of individuals in the international law arena therefore symbolises a change in the strategy of international law in terms of forums and institutions.

Customary international law, as well as treaty law in both the UN and AU human rights instruments set out general and specific obligations with which state parties must comply. These include the adoption of legislative, administrative, judicial and other measures for the prevention and prohibition of torture, the investigation of its allegations and punishment of its perpetrators, as well as provision of redress to its victims. Therefore, in order to achieve the ultimate aim of eradication of torture and other human rights violations, there is a need for harmonisation of the national legal frameworks with the international human rights standards against torture. On this basis, Lesotho's legal and institutional frameworks are evaluated against the international normative framework in the next chapter.

[649] B Conforti *International law and the role of domestic legal system* (1993) 3.
[650] Sohn (note 164 above) 7.

# CHAPTER 3

# LEGAL AND INSTITUTIONAL FRAMEWORKS AGAINST TORTURE IN LESOTHO

## 3.1 Introduction

> … it is essential, if a man is not to be compelled to have recourse… to rebellion against tyranny and oppression, that human rights should be protected by *the rule of law.*[651] (Emphasis added)

The above quotation, from the preamble of the Universal Declaration, illustrates the important role played by the rule of law in the protection of human rights, including the right to freedom from torture. Rule of law contemplates the existence of an effective legal system, which entails laws and mechanisms or institutions entrusted with the implementation of such laws.[652] In the previous chapter of this thesis, relevant binding and non-binding human rights standards against torture, as well as how such have been interpreted and applied in case law, general comments and recommendations of various human rights bodies have been set out. The thesis of this research is that the prohibition of torture cannot be achieved by the adoption of international standards alone, but also requires effective national legal frameworks, which incorporate the said international standards against torture.[653] Based on this thesis, the task at hand is to analyse Lesotho's national legal and institutional frameworks against torture from a human rights perspective.

This analysis is divided into four sections. In the first section, a general overview of the place of international law in the legal system of Lesotho is given. A historical approach, which illustrates how international law has been incorporated into the national legal system through succession, accession and ratification of various international instruments during different political phases, is adopted. It is also

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[651] Universal Declaration preamble para 3.
[652] C Saunders & K Le Roy 'Perspectives on the rule of law' in C Saunders & K Le Roy (eds) *The rule of law* (2003) 5. The authors discuss the three core principles on which the rule of law is based, namely governance of the polity by general rules laid down in advance, application and enforcement of these rules and lastly effective and fair resolution of disputes.
[653] HRC, GC 20 para 14.

illustrated how the courts of law have approached both customary international law and international treaties. In the second section, the national legal framework of Lesotho, namely the Constitution and other subsidiary laws are critiqued against the international standards against torture. In the third section, an assessment of the extent to which several institutions, which are tasked with the protection of human rights in Lesotho, comply with international human rights standards against torture is made. Institutions assessed in this regard include the LMPS, Police Complaints Authority, Office of the Ombudsman and Director of Public Prosecutions. In the last section of the chapter, a conclusion is drawn as to where in theory, Lesotho stands with regard to the implementation of its international human rights obligations against torture.

## 3.2 General overview of the place of international law in the legal system of Lesotho

Lesotho is party to several international human rights instruments, which clearly prohibit torture and create obligations for state parties in relation thereto. However, enjoyment of all human rights, including the right to freedom from torture does not rely solely on the existence of these provisions in international human rights instruments, but also on national legal mechanisms, which are put in place to ensure the implementation of such instruments. It is at the national level that individuals can easily access and enforce against their own governments, the rights and obligations contained in the ratified international human rights instruments.[654] This is in accordance with the principle of subsidiarity in terms of which individuals are required to exhaust local remedies before approaching an international or regional body to vindicate their human rights.[655]

[654] Viljoen (note 20 above) 10.

[655] CAT article 22(4) (b) requires exhaustion of local remedies. The following cases were declared inadmissible for failure to adhere to this requirement: *X. v Switzerland* (note 365 above) paras 8.1 to 8.7; *H. v Sweden* Communication 627/2014 (Committee against Torture), 5 August 2016, UN Doc CAT/C/58/D/627/2014 para 7.5 in which local remedies were not exhausted and the admissibility and merits of the communication had been dealt with by the European Court; *E.E. v The Russian Federation* Communication 479/2011 (Committee against Torture), 26 August 2012, UN Doc CAT/C/50/D/479/2011 para 8.4; *B.R. v Italy* Communication 598/2014 (Committee against Torture) 12 June 2016, UN Doc CAT/C/57/D/598/2014 para 6. Exceptions to the exhaustion rule were considered in the case of *Gerasimov v Kazakhstan* (note 382 above) para 11.5 in which the author's lawyer was given the decision of the lower court after the date of appeal and the Committee held that it was

In the context of the African human rights system, the principle of subsidiarity is contained in article 56(5) of the African Charter.[656] Sibanda argues that a close examination of article 1 of the African Charter in terms of which state parties undertake to 'recognise' the rights and freedoms contained in the Charter, article 56(5) on exhaustion of local remedies, and article 62 on state reporting, demonstrate that even in the African context, state parties are primary players in the protection and promotion of African Charter rights and freedoms, while the role of the African Commission is a subsidiary one.[657] It is therefore imperative for states to have national legal and institutional frameworks, which adequately protect human rights. The need for human rights-compliant legal and institutional frameworks is framed as a general state party obligation in several international human rights treaties, which mandate state parties to adopt legislative measures to implement their provisions.[658] Therefore, in order for the citizens of Lesotho to fully enjoy the right to freedom from torture as contained in the international human rights instruments discussed in the previous chapter, it is important for the national legal and institutional frameworks to be aligned with such instruments. Harmonisation of Lesotho's legal system with the international legal system on torture depends on how in theory and in practice international law is related to the municipal law of Lesotho.

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impossible for him to have appealed before approaching the Committee; *Dmytro Slyusar v Ukraine* (note 59 above) para 8.2; *Hanafi v Algeria* Communication 341/2008 (Committee against Torture) 3 June 2011, UN Doc CAT/C/46/D/341/2008 para 8.5 the Committee held that the local remedies had been unduly prolonged and therefore the authors were exempted from the requirement to exhaust local remedies before approaching the Committee.

656 Article 56(5) provides that 'communications relating to human and peoples' rights referred to in article 55, received by the Commission, shall be considered if they, '…are sent after exhausting local remedies, if any…' Exceptions to the exhaustion of local remedies rule include unavailability or when they are unduly prolonged; *The Nubian Community in Kenya v Kenya* Communication 317/2006 (African Commission) 19-28 February 2015 para 52. The Commission held that this case falls within the exceptions as complainants were unable to utilise local remedies because of many procedural and administrative bottlenecks put in their path. See also *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/2006 (African Commission) 18 - 19 February 2015, paras 40 - 50 in which the Commission held that the insecurities in Côte d'Ivoire rendered the local remedies unavailable as the authorities, which the victims had to approach for redress were the ones involved in the alleged violations. In *Atangana Mebara v Cameroon* Communication 416/2012 (African Commission) 18 May 2016 paras 63 & 69 the Commission held that local remedies had been unduly prolonged since the magistrate had not responded despite statutory timeframes for such response having expired.

657 S Sibanda 'Beneath it all lies the principle of subsidiarity: The principle of subsidiarity in the African and European regional human rights systems' (2007)40(3) *Comparative and International Law Journal of Southern Africa* 425.

658 CAT article 2; ICCPR article 2(2); CEDAW article 2; African Charter article 1; African Women's Protocol article 2(1).

The two main theories, which are often employed to determine the place of international law in a particular state, are monism and dualism.[659] On the one hand, monism views international law and municipal law as a single entity composed of binding legal rules.[660] Its proponents posit that there is a single universal system of law and that international law and municipal law are aspects of such system.[661] Monists insist that the two legal systems are interrelated parts of one legal structure.[662] According to the theory of monism, municipal courts are obliged to directly apply rules of international law at the same level as municipal laws.[663] Where the two legal systems clash, monism gives preference to rules of international law.[664] In its purest form, monism dictates that international law prevails over national laws and that a national law, which contradicts an international instrument is null and void, even if that national law is a constitution, whether passed prior to or post the state's ratification of or accession to an international instrument in question.[665] Supremacy of international law over municipal law in both international and national decisions thus underlies the theory of monism.

Dualism, on the other hand, treats international law and municipal law as two entirely distinct and separate legal systems.[666] Unlike in monism, where the underlying principle is that international law has primacy over municipal law in both international and national decisions,[667] dualist theory asserts that international law has primacy over municipal law in international decisions and municipal law has primacy over international law in municipal decisions.[668] In relation to dualists, Dugard states that

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[659] G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014)17 (14) *Potchefstroom Electronic Law Journal* 1472.
[660] JG Starke 'Monism and dualism in the theory of international law' in SL Paulson (ed) *Normativity and norms: Critical perspectives on Kelsenian themes* (1999) 537.
[661] As above.
[662] Starke (note 660 above) 539.
[663] DP O'Connell 'The relationship between international law and municipal law' (1960) 48 (3) *Georgetown Law Journal* 432.
[664] JF Coyle 'Incorporative statutes and the borrowed treaty rule' 50 (2010) 3 *Virginia Journal of International law* 656.
[665] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5.
[666] As above.
[667] O'Connell (note 663 above) 432.
[668] As above.

domestic courts can only apply international law if (a) it is adopted by the courts or (b) it is transformed into domestic law by national legislation.[669] In dualist jurisdictions, international law is regarded as having been incorporated into the domestic legal order only when expressly stated by a legislative enactment or when its articles are included, although not expressly, into a domestic law.[670] If international law is not transformed into national law through legislation, national courts cannot apply it.[671] Hence, dualism is also known as the transformation or adoption theory.[672]

The two theories of monism and dualism have been used to analyse the incorporation of international law into domestic legal systems of many countries and in almost all of them, the reality reflected through jurisprudence is different from the tenants of these two theories.[673] In the next sections of the chapter, an attempt will be made to illustrate that in the same manner, the legal system of Lesotho fails to fit squarely in either of these theories although it is often said to be dualist.[674] According to state party reports submitted to different treaty bodies,

> [i]n Lesotho, treaties are not invoked directly in domestic courts, that is, they are not self-executing. They have to be domesticated into national laws and administrative regulations in order to be enforced…[675]

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669 Coyle (note 664 above).
670 Killander & Adjolohoun (note 665 above) 9. See also *Basotho National Party and Another v Government of Lesotho and Others* Constitutional Case No. 5/2000 [2003] LSHC 6, 22.
671 As above.
672 Killander & Adjolohoun (note 665 above) 9.
673 J Sloth-Nielsen & K Hove 'Mudzuru and another v The Minister of Justice, Legal and Parliamentary Affairs and 2 Others: A review' (2015) 15 *African Human Rights Law Journal* 554. The authors highlight the use of international law and foreign case law by Zimbabwean Courts and how such has been bolstered by constitutional provisions in the new Constitution of Zimbabwe, which requires courts to consider international law in the interpretation of the provisions of the Constitution; D Tladi 'Interpretation and international law in South African Courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 3 in which the author illustrates the practical challenges to interpretation of international law in a supposedly international law-friendly South African constitutional framework. Some of the challenges identified include a clash between international and domestic rules of interpretation; D Tladi 'Interpretation of treaties in an international law-friendly framework: The case of South Africa' in HP Aust & G Nolte (eds) *The interpretation of international law by domestic courts: uniformity, diversity, convergence* (2016). See also N Botha 'Justice Sachs and interpretation of international law by the Constitutional Court: Equity or expediency?' (2010) 25 *South African Public Law* 253.
674 For instance, *BNP v Government of Lesotho and others* (note 670 above) and other cases considered in section 3.2.6.1 of this thesis, the Courts have referred to the legal system of Lesotho as being dualist.
675 CMW Committee, *The initial state party report for Lesotho* para 1.

Categorisation of Lesotho as dualist is based on Lesotho's history, which includes the heritage of Roman Dutch Common Law, as well as a constitutional supremacy clause in section 2 of the Constitution.[676] As will be illustrated below, jurisprudence of the courts of Lesotho does not explicitly reflect dualism as it is defined in theory, but rather reflects a mixture of both dualism and monism. There is neither consistency nor predictability as to how a particular judge will approach a question of application of international law against torture in domestic courts if such arises in a case because categorisation of Lesotho as dualist is theoretically supported by the Constitution and other pieces of legislation while jurisprudence paints a totally different picture.

The disparity between theory and practice as far as the application of international law in Lesotho is concerned is highlighted in the next sections through an analysis of the legal system of Lesotho from a historical perspective, including ratification of international instruments, enactment of corresponding domestic laws, submission of reports to relevant treaty bodies and the courts' reasoning for accepting or rejecting reliance on international law in domestic courts. In order to make a clear illustration, this section is not limited to the application of international instruments against torture, but extrapolates Lesotho's conduct in relation to international law in general as the courts' attitude to general international law gives a picture of how the courts would approach the application of international human rights standards against torture.

### *3.2.1 International law in the legal system of Lesotho prior to independence (pre-1966)*

Lesotho was formerly known as Basutoland, named after a nation called the Basotho who occupied the territory during the 1800s.[677] The Basotho as a nation was formed by the unification of a number of clans and displaced refugees who had come to Moshoeshoe for protection against Shaka Zulu and the Boers who invaded their

[676] GJ Van Niekerk 'Constitutional protection of common law: The endurance of civilian tradition in Southern Africa' (2012) 18 (1) *Fundamina: A Journal of Legal History* 115.
[677] S Rosenberg & RF Weisfelder *The historical dictionary of Lesotho* (2013) 472.

homelands in the 1800s.[678] These conflicts drove most Africans out of their homelands and forced them to seek refuge in Thaba-Bosiu where Moshoeshoe had established a fortress.[679] Moshoeshoe subsequently gathered all those who had come to him for protection and founded the Basotho nation for whom he became King.[680] His Kingdom became known as Basutoland (later named Lesotho).[681]

During the Great Trek, white settlers (also known as the Boers) arrived in the Cape Colony.[682] In the mid-1820s, they crossed the Orange River into Moshoeshoe's territory and allegedly requested him to settle there.[683] Moshoeshoe's view was that he had lent them the territory, but the Boers later claimed to have rights over it.[684] These divergent views about ownership of land led to conflicts between the Basotho who occupied Basutoland and the Boers who occupied the current South Africa.[685] The conflicts gave rise to a number of bilateral treaties between the two territories thus bringing international law into play.

The first territorial treaty was signed between Moshoeshoe and Napier who represented Great Britain in 1843.[686] According to this treaty, the British recognised Basotho sovereignty over the land between the Orange and Caledon rivers.[687] The Boers, who had settled in some areas included in the 1843 treaty did not recognise this territory and continued their invasion and attempts to conquer more of Moshoeshoe's land.[688] In 1845, the territorial treaty was altered by Governor Maitland to legally recognise the Boers' settlement.[689] This alteration of the 1843 Treaty fuelled more conflicts between the Basotho and the Boers. The British ended up drawing new boundaries, which separated the territories and this time leaving

[678] S Poulter *Legal Dualism in Lesotho* (1981) 1.
[679] As above.
[680] As above.
[681] As above.
[682] *South African History Online* 'Basotho wars: 1858-1868' http://www.sahistory.org.za/south-africa-1806-1899/basotho-wars-1858-1868 [accessed 14 February 2016].
[683] As above.
[684] As above.
[685] As above.
[686] Napier Treaty of 1843.
[687] EA Eldredge *A South African Kingdom: the pursuit of security in nineteenth century Lesotho* (1993) 50.
[688] As above.
[689] South African History Online (note 682 above).

lesser land for Moshoeshoe. These boundaries became known as the Warden Line (named after the British Resident in Bloemfontein, Henry Warden).[690] The Warden Line was not welcomed by Moshoeshoe and his people and a fierce conflict between the British and the Basotho ensued, resulting in the Battle of Viervoet in 1851 and another in 1852 in the Berea Plateau.[691] The British were defeated in both battles. They then realised that the cost of maintaining sovereignty became too high and they handed over the territory to the Boers through the signing of the Sand River Convention.[692]

Upon their takeover, the Boers demanded land beyond the Caledon River, and named the new territory the Republic of the Orange Free State (Free State).[693] The demand for more land ignited new feuds between the Basotho and the Boers. President of the Free State, JN Boshof declared war against the Basotho, resulting in the War of Senegal in March 1858 in which Moshoeshoe was almost defeated.[694] After this war, an uneasy peace between the two territories followed and in 1861, Moshoeshoe requested protection from Britain.[695] Moshoeshoe's request for Britain's involvement in the conflict between Moshoeshoe and the Boers also manifests a principle of international law, namely the concept of humanitarian intervention in modern international law.[696]

In 1865, the Free State launched heavy attacks against Moshoeshoe and his people. This conflict became known as Seqiti War.[697] By the late 1860s, Moshoeshoe and the Basotho people were exhausted and at the edge of famine as a result of these struggles.[698] Their total defeat by the Boers was also looming.[699] Moshoeshoe then renewed his entreaty for British Protection and in March 1868, the British Parliament declared the Basotho Kingdom a British Protectorate.[700] The Boers discontinued the

[690] Eldredge (note 687 above) 51.
[691] South African History Online (note 682 above).
[692] Eldredge (note 687 above) 55.
[693] As above.
[694] As above.
[695] As above.
[696] Rosenberg & Weisfelder (note 677 above) 374.
[697] South African History Online (note 683 above).
[698] Poulter (note 678 above) 2.
[699] As above.
[700] As above.

war and in February 1869, boundaries were agreed upon between Basutoland and the Republic of the Free State presently, known as Lesotho and South Africa respectively. These boundaries were drawn in the Convention of Aliwal North.[701]

The history above reflects that from its foundation as a sovereign state and even when it had become a British protectorate, Lesotho's affairs were governed by international law. The conflicts, which Lesotho had with the British, as well as the Boers, resulted in the conclusion of several peace and boundary treaties. Moshoeshoe viewed the said international law as binding on him and his people.[702] To date, the boundaries between Lesotho and South Africa remain as stipulated in the Aliwal North Convention. However, there is no literature, which suggests that international law was applied to solve domestic disputes during Moshoeshoe's reign. This could be influenced by several factors, such as the fact that during that time, Moshoeshoe and his Chiefs who also acted as legislatures focused more on stabilising their territories and solving territorial disputes than on internal disputes amongst the subjects.[703] The other factor could be the effect of General Proclamation 2B of 1884, which dictated that domestic disputes were to be resolved by domestic laws as illustrated below.

As referred to earlier, when the British became frustrated and realised the high cost of the peaceful administration of Basutoland, they quickly handed the territory over to the Cape for it to administer.[704] As far as the legal system was concerned, the High Commissioner issued General Law Proclamation 2B of 1884 (the Proclamation), which made law that was applicable in the Colony of the Cape of Good Hope at the time to be equally applicable in Lesotho. The Proclamation reads as follows:

> In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided, however, that in any suits, actions,

[701] As above.
[702] Although there is no literature which reflects Moshoeshoe's views about the treaties, the fact that the boundaries agreed upon during his time remain to date, is a clear indication that he accepted the boundaries as agreed and viewed them as binding.
[703] WCM Maqutu *Contemporary constitutional history of Lesotho* (1990) 17.
[704] As above.

> or proceedings in any Court, to which all parties are Africans, and in all suits, outcomes or proceedings whatsoever before any Basotho Courts, African law may be administered.[705]

This Proclamation imported Roman Dutch Law and its legal traditions into Lesotho although it still left room for the application of African law (later known as Sesotho customary law), thus creating a dualist system, which still applies today.[706] In terms of this legal dualism, Sesotho customary law operates side by side with the 'received law'.[707] It is perhaps at this stage that Roman Dutch Law traditions, including a dualist approach with regard to the relationship between international law and municipal law, were imported into the legal system of Lesotho. During the time when Lesotho was its protectorate, the United Kingdom concluded international treaties and extended their application to Lesotho while at the same time the Cape passed Proclamations, which were meant to run the country. Proclamation 2B did not make any reference to international law nor to its status *vis-à-vis* other Proclamations, which were passed. However, an inference, which can be drawn from its wording, is that the status of international law in Lesotho during its protectorate days would be that which obtained in the Cape Colony of Good Hope, which was dualism as influenced by the English legal system.[708]

Although it is argued in this research that Lesotho's dualist approach to international law was mainly influenced by the British legal system, Killander and Adjolohoun warn that the description of the English legal system as the epitome of dualism is arguably exaggerated for a number of reasons: firstly, customary international law formed and continues to form part of the law of the land in England, as well as many common law countries.[709] Secondly, unincorporated treaties still play an increasingly important role in the English legal system, though the courts may not directly apply them.[710] This objection notwithstanding, it suffices to conclude that the dualist approach to international law in Lesotho became more evident when Lesotho became a British protectorate. Therefore, the Roman Dutch and English systems as

[705] JE Beardsley 'The Common Law in Lesotho' (1970)14(3) *Journal of African Law* 198.
[706] Poulter (note 678 above) 18. See also *Lesetla v Matsoso* (High Court) 11 October 2002 [2002] LSCA 14 para 10.
[707] As above.
[708] Maqutu (note 703 above).
[709] Killander & Adjolohoun (note 665 above) 11.
[710] As above.

introduced by Proclamation 2B acts as a cradle for continued dualism in Lesotho. However, as will be illustrated in the next political phases, the Courts of Lesotho did not stick to tenets of dualism as described in theory, but ventured to approach international law through a mixture of both dualism and monism. It would therefore be misleading to categorise Lesotho in terms of the dualist/monist dichotomy as court practice does not fit squarely into either theory.

### *3.2.2 The legal system post-independence and prior to the state of emergency (1966 - 1970)*

Lesotho continued to be a British Protectorate until 1966 when it had its first democratic elections. These elections were governed by the first Constitution, which was approved by the British Royal Decree in January 1965.[711] The elections were held in preparation for independence from Britain, which took place on 4 October 1966. Following the 1965 elections and attainment of independence, the parliament of Lesotho passed an Independence Order of 1966 on the basis of which a new Constitution was adopted by Lesotho, now as an independent state.[712] The 1966 Constitution was based on the British model although it had a Bill of Rights, which was influenced by constitutional practice of the United States of America.[713] The 1966 Constitution did not make any provision for international law, but had a constitutional supremacy clause.[714] That is, the international instruments to which Lesotho was a party would only be applicable to the extent that they did not contradict provisions of the Constitution. Thus, in cases of conflict between international law and the constitution, the national constitution is elevated above international instruments.

As far as other laws which had been passed by the Colony of the Cape of Good Hope were concerned, the 1966 Constitution did not do away with them. They continued to operate. Some were slowly phased out and some are still part of the

[711] M Khaketla *Lesotho: 1970 An African coup under the microscope* (1992) vii.
[712] Maqutu (note 703 above) 17.
[713] As above.
[714] Constitution of Lesotho 1966 section 2 provided that 'the Constitution of Lesotho is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law, shall, to the extent of the inconsistency, be void'.

laws of Lesotho to date. This status is highlighted by Palmer and Poulter in the following words:

> The newly independent state of Lesotho took over the existing laws that had previously been in force in Basutoland, though in future they were to be construed with any modifications, adaptations, qualifications and exceptions required to bring them into conformity with the independence legislation, namely the Constitution…[715]

As an acknowledgment of the relevance of international law to Lesotho as a new independent state, in the same month that it gained independence, Lesotho ratified three conventions of the International Labour Organisation (ILO).[716] These Conventions were later domesticated through the Labour Code Order 1992, which provides that 'no provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any International Labour Convention which has entered into force for the Kingdom of Lesotho'. [717]

Lesotho also took cognisance of the fact that there were international treaties, which the government of the United Kingdom had concluded on its behalf during the time when Lesotho was under British protection. However, Lesotho neither hastened to be immediately bound by those treaties, nor to discharge itself from their obligations altogether. It proposed a twenty-four month period running from the date of independence to review its position as regards such treaties. What was to happen to Lesotho's treaty obligations in the interim during this review period was contained in a letter of 22 March 1967 written by the Prime Minister of Lesotho to the Secretary General of the United Nations. The letter reads as follows:

[715] V Palmer & S Poulter *The legal system of Lesotho* (1972) 41; TLC Lenka 'A historical and comparative study of human rights violations in criminal investigations in Lesotho' unpublished LLD thesis, University of the Free State 2010.
[716] Convention Concerning Forced or Compulsory Labour 1930, Right to Organise and Collective Bargaining Convention 1949 and Freedom of Association and the Right to Organise Convention 1948; all of which were ratified on 31 October 1966.
[717] Labour Code Order 1992 Section 4 (b).

Your Excellency,

The government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, (of) legal continuity between Lesotho and the several states with which, through the actions of the government of the United Kingdom, the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the government of the Kingdom of Lesotho takes the present opportunity of making the following declarations:

1. As regards bilateral treaties validly concluded by the government of the United Kingdom, on behalf of the country formerly known as Basutoland, or validly applied or extended by the said country to the country formerly known as Basutoland, the government of the Kingdom of Lesotho is willing to continue to apply within its territory on the basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (i.e. until October 4, 1968) unless abrogated by mutual consent. At the expiry of that period, the government of the Kingdom of Lesotho will regard such of these treaties which could not by application of customary international law be regarded as otherwise surviving, as having terminated.
2. …
3. The government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depository in each case what steps it wishes to take in relation to each such instrument, whether by way of confirmation of termination or confirmation of succession or accession. During such interim period of review, any state party to a multilateral treaty which has, prior to independence been applied or extended to the country formally known as Basutoland, may, on the basis of reciprocity, rely as against Lesotho on the term of such treaty.
4. It would be appreciated if your Excellency would arrange for the text of this declaration to be circulated amongst all members of the United Nations.

Please accept, Sir, the assurance of my highest consideration.

Signed LEABUA JONATHAN (Prime Minister).[718]

The implications of this letter to Lesotho's international human rights obligations are discussed in more detail in the case of *Joe Molefi*, which is considered later on in this

[718]*Joe Molefi v Legal Advisor & Others* [1970] 3 ALL ER 724, 17 June 1970 para 12 www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1901-52-2-01jpeg.pdf [Accessed 4 April 2017].

chapter. What is important to highlight at this juncture is the fact that from the time of independence, Lesotho was aware that being a party to international treaties, whether bilateral or multilateral, carries with it certain obligations with which state parties are expected to comply; hence immediately upon entry into power, the government took a stance as regards such obligations. The letter does not reflect a dualist approach to international law in which case the government would claim that in the absence of any domesticating laws, any international instrument to which the British government was a party or made Basutoland a party would not be binding on the government of Lesotho.

After the twenty-four months review period, Lesotho continued to ratify international treaties, such as the four Geneva Conventions 1949,[719] and the Convention of the Privileges and Immunities of the UN 1946.[720] Some aspects of the Geneva Conventions have been domesticated in that the Penal Code Act criminalises grave breaches of international humanitarian law including torture, which is committed as part of war crimes and crimes against humanity.[721] The Penal Code Act specifically makes reference to the Geneva Conventions.[722]

### *3.2.3 The legal system during the state of emergency (1970 - 1986)*

The 1966 Constitution was suspended in 1970 following Lesotho's second democratic elections. The then ruling party, Basotho National Party (BNP), which had won the elections in 1965, lost to the opposition Basotho Congress Party (BCP). As the results were being announced over the national radio station, the Prime Minister, Leabua Jonathan, declared a state of emergency and suspended the

[719]Geneva Convention for the Amelioration of the condition of the wounded and sick in armed forces in the field (1st Geneva Convention) 12 August 1949, Geneva Convention for the Amelioration of the condition of the wounded and sick and shipwrecked members of armed forces at sea (2nd Geneva Convention), Geneva Convention relative to the treatment of prisoners of war (3rd Geneva Convention), ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention) 12 August 1949. Lesotho ratified all four Geneva Conventions on 20 May 1968.

[720] Convention of the Privileges and Immunities of the UN 1946. Lesotho ratified it on 26 November 1969.

[721] Penal Code Act 2010 sections 94 & 95.

[722] As above.

Constitution 'pending the drafting of a new one'.[723] He justified this suspension on the basis that the election had been marred by acts of violence against BNP supporters and was, therefore, unfair.[724] However, he did not mention that there were any flaws in the Constitution, which warranted such a suspension nor the need for its re-drafting precipitated.[725]

After suspending the Constitution, the Prime Minister then established a Council of Ministers (the Council) composed of members of the former cabinet. The Council performed legislative functions and in 1973, it passed the Lesotho Order of 1973, which constituted an Interim National Assembly (INA). The INA passed several laws from 1973 to 1986 when the military toppled the government through a *coup d'état*. Amongst laws passed by the INA was the Parliament Act of 1983, which would act in the place of a Constitution.[726] According to a number of authors who wrote on Lesotho's constitutional changes, suspension of the Constitution was followed by massive human rights violations and disregard for international law.[727] It is argued that some of the human rights violations were sanctioned by laws passed by the Council of Ministers and the INA.[728] Lesotho adopted a strict dualist approach to international law in terms of which the Prime Minister ignored all voices of the international community and stood firm that whatever was happening in Lesotho was Lesotho's problem, to be solved according to the laws of Lesotho and that international law had no place in the national legal system.[729] A dualist approach to international law in Lesotho during this period can be inferred from the fact that there were laws promulgated during the period, which stipulated expressly that their enactment was meant to give effect to certain principles contained in international human rights instruments which Lesotho is a party. For example, section 13 of the 1983 Refugee Act of Lesotho made specific reference to the UN Refugee Convention of 1951. The impression given by express mention of section, a specific

[723] Maqutu (note 703 above) 44.
[724] As above.
[725] As above.
[726] Maqutu (note 703 above) 14.
[727] As above.
[728] As above.
[729] As above.

international instrument, is that any other convention, which is not expressly mentioned in an Act of parliament, is not considered law in Lesotho.

Legitimacy of Orders passed by the Council of Ministers and the INA was dealt with in the case of *Moerane and nineteen others v R*[730] and later in *Khaketla v The Prime Minister and others.*[731] In the *Moerane* case, the appellants had been charged with treason. They in turn argued that the government did not have *majestas* (Latin term meaning dignity) and therefore laws passed by the INA and the Council, which were established by a questionable government, ought to be declared invalid. They urged the Court to recognise the 1966 Constitution and to find that the government had violated human rights contained in the 1966 Constitution. The Court relied on the doctrine of efficacy[732] and recognised the declaration of the state of emergency as a revolution, which gave *majestas* to the government of the day. Consequently, it held that all laws passed by the government were lawful as was the suspension of the 1966 Constitution.[733]

Having been declared lawful, the BNP government continued its international relations and ratified a number of international treaties, including CERD in 1971, the Genocide Convention in 1974, as well as the UN Refugee Convention and its 1967 Protocol in 1981.[734] However, during this period, no domestic laws were enacted to implement the provisions of CERD and the Genocide Convention despite that article 2(1) of CERD and article 5 of Genocide Convention mandate state parties to adopt legislative measures to implement their provisions. These conventions were also not applied by the Courts. The only laws which implemented aspects of Lesotho's obligations against torture contained in the UN and OAU Refugee Conventions are

[730] *Moerane and 19 others v R* 1974-1975 Lesotho Law Reports 212.
[731] *Khaketla v The Prime Minister and others* (High Court) 24 July 1985 [1985] LSCA 118, 10.
[732] The doctrine of efficacy was propounded by an Austrian jurist and philosopher, Hans Kelson, and refers to the idea of pure theory of law, that is, focusing on the law as it is without diluting its content with any other doctrines, such as political ideology or morality. *Stanford Encyclopaedia of Philosophy* (2010) 'The pure theory of law' http://plato.stanford.edu/entries/lawphil-theory [accessed 18 August 2015].
[733] *Khaketla v The Prime Minister and others* (note 732 above).
[734] Conventions ratified during this period include: CERD 1965, Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery 1956, Convention on Status of Stateless Persons 1954, Genocide Convention 1948, International Convention for Suppression of Unlawful Seizure of Aircraft 1970, Convention against Taking of Hostages 1979, UN Refugee Convention 1951.

the Aliens Control Act of 1966 and the Refugee Act of 1983, which are discussed in the next section.

In terms of article 9 of CERD, Lesotho's initial report to the CERD Committee was due in 1972, one year after its entry into force in Lesotho and subsequent reports in 1974 and every two years thereafter. However, Lesotho's initial report was submitted in 1998, more than twenty-five years after CERD's entry into force in Lesotho, and to date, no subsequent reports have been submitted. The reporting obligations under the UN and OAU Refugee Conventions to provide the UNHCR or other UN bodies with information regarding conditions of refugees, implementation of the Convention and domestic laws governing refugees in a particular state party were fulfilled by chance because firstly, the Conventions do not stipulate the time within which to report. Secondly, the era of the state of emergency in Lesotho coincided with the era of apartheid in South Africa.[735] Because of an influx of refugees from South Africa into Lesotho, particularly after the 1976 Soweto uprising, the UNHCR established a Refugee office in Lesotho.[736] Thus, information required under article 35 of the UN Refugee Convention was within UNHCR's reach. The BNP government was toppled by the military in 1986. Below is an analysis of how the military regime approached international law.

### *3.2.4 The legal system during military rule (1986 - 1993)*

In 1986, the Royal Lesotho Defense Force (RLDF), under the leadership of Major General Metsing Lekhanya, launched a *coup d'état* against the BNP government.[737] The military regime repealed the 1983 Act and passed Lesotho Order No. 2 of 1986, which was to work as the country's Constitution.[738] The military government ruled for about five years and in 1991 it was toppled by another group of the army called the 'captains' under the leadership of Colonel Elias Phitšoane Ramaema.[739] The

[735] UNHCR 'Feature: Lesotho marks the end of an era for apartheid's refugees' (22 August 2002 http://www.unhcr.org/afr/news/latest/2002/8/3d6a139e4/feature-lesotho-marks-end-era-apartheids-refugees.html?query=Lesotho [accessed 5 June 2017].
[736] As above.
[737] Maqutu (note 703 above) 71.
[738] Maqutu (note 703 above) 4.
[739] JA Kalley, E Schoeman & LE Andor *Southern African Political History: A chronology of key political events from independence to mid-1997* (1999) 149.

Ramaema military regime set aside the 1986 Order and promulgated Lesotho Order No. 2 of 1990 as the basis of its power.[740]

Legitimacy of the Orders passed by the military regime and the request for the recognition of the 1966 Constitution were raised before the High Court in *Mokotso and others v King*.[741] The Court held that taking into account a 'notorious' fact that the Military government was in effective control throughout the country and had for two years been ruling the country using the three arms of government, it had inherited all obligations and responsibilities of the previous government and therefore had to be viewed as a legitimate power.[742] Consequently, the 1986 Lesotho Order was regarded as the nation's principal law in force during that time.

Unlike the 1966 Constitution, which expressly provided for constitutional supremacy, the 1986 Order did not. Therefore, the place of international law *vis-à-vis* the laws of Lesotho during this time, is unknown. However, the military regime continued to ratify, as well as accede and succeed to a number of international human rights instruments, including the OAU Refugee Convention 1969, ICESCR 1966, ICCPR 1966, African Charter 1981 and CRC 1989. It is interesting to note that despite this massive ratification, Lesotho did not comply with the obligations contained in these international instruments. It did not enact laws aimed at implementing these instruments at the domestic level as required;[743] and did not submit any state party reports to indicate measures adopted to implement these instruments.[744] The international instruments were also not applied in the courts. Neither were reports in respect of treaties, which had earlier been ratified, acceded or succeeded to by the BNP government submitted.

The conclusion that the status of international law in the legal system of Lesotho during this period remained unknown is supported by the fact that there is no case

[740] As above.
[741] *Mokotso and others v King* CIV/APN/384/1987 (unreported) 10.
[742] As above; JS Read 'Mokotso and others v H. King Moshoeshoe II and others' (1999) 53(1/2) *Journal of African Law* 209.
[743] ICESCR article 2(1), ICCPR article 2(2), African Charter article 1 and CRC article 3(2) mandate the adoption of legislative measures which harmonise domestic legal systems with their provisions.
[744] ICESCR article 16; ICCPR article 40; CMW article 73; African Charter article 62 and CRC article 44 require state reporting.

law, which reflects the use of international law in the domestic courts of Lesotho during this period. An argument based on dualism would be inconsistent with Lesotho's international human rights obligation as the ICESCR Committee has stated that 'in general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals'.[745]

### *3.2.5 The legal system during democratic rule (1993 - the Present)*

In 1991, when Ramaema and 'the captains' removed Lekhanya from power, they promised to restore civilian rule. Indeed, in the following year, 1992, preparations for elections and the adoption of a new Constitution were made. Having been under a military regime for almost a decade, Lesotho had democratic elections, which ushered in a new Constitution in 1993. Several 'undemocratic decrees', which were passed by the self-imposed BNP government and the military regime, were repealed in favour of laws that adhered to the Bill of Rights, which was contained in the 1993 Constitution. In effect, the 1993 Constitution is a replica of the 1966 Constitution. It could be argued that the reason for this replication is that, in the first place, there was nothing wrong with the 1966 Constitution, which warranted its suspension. Unlike the Constitution of other countries, such as the 1996 Constitution of South Africa, the 1993 Constitution of Lesotho is silent on the place of international law in Lesotho.[746] However, just like the 1966 Constitution, it has the supremacy clause which places all other laws subject to the Constitution.[747]

Since democratic rule in 1993, Lesotho ratified and/or acceded to several international human rights instruments, such as CEDAW, the Equal Remuneration Convention 1951(No. 100),[748] Discrimination (Employment and Occupation) Convention 1958,[749] the African Charter on the Rights and Welfare of the Child, the

[745] ICESCR Committee, GC 9 para 4.
[746] Constitution of South Africa 1996 sections 231 & 232.
[747] Constitution of Lesotho 1993 section 2.
[748]Lesotho ratified on 27 Jan 1998.
[749]Lesotho ratified on 27 Jan 1998.

Optional Protocol to ICCPR 1966,[750] the ILO Convention against Child Labour 1999,[751] the Abolition of Forced Labour Convention 1957,[752] CAT, Occupational Health and Safety Convention 1981,[753] UN Convention Against Transnational Organised Crimes 2000,[754] Protocol Against Smuggling of Migrants 2000,[755] Optional Protocol to CRC on the involvement of children in armed conflict 2000,[756] Protocol to the African Charter on establishment of the African Court on Human and Peoples Rights 1998,[757] Convention for the Suppression of Traffic in Persons 1949,[758] Optional Protocol to CEDAW 1999,[759] Convention on Reduction of Statelessness 1961[760] and Convention on the Rights of Persons with Disabilities.

During this period, the government of Lesotho ratified more instruments than it did in the past. This era also saw a change in the pattern of submission of state party reports to international treaty bodies. Lesotho started submitting reports on the implementation of several treaties, such as ICCPR, CRC, CERD, CEDAW and CMW.[761] Its report to the CEDAW Committee, for instance, outlines legislative and policy measures, which have been put in place to combat gender-based violence, which is linked to torture.[762] Its First Periodic Report to the Committee on the Rights of the Child refers to constitutional and legislative measures put in place to prohibit the torture of children.[763] Although it is not in all reports that Lesotho's obligations were mentioned, what is commendable, however, is that during this period, Lesotho

[750]Lesotho ratified on 6 Sept 2000.
[751]Lesotho ratified on 14 June 2001.
[752]Lesotho ratified on 14 June 2001.
[753]Lesotho ratified on 1 Nov 2001.
[754]Lesotho ratified on 24 Sept 2003.
[755]Lesotho ratified on 24 Sept 2003.
[756]Lesotho ratified on 24 Sept 2003.
[757]Lesotho ratified on 28 October 2003.
[758]Lesotho ratified on 24 Sept 2004.
[759]Lesotho ratified on 24 Sept 2004.
[760]Lesotho ratified on 24 Sept 2004.
[761] See Lesotho's initial report to the HRC, 16 October 1998, UN Doc CCPR/C/81/Add.14; Lesotho's initial report to the CERD Committee, 8 September 1998, UN Doc CERD/C/337/Add.1; Lesotho's initial Report to the Committee on the Rights of the Child, 20 July 1998 UN Doc CRC/C/11/Add.20; Lesotho's initial to fourth Periodic Reports to the CEDAW Committee 26 August 2010 UN Doc CEDAW/C/LSO/1-4; Lesotho's initial Report to the Committee on Migrant Workers, 13 April 2016, UN Doc CMW/C/LSO/1.
[762] Lesotho's initial to fourth periodic report to the CEDAW Committee (note 757 above) paras 24, 27, 31, 46 & 57 in which it is acknowledged that gender roles and stereotypes perpetuate gender-based violence.
[763] Lesotho's First Periodic Report to the Committee on the Rights of the Child, 16 November 2016, UN Doc CRC/C/LSO/2 paras 128 - 137.

seems to have appreciated that state reporting is an obligation, which has to be fulfilled; thus practical compliance with the reporting obligation, which had not been complied with by previous regimes. The change in trend towards international law did not only remain with ratification of treaties and filing of state party reports, but was also illustrated in the enactment of laws,[764] and further influenced the application of both customary international law and international treaty law in the courts of Lesotho as discussed in detail below. Post 1993, the courts started applying international law and making pronouncements, albeit inconsistent, which shed some light on the applicability of international law in the legal system of Lesotho.

### *3.2.6 Application of international law in the courts of Lesotho*

#### *3.2.6.1 Courts' application of customary international law*

Customary international law, unlike international treaty law (discussed in the next section) is seldom applied or even referred to in the courts of Lesotho. One of the few cases in which a principle of customary international law was implied is the case of *Lekhoaba v Minister of Home Affairs*.[765] In this case, the court held that while dual citizenship is proscribed by the 1993 Constitution, section 42, however, provides that parliament may not under any circumstances make a provision whose effect would render any person stateless. This, the Court emphasised, 'is an *immutable principle of the law of nations*, which declares that every human being cannot be stateless and has an inalienable right to be a national of his fatherland'.[766] The court took cognisance of the principle of customary international law, which is emulated in section 42 of the Constitution. What remains uncertain is whether the court would adopt a similar approach in a case where constitutional provisions conflicted with the principles of customary international law. Considering that the prohibition of torture is a peremptory norm of customary international law, which binds all states even in the absence of treaty ratification, the High Court's approach to customary international

[764] For instance, Sexual Offences Act 2003, Legal Capacity of Married Persons Act 2006, which were aimed at gender mainstreaming in compliance with non-discrimination as contained in articles 1 of ICCPR, ICESCR, CEDAW, African Charter article 2 and African Women's Protocol article 2.
[765] *Lekhoaba v Director of Immigration and Another* Const./C/3/2007 [2007] LSHC 6.
[766] As above para 64 (emphasis added).

law in *Lekhoaba* case opens the door for the application of customary international law standards against torture in Lesotho.

### *3.2.6.2 Courts' application of international treaty law*

The earliest case after independence in which the question of the application of international treaties in the courts of Lesotho was discussed, is the case of *Joe Molefi v Legal Advisor and others.*[767] In this case, the appellant sought to be declared a refugee as contemplated by the UN Refugee Convention. The Convention had been ratified by the United Kingdom during the time when Lesotho was its protectorate and its application was extended to Lesotho. One of the questions raised in this case was whether the applicant could be declared a refugee under Lesotho law based on the definition of refugee contained in the UN Refugee Convention. The court was confronted with the interpretation of section 38 of the Aliens Control Act 1966 on which the Petitioner relied. The Court held that the letter, which the Prime Minister of Lesotho had written to the Secretary General of the United Nations, was a positive manifestation of Lesotho's intention to be bound by international instruments, including the Convention Relating to the Status of Refugees.[768] It held further that article 38 of the Aliens Control Act caused the Convention to be part of the domestic laws of Lesotho and that the Appellant was a refugee as defined by the UN Refugee Convention.[769] However, the petitioner's circumstances did not fall within those contemplated in article 38 and therefore he could not be declared a refugee in terms of the Aliens Control Act. The Court adopted a strict dualist approach to international law in that the Refugee Convention was regarded as binding on Lesotho only because it had been transformed into the laws of Lesotho by virtue of section 38 of the Aliens Control Act.

The courts' approach to international law as stated in the *Joe Molefi* case,[770] started off as strictly dualist in that they rejected the use of undomesticated international instruments. In the case of *Director of Public Prosecutions v Mohollo Tšoenyane &*

[767] *Joe Molefi v Legal Advisor and others* (note 719 above).
[768] As above (unnumbered paragraphs).
[769] As above (unnumbered paragraphs).
[770] Joe Molefi (note 719 above).

*Others,* the High Court of Lesotho held specifically that whether bilateral or multilateral, in order for international agreements to be relied upon in domestic courts, 'they require adoption by domestic legislatures'. [771] In *Basotho National Party and Another v Government of Lesotho and Others,*[772] the applicants, a political party which had just lost the 2002 general elections, sought orders, including that the court direct the Government of Lesotho to 'take necessary steps, in accordance with its constitutional processes, to adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions, such as the Universal Declaration 1948, African Charter and others'.[773] The Court explicitly stated that 'these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment'.[774] It stressed that:

> The court cannot usurp the functions assigned the executive and the legislature under the Constitution and it cannot even indirectly require the executive to indirectly introduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making activities of the executive and the legislature.[775]

The *Tšoeunyane* and *BNP* cases illustrate a strict dualist approach in that the courts rejected the application of international human rights instruments in the absence of an Act of Parliament, which incorporated them into the domestic legal system. The case of *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea and others*[776] was also decided from a dualist perspective. In this case, a daughter of a late principal chief challenged the constitutionality of section 10 of the Chieftainship Act 1968, which limits the right to succession to office of chief to first-born male children. Amongst instruments cited to advance the arguments that Lesotho had an obligation not to discriminate on the basis of sex were the ICCPR, CEDAW, African Charter and African Women's Protocol. The Court held that:

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[771] *Director of Public Prosecutions v Mohollo Tšoenyane & Others* CR/299/99 (High Court of Lesotho) unreported 25 February 2000 para 6.
[772] *BNP v Government of Lesotho and Others* (note 670 above).
[773] As above para 2.
[774] As above para 22.
[775] *BNP v Government of Lesotho and Others* (note 670 above) 23.
[776] *Senate Gabasheane Masupha v Senior Resident Magistrate for the district of Berea and others* C of A (CIV) 29/2013 [2014] LSCA.

> These instruments, it is clear, are aids to interpretation *not the source of rights enforceable by Lesotho citizens*. In the present matter, there's no aspect of the process if interpreting section 10 of the [Chieftainship] Act, which leaves its meaning exposed to any uncertainty, to the resolution of which the instruments in question could contribute further than the considerations, which have already been taken into account.[777]

The Court did not rule out international instruments as completely irrelevant to the enquiry, but said they could only be helpful as interpretative guides if there was uncertainty in the interpretation of section 10 of the Chieftainship Act. Although in wording the ruling may sound international law friendly, in effect, it adopted a strictly dualist approach. By holding that international human rights instruments to which Lesotho is a party are 'not the sources of rights enforceable by Lesotho citizens,' the Court exonerated the state from its international human rights obligations in the absence of an Act of parliament. That is, despite being blatantly discriminatory, the Chieftainship Act was upheld and not tested against international human rights standards against discrimination. In the context of this research, it can be opined that the Court erred because it did not take into account the fact that non-discrimination on the basis of sex is an established principle of customary international law which binds all states even in the absence of ratification of an international human rights instrument, which outlaws discrimination.[778]

Prior to the BNP and Masupha cases, the High Court of Lesotho, in the cases of *Sello v Commissioner of Police and others,*[779] and *Law Society of Lesotho v Right Honourable Prime Minister,*[780] had approached human rights cases in a more international law-friendly manner. The case of *Sello v Commissioner of Police and others* was an application of *habeas corpus* of a woman who was detained under the Internal Security Act (General) 1984 for over twenty days without access to any visitors. The Court held that while there is a law, the Internal Security Act, which authorised such an arrest, that law should be interpreted bearing in mind the rights of

[777] *Masupha* (note 777 above) para 28.
[778] JP Humphrey 'The implementation of international human rights law' (1978-1979) 24 *NY Law School Law Review* 31.
[779] *Sello v Commissioner of Police and others* CIV/APN/10/1980 (High Court of Lesotho) unreported 22 February 1980.
[780] *Law Society of Lesotho v Right Honourable Prime Minister* C of A (CIV) 5 /1985 (Lesotho Court of Appeal) unreported 3 September 1985.

the individuals and held further that 'may it also be remembered that this Kingdom is a signatory to the Declaration of Human Rights Charter' (*sic*).[781] That is, the Court considered Lesotho's international human rights obligations as a yardstick against which interpretation of the Internal Security Act had to be measured.

The case of *Law Society of Lesotho v Right Honourable Prime Minister* involved the independence of the judiciary in which a former officer of the Attorney General and Director of Public Prosecutions had been appointed as an acting judge. [782] The Court was called in to interpret the Human Rights Act 1983. In so doing, it relied on the European Convention and Universal Declaration and the extent to which they had influenced the law in Britain, as well as its territories, including Lesotho.[783] Although the Court did not rely on the international treaties to interpret provisions of the Human Rights Act, it, however, reiterated the role that international law played in shaping the national legal framework, including the Human Rights Act. The reminder that the Human Rights Act was anchored in international human rights thus reflects the Court's willingness to align its interpretation with what obtains in the realm of international law. This approach thus best fits the theory of monism and not dualism.

In the case of *DPP v Sole and another*,[784] the Court had to determine whether the right to legal representation as contained in section 12 of the 1993 Constitution could be stretched to include the accused person's right to be represented in a criminal trial by a former Director of Public Prosecution who had been involved in the investigations leading to the charge on behalf of the state. The Court referred to a number of cases from different jurisdiction in the commonwealth, South Africa, the European Court on Human Rights, as well as a number of international conventions such as the ICCPR, African Charter, European Convention and Inter-American Convention. The Court found the *dicta* of the European Court 'instructive'.[785] It considered all arguments and the relevant instruments and ultimately drew inspiration from a judgment made by the European Court. That is, although the Court

[781] *Sello* (note 780 above) 17.
[782] *Law Society of Lesotho* (note 781 above) 2.
[783] *Law Society of Lesotho* (note 783 above) 19.
[784] *DPP v Sole and another* [2001] LSHC 63.
[785] *Sole* (note 785 above) 57.

did not hold that Lesotho has obligations under the European Convention, jurisprudence of the European Court, which is a part of international law, was applied in interpreting a domestic legislation.[786]

In the case of *Lesotho Revenue Authority v Master of the High Court and Others,*[787] the Court held that in interpreting the national laws, as well as the Constitution, fair balance between the public interest and the rights of the individual has to be established.[788] The Court borrowed the principle of fair balance from article 1 of the European Convention, which had been used by Ackerman JA in the South African case of *First National Bank and Another v Commissioner of South African Revenue Services and others.*[789] The courts' international law-friendly approach in this case is similar to the one, which was adopted in the case of *DPP v Sole* above.

A similarly monist approach was adopted in a number of cases, which followed the *Sole* case. In *Judicial Officers of Lesotho and another v the Right Honourable Prime Minster and another,*[790] magistrates sought an order declaring Rule 16 of the Judicial Commission Rules, as well as the government directive, which assigned magistrate courts to District Administrators as unlawful and contrary to the principle of separation of powers. The Court held that besides section 118 of the Constitution, 'Lesotho is also a party to ICCPR, African Charter and Universal Declaration of Human Rights, which all impose on state parties, the duty to guarantee independence of the courts'.[791] Similarly, in *Moosa and others v Magistrate Ntlhakana and others*,[792] the Court took cognisance of the fact that 'Lesotho has signed the African Union Convention on the African Charter on human and peoples' rights (*sic*) regarding the rights of citizens'.[793] *Makhasane v Commissioner of Police and others* was a trial for damages arising out of unlawful arrest and detention, as

[786] *Law Society of Lesotho* (note 775 above) 19.
[787] *Lesotho Revenue Authority v Master of the High Court and Others* CIV/APN/67/2004, [2004] LSHC 55.
[788] As above para 90.
[789] *First National Bank and Another v Commissioner of South African Revenue Services and others* 2002 (4) SA 768 cited in *LRA* (note 788 above).
[790] *Judicial Officers of Lesotho (JOALE) and another v The Right Honourable Prime Minster and another* Constitutional Case No.3/2005, [2006] LSHC 150.
[791] As above 17.
[792] *Moosa and others v Magistrate Ntlhakana and others* CIV/APN/167/2007, [2007] LSHC 83.
[793] As above para 40.

well as verbal and physical abuse. [794] In determining the amount for damages, the Court took into account the fact that the 'African Charter protects a number of civil and political rights, including the right to dignity'[795] and held that such had been infringed by the police who unlawfully arrested and detained the complainant.[796]

Particularly when making reference to the right to freedom from torture, the Court of Appeal of Lesotho in the case of *Makotoko Lerotholi & Others v Director of Public Prosecutions* held that:

> Even the police are mandated by the law as well the provisions of international laws and conventions regarding the rights of suspects to which this country is signatory, to treat suspects humanely and in accordance with the law…the suspects are equally entitled to a fair, human and just treatment in keeping with domestic and international law.[797]

In a majority of cases in which the courts were persuaded by the international instruments, they were satisfied by the fact that Lesotho has ratified such instruments and is therefore bound to act as mandated thereby. They did not raise any issues about whether the said instruments had been domesticated or not. The courts even went further to rely on other regional instruments, such as the European and Inter-American Conventions to which Lesotho is not even a party, for instance the *Sole* and *LRA* cases.[798] In Attorney *General v 'Mopa*,[799] the Court not only compared section 12 of the Constitution with the European Convention, but also used cases from the European Court to interpret section 12 of the Lesotho Constitution.[800]

The most celebrated cases in which the courts' pronouncements on international law were very clear are the cases of *Molefi Tšepe v IEC and others*[801] and *Fuma v*

[794] *Makhasane v Commissioner of Police and others* CIV/T/401/2006, [2011] LSHC 20.
[795] As above, (unnumbered paragraphs and pages).
[796] As above.
[797] *Makotoko Lerotholi & Others v DPP* CRI/A/23/2007 (Lesotho Court of Appeal) 7 July 2007 (unreported).
[798] *LRA* (note 788 above) and *Sole* (note 785 above).
[799] *Attorney General v 'Mopa* (2002) AHRLR 91 (LeCA 2002).
[800] As above para 25 in which the Court referred to *Webber v United Kingdom.*
[801] *Molefi Tšepe v IEC* CIV/APN/135/2005, [2005] LSHC 96 (hereinafter *Ts'epe*).

*Commander LDF*.[802] These decisions are not celebrated only because of their contribution to the enforcement of the rights of women and people with disabilities respectively, but also because of the courts' bold and extensive interpretation of Lesotho's international obligations as contained in the international human rights instruments. In the *Tšepe* case, the Court was called on to declare the Local Government Elections Act 1998 (as amended by an Amendment Act of 2005), which reserved one third quota of all Local Government seats for women, discriminatory and unconstitutional. The Court held that there was no discrimination in the Act and relied on articles 3 and 26 of ICCPR,[803] HRC General Comment 18,[804] articles 3 and 4 of the CEDAW,[805] article 18(3) and (4) of the African Charter, as well as the SADC Declaration on Gender Equality.[806] The Court stated that:

> If regard be had to Lesotho's international law obligations, these, if anything, reinforce the interpretation of section 18(4) (e) of the Constitution and require equality, which is substantive and not merely formal and restitutionary in its reach.[807]

The *Fuma* case was an application before the Constitutional Court in which Fuma, a soldier of the Lesotho Defense Force (LDF) was retired on medical grounds in terms of section 24 of the LDF Act by the medical board having reached a conclusion that he is legally blind because of *inter alia* HIV.[808] Fuma contended that the board's decision to retire him was discriminatory on the basis of his HIV status because there were still other officers in the army who were visually impaired, but instead of being retired, they were given other duties in the institution that befitted their condition. He stated that the only factor, which influenced the medical board's decision to retire him, was his HIV status. The Court held that in deciding the case, 'it primarily takes a view that the unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter, but that by default, it technically assumes the effect of municipal law in the

[802] *Fuma v Commander LDF* CONS. Case no. 08/2011 [2013] LSHC 68.
[803] *Tšepe* (note 802 above) para 17.
[804] As above para 18.
[805] As above para 17.
[806] As above para 21.
[807] As above para 22
[808] *Fuma* (note 803 above) summary.

country'.[809] Having considered the relevant provisions of the ICCPR, the Court went further to hold that '[t]he ICCPR is in this respect, not only inspirational, but it is also domestically applicable…'[810]

Most Anglophone African countries, which had inherited Roman Dutch Law during colonisation, have since adopted new constitutions, which reflect the change in jurisprudence, which had shifted more and more towards the application of international law in domestic courts, so long as such instruments have been ratified. For instance, the Zimbabwean Constitutional Court in the case of *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*, held that by ratifying the CRC and the African Children's Charter, 'Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice'.[811] Although Makara J's approach in the *Fuma case* seems similar to the approach adopted by the Zimbabwean Constitutional Court, the difference between these two approaches is that Makara J went on to state that ICCPR is applicable '*to the extent of its consistency with the Constitution and other laws of Lesotho*'[812] *(*emphasis added). This could be attributed to the fact that the Constitution of Zimbabwe contains a provision, which mandates Courts to take international law into account, while the Constitution of Lesotho is silent as to the place of international law and contains the supremacy clause.

Although the courts' trend in the above cited case seems to be tilted more towards monism than dualism, in cases which followed, the courts adopted an approach that combines both approaches. While the courts do not reject reference to international human rights instruments, they often couple such instruments with corresponding domestic laws. This approach thus illustrates the courts' reluctance to solely rely on international law where there is no corresponding domestic legislation. For instance, in cases involving the rights of children, the courts have not flinched from considering

[809] As above para 22.
[810] As above para 56.
[811] *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/2015 (Constitutional Court of Zimbabwe) 14 January 2015 & 20 January 2016, 27
[812] *Fuma* (note 803 above) para 56.

the CRC and African Children's Charter where the best interest of the child principle is employed. The court's justification in such instances could be that the Children's Protection and Welfare Act (CPWA) 2011 incorporates the said conventions in the following words:

> The objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.[813]

In the case of *Rex v Malefetsane Mohlomi & Others*, the Court, confronted with a review of a criminal trial of two accused persons aged sixteen and seventeen year old, held that since the accused were children as defined in the CPWA, the trial court ought not to have tried them together with the two adults with whom they were charged with contravention of the Sexual Offences Act 2003. [814] The Court found that their rights, as stipulated in the CRC and the African Children's Charter had been violated and ordered that they be tried afresh by a different magistrate who must, in the conduct of trial, put in mind the best interest of the child principle as expounded in the CRC and the African Children's Charter.[815]

A similar approach regarding the applicability of the African Charter and CRC was adopted in the cases of *Mapetla v Leboela*[816] and *L. v M.,*[817] which dealt with the custody of minor children. In the former case, the Court held specifically that the international law principle of best interest of the child is particularly relevant in the courts of Lesotho because of section 4 of the Children's Protection and Welfare Act 2011, which reiterates the said principle. In the latter case, the Court of Appeal held that the High Court had erred by ignoring arguments based on the CRC and African

[813] Children's Protection and Welfare Act 2011 section 2.
[814] *Rex v Malefetsane Mohlomi & Others* 14 March 2013 [2013] LSHC 27 paras 1 - 3.
[815] As above para 105. For a discussion of children's rights under CRC and African Children's Charter see A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal*, 482.
[816] *Leboela v Mapetla* C of A (CIV) No. 44/2011 [2012] LSCA 2.
[817] *L. v M.* 21 C of A (CIV) No.29/2011 [2011] LSCA 29.

Children's Charter as these international instruments are 'authoritative since Lesotho had ratified them in March 1992 and November 1992 respectively'.[818]

In like manner, Conventions of the International Labour Organisation (ILO) are applied with ease by both the Labour Court and the Labour Appeal Court, because of section 2 of the Labour Code Order 1992, which provides that:

> In cases of ambiguity, provisions of the Code shall be interpreted in such a way as more closely conforms with the provisions of conventions adopted by the conference of the ILO and of recommendations adopted by it.

### *3.2.7 Concluding remarks on the place of international law in the legal system of Lesotho*

Although not conclusive, the foregoing discussion has highlighted the place, which international law occupied in the legal system of Lesotho from the time the Basotho nation was founded to date. The discussion has highlighted that from its foundation, Lesotho relied on international law to solve territorial disputes, which approach best fits the theory of monism. However, when Lesotho became a British Protectorate, it inherited the British dualist approach to international law by stating in the Constitution that the Constitution is the supreme law of Lesotho on the basis of which courts of law initially rejected the application of undomesticated international law in domestic cases. It can therefore be argued that the current Constitution is one of the colonial legacies, which reinforces dualism in Lesotho. However, in other cases, especially those adjudicated upon after 1993, the Courts of law became friendlier to international law, in particular as regards protection of human rights. In these cases, the courts have taken cognisance of the important role, which international law plays in domestic law, as well as the role that domestic law plays in the implementation of international human rights law. This mutual relationship between the two legal systems, therefore, counters observations by authors, such as

[818] As above para 5.

Torrijo who argue that international law and domestic law 'are definitely an odd couple'.[819]

Despite some level of ambivalence with regard to the place of international law in the legal system of Lesotho, it is prudent to mention that as illustrated in the previous chapter, prohibition of torture has attained the status of a peremptory norm of international law.[820] That is, the international human rights instruments to which Lesotho is a party merely codify a principle, which is already accepted in international law. In addressing the principles of customary international law and their status in a municipal legal system prior to the 1996 Constitution, the South African Appellate Division Court in the case of *Minister of Interior v Bechler; Beier v Minister of the Interior* held that where an unincorporated treaty provides evidence of a rule of customary international law, it may be applied as a customary rule, but not as a treaty.[821] That is, Lesotho has international human rights obligations against torture, which cannot be discarded merely because the treaties in which they are contained have not been domesticated in accordance with the theory of dualism. It is on this basis, as well as the principle of performance of treaty obligations in good faith as enunciated in the VCLT that Lesotho's legal and institutional frameworks will be benchmarked in the next section, against human rights standards discussed in the previous chapter.

## 3.3 Legal framework against torture in Lesotho

In each of the international human rights instruments discussed in the previous chapter, state parties undertake to adopt specific measures aimed at preventing and prohibiting torture, prosecuting and punishing its perpetrators and providing effective remedies for its victims. Central to states' obligations in relation to torture is the enactment of laws aimed at harmonising domestic laws with states' international human rights standards against torture. The centrality of this measure is illustrated by the fact that in almost all the international human rights instruments discussed in

[819] XF Torrijo 'International law and domestic law: Definitely an odd couple' *Revista Jurudica Universidad de Puerto Rico* (2008) 77, 485.
[820] Dugard (note 132 above); Brierly (note 147 above); Simpson (note 147 above).
[821] *Minister of Interior v Bechler; Beier v Minister of the Interior (*1948) 3 SA 449.

the previous chapter of this thesis, the enactment of laws is stated as the basic standard with which states must begin in order for them to fulfil all general and specific obligations contained in each instrument. For instance, state parties to the African Charter undertake to 'adopt legislative or other measures' to give effect to the rights, duties and freedoms contained in the Charter'.[822] In a similar way, CAT mandates state parties to 'take effective legislative, administrative, judicial and other measures to prevent acts of torture'.[823]

There are different ways through which states implement the obligation to harmonise domestic legal frameworks with the international legal frameworks. One such way is the analysis of the existing national laws and determining whether they meet the state's international human rights obligations.[824] If the result of the analysis is that the national legal framework fails to meet certain or all obligations, then the state is required to amend or repeal those laws in favour of new laws, which comply with the international human rights standards.[825] When interpreting what 'effective legislative measures' in the context of torture entails, the Committee against Torture in its General Comment 2 stated that an effective law in this regard is one which takes into account the definition of torture in article 1(1) of CAT, which recognises the absolute nature of the right to freedom from torture as contained in article 2(2), which excludes the defense of superior orders as per article 2(3), which criminalises torture as a distinct crime as mandated in article 4(1) and provides appropriate punishment in terms of article 4(2) of CAT.[826] In concurrence with these standards, the APT has published a comprehensive guide, which assists law makers to assess national legal frameworks' compliance with the above criteria.[827] In terms of this guide, an anti-torture legislation complies with the provisions of CAT if it contains the following elements or covers the following themes:

[822] African Charter article 1.
[823] CAT article 2(1).
[824] JAE Faria 'Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?' (2009) *Uniform Law Review* 27.
[825] As above.
[826] Committee against Torture, GC 2 paras 5, 9, 11 & 26.
[827] Association for Prevention of Torture 'Guide on anti-torture legislation' March 2014 (APT Guidelines). www.apt.ch/content/files_res/anti-torture-guide-en.pdf [accessed 5 April 2017].

a) Definition of torture;
b) Modes of liability;
c) The exclusionary rule;
d) Jurisdiction;
e) Complaints, investigations, prosecutions and extraditions;
f) Amnesties, immunity, statute of limitation;
g) Non- refoulement; and
h) Redress.[828]

Because this guide clearly dissects the elements, which are given in detail in General Comment 2, it is used below to analyse Lesotho's legal framework. It is imperative to note at the outset that there is no law in Lesotho, which focuses exclusively on torture, nor is torture proscribed as a criminal offence in the Penal Code Act, which is considered later on in this section. Therefore, the legal frameworks being analysed in this section consist of the Constitution and other subsidiary pieces of legislation, which have some provisions relating to torture.

### *3.3.1 Constitution of Lesotho 1993*

The Constitution is the supreme law in Lesotho.[829] It contains a bill of rights in chapter two. Section 8(1) thereof provides that 'no one shall be subjected to torture or to inhuman or degrading punishment or other treatment'. Subsection (2), however, contains the following proviso:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Lesotho before the coming into operation of this Constitution.

The Constitution, therefore, guarantees the right to freedom from torture, but excludes lawful punishment from being regarded as torture, which exception is also contained in article 1(1) of CAT. The Constitution also protects other rights, which

[828] As above.
[829] Constitution section 2.

are relevant to the prevention of torture. These include the right to life,[830] right to personal liberty,[831] freedom from slavery and forced labour,[832] freedom from arbitrary search or entry,[833] right to fair trial,[834] freedom from discrimination,[835] right to equality before the law and equal protection of the law[836] and the right to a remedy when the rights contained in the Constitution have been infringed.[837]

Having listed a number of human rights, from section 4 to section 20, section 21 of the Constitution contains circumstances under which human rights and fundamental freedoms may be derogated from. It provides that during any time when Lesotho is at war or when a state of emergency has been declared in accordance with section 23, section 6, which provides for the right to personal liberty, section 18 on freedom from discrimination and section 19 on the right to equality before the law and equal protection of the law may be derogated from. Section 8, which provides for the right to freedom from torture, is not listed amongst the rights which may, during a state of emergency, be derogated from. The Constitution thus protects freedom from torture as a non-derogable right. This is in accordance with article 2(2) of CAT and article 4 of ICCPR in compliance with states' obligations under customary international law, as well as ICCPR, CAT and the African Charter.[838] Therefore, the Constitution complies with the international human rights obligation to recognise freedom from torture as a non-derogable right.

[830] Constitution section 5(1) protects the right to life. However, section 5(2) retains the death penalty as a lawful punishment in Lesotho.
[831] Constitution section 6.
[832] Constitution section 9.
[833] Constitution section 10.
[834] Constitution section 12.
[835] Constitution section 18; In Committee against Torture, GC 2 para 20 & HRC, GC 31 para 8, the Committee against torture and the HRC respectively stated that states' general obligation to prevent torture also includes the duty to protect people who belong to minority and marginalised groups because they are vulnerable to being subjected to torture because of their status, such as sex, sexual orientation, gender identity, age, ethnicity, etc. Therefore, the non-discrimination provisions in section 18 of the Constitution comply with this obligation.
[836] Constitution section 19 guarantees the right to equality before the law and equal protection of the law in compliance with states' obligations under CAT article 13, which mandates state parties to ensure that there are competent authorities to which victims of torture can complain and be impartially heard.
[837] Constitution section 22.
[838] ICCPR article 4; CAT article 2(2) & (3); African Charter article 27, all which do not permit derogation from the prohibition of torture.

Another provision in the Constitution which illustrates that the right to freedom from torture is non-derogable is the interpretation and savings clause of the Constitution, which provides that:

> In relation to any person who is a member of a disciplined force raised under a law of Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of the provisions of this chapter other than section 5, 8 and 9.[839]

The effect of this section is that in as much as the laws governing disciplined forces may limit some rights contained in the Constitution, the right to life, freedom from torture and freedom from slavery may not be limited or be deviated from. This interpretation was confirmed by the High Court in the case of *Jobo and others v Lesotho Defense Force* in which the Court held that regardless of the offences with which one is charged, he has a right not to be subjected to torture.[840]

Equally relevant to states' obligation against torture is the obligation to provide redress to victims of human rights violations.[841] In this regard, section 22 of the Constitution provides that:

> (1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the person), then, without prejudice to any other action with respect to the same matter, which is lawfully available, that persons (or that other person) may apply to the High Court for redress.

Section 22 therefore complies with article 14 of CAT and article 2(3) of ICCPR, which mandate that where there has been a human rights violation, the victim must be availed avenues to complain and such a claim must be adjudicated upon by a

[839] Constitution section 24(3).
[840] *Jobo and others v Lesotho Defence Force* CIV/APNS/189/194/198/199/203/2015, 17 June 2015 [2015] LSHC 25 para 27.
[841] ICCPR article 2(3); HRC, GC 31 para 8 interpreted states' obligations under ICCR article 7 to include obligation to provide effective remedy; *Kouider Kerrouche v Algeria* (note 261 above) para 10, *Zhakhangir Barazov v Kyrgyzstan* (note 272 above), *Urmatbek Akunov v Kyrgyzstan* (note 272 above) para 10; *Manojkumar Samathanam v Sri Lanka* (note 270 above) para 10; CAT article 14; Committee against Torture, GC 3 para 2.

competent and impartial court or tribunal. However, competence and impartiality of the judiciary to handle cases of torture is limited to hearing of civil claims for damages because of the absence of an anti-torture law in Lesotho.

Although the Constitution guarantees the right to freedom from torture as a non-derogable right and also sets up a mechanism for the vindication of this right where it has been violated in compliance with Lesotho's international human rights obligations, two big challenges remain: firstly, the Constitution does not define torture, [842] and secondly, it does not criminalise torture as a distinct crime nor contain any provisions from which it may be inferred that torture is a crime. Victims of torture may therefore approach the High Court for a civil remedy, but will not be availed the opportunity of the perpetrators being charged with the criminal offence of torture as the Constitution does not contain such a criminal offence.. In other jurisdictions, this hurdle is tackled by backing up constitutional provisions with laws, which criminalise violation of the rights contained in the Constitution.[843] However, as will be illustrated below, the Penal Code of Lesotho also fails to criminalise torture and therefore leaves a lacuna as far as the obligation to criminalise torture is concerned. The HRC has emphasised that over and above the affirmation of the right to freedom from torture as the Constitution does, the state has a further obligation to proscribe acts of torture through criminal law.[844] This lacuna therefore indicates Lesotho's failure to comply with one of the key international human rights obligations to prohibit torture through criminal law. In its General Comment on the implementation of article 2 by state parties, the Committee against Torture has stated that:

> By defining torture as distinct from assault or other common law crimes, states parties will promote CAT by highlighting the gravity of the offence, (b) strengthen the deterrent effect of the prohibition, (c) enhance tracking of the specific crime of torture and thereby assist state parties to bring national law into full conformity with CAT.

[842] Constitution section 8 guarantees the right to freedom from torture, but does not define it.
[843] For instance, section 12 of the Constitution of South Africa protects the right to freedom from torture. The constitutional provision is backed up by the Prevention and Combating of Torture of Persons Act 2013 which criminalises torture as a discrete crime. See JD Mujuzi 'Prosecuting and punishing torture in South Africa as a discrete crime and as a crime against humanity' (2015) 23 (2) *African Journal of International and Comparative Law* 339.
[844] HRC, GC 31 para 8.

By failing to define and criminalise torture, the legal framework of Lesotho fails to comply with key obligations to prevent and prohibit torture and thereby fails to promote CAT and other international human rights instruments which contain standards against torture. In the next section, it will be considered whether the other laws subsidiary to the Constitution have similar challenges or limitations as the Constitution.

### *3.3.2 Subsidiary legislation on torture*

As alluded to earlier, there is no specific anti-torture law in Lesotho. The absence of anti-torture legislation at the domestic level is catastrophic in that it creates space for impunity and where perpetrators are brought before courts of law, they are prosecuted for lesser offences, such as assault and the sentences imposed do not highlight the gravity of the offence of torture.[845] In its General Comment on the implementation of article 2 by state parties, the Committee against Torture has stated that the absence of a definition of torture, which is absent in the legal system of Lesotho, creates actual or potential loopholes for impunity.[846] Because of the absence of an anti-torture law in Lesotho, the fragmented pieces of legislation, which have provisions with a bearing on Lesotho's obligations against torture, will be analysed in the next section. These laws include the Aliens Control Act, Refugee Act, Fugitive Offenders Act, Criminal Procedure and Evidence Act 1981, Penal Code Act 2010, Education Act 2010 and Children's Protection and Welfare Act 2011. Relevant provisions of these laws are discussed in detail below.

#### *3.3.2.1 Aliens Control Act 1966*

As indicated above, one of the characteristics of an effective anti-torture legal framework is that there must be a provision on non-refoulement.[847] *Non- refoulement* is an obligation in terms of which state parties are prohibited from expelling, returning

[845] Committee against Torture, GG 2 paras 10 & 11.
[846] Committee against Torture, GC 2 para 10.
[847] Committee against Torture, GC 1; APT Guidelines (note 828 above) 47; J Niyizurugero & P Lessene *Robben Island Guidelines of the prohibition and prevention of torture in Africa: Practical guide for implementation* (2008) 31, who argue that states also have an obligation to ensure that extradition treaties with other countries must also comply with international obligations including non-refoulement.

or extraditing a person to another country in which there are substantial grounds to believe that such a person's life is at risk or he would be subjected to torture.[848]

Expulsion of foreign nationals from Lesotho is regulated by the Aliens Control Act 1966,[849] which deals with entry, registration and departure of aliens who seek temporary and permanent sojourn in Lesotho. It also regulates the expulsion of aliens who unlawfully enter the territory of Lesotho.[850] In terms of the Aliens Control Act, an alien is 'a person who is not a citizen of Lesotho'.[851] An alien may be expelled if he or she has been lawfully refused to enter or land in Lesotho.[852] Such expulsion is effected through an order by the Minister.[853] This Act fails to comply with Lesotho's non-refoulement obligations with regard to two aspects: one, vesting the prerogative of expulsion solely in the Minister is subject to abuse and is not compliant with the states' obligations under ICCPR and CAT;[854] two, in terms of section 28, the process of expulsion may involve arrest and detention in police custody or in prison.[855] That is, the alien subject to return is detained with people suspected of committing criminal offences. This contravenes Lesotho's obligations under the CMW as the Committee on Migrant Workers has stated that illegal migration is an administrative offence and not a criminal offence and therefore detention must be a measure of last resort and must not be unlimited or of excessive length.[856] Because this provision does not express conditions under which an alien may be placed under police custody while his return is being considered, it may also be abused for reasons based on discrimination. The detention itself may amount to torture where it results in severe physical or psychological pain and suffering on the part of the detainee and is done on grounds of discrimination by police and

[848] UN Refugee Convention article 32; CAT article 3; UNHRC, Advisory opinion (note 230 above).
[849] Aliens Control Act No.16 of 1966. See also *Joe Molefi v Legal Advisor & Others* (note 719 above).
[850] Aliens Control Act section 25.
[851] Aliens Control Act section 2(1).
[852] Aliens Control Act section 4.
[853] Aliens Control Act section 25.
[854] The Alien's Control Act does not provide for the right to challenge the decision to expel an alien while ICCPR article 13 and UN Refugee Convention article 33 (2) provide that protection from refoulement will cease only where there are compelling reasons of national security; OHCHR 'Expulsion of aliens in international human rights law' *OHCHR Discussion Paper,* Geneva (September 2006) 10.
[855] Aliens Control Act sections 25(1) & 28(1).
[856] CMW, GC 2 paras 27 & 38; CRC article 37(b) which provides against detention of children; OHCHR 'Administrative detention of migrants' *OHCHR Discussion Paper* 5 http://www2.ohchr.org/English/issues/migration/taskforce/disc-paper.html [accessed 6 April 2017].

immigration officials. The Committee on Protection of Migrant Workers has raised its concern about the detention of migrant workers in its concluding observations when considering Lesotho's initial state party report.[857]

The only safeguard against torture during arrest and period of detention, which can be inferred from the Aliens Control Act, is contained in section 28(2), which provides that 'an alien detained in accordance with the provisions of this section must be in lawful custody'. It is presumed that by lawful custody, the section refers to custody in which all laws, including protection of human rights are adhered to. However, when dealing with the expulsion of migrant workers in an irregular situation, the Committee on Migrant Workers in its General Comment stated that states must refrain from administrative detention and where it is indispensable, it must be a last resort.[858] Therefore, by authorising the arrest and detention of aliens, the Act increases the risk of such aliens being subjected to torture. The other shortfall is that the Act does not provide measures to safeguard the detainees against torture while in detention. The Committee against Torture has laid down some measures, which states may put in place to prevent torture. These include the maintenance of official registers, informing detainees of their rights such as the rights to legal representation and affording them independent medical assistance.[859] The Aliens Control Act does not contain any of these guarantees and is, therefore, inconsistent with international human rights standards against torture. The inadequacy of the Aliens Control Act was conceded in the Lesotho's initial report to the CMW Committee in which it is stated that '[t] he Aliens Control Act, 1966 is outdated and does not take into consideration the new developments in international law'.[860]

Another shortfall of the Aliens Control Act is that it is silent on Lesotho's obligations in cases where expulsion of an alien is likely to expose the expelled person to torture in the country to which he is returned. This is thus inconsistent with Lesotho's non-refoulement obligations under article 7 of ICCPR and article 3(1) of CAT. In contrast

[857] CMW, *Concluding observations on the initial report of Lesotho* 23 May 2016 UN Doc CMW/C/LSO/CO/1 paras 29 & 30.
[858] CMW, GC 2 para 26.
[859] Committee against Torture, GC 2 para 13.
[860] *Lesotho's initial report to CMW* para 37.

with the Aliens Control Act, the South African Prevention and Combating of Torture of Persons Act, expressly prohibits the extradition, expulsion or return of a person to a country 'where there are substantial grounds for believing that he or she would be in danger of being subjected to torture'.[861] This shortfall could thus be rectified by enactment of an anti-torture law and inclusion of non-refoulement provisions as recommended in the APT Guideline.[862]

The Aliens Control Act, however, does not apply to refugees. Persons who qualify as refugees in terms of any international treaty or convention to which Lesotho is a party shall not be refused entry into or sojourn in Lesotho, and shall not be expelled from Lesotho.[863] Such persons are dealt with under the Refugee Act, which is considered in detail below.

### *3.3.2.2 Refugee Act 1983*

As illustrated above, refugees are exempted from the application of the Aliens Control Act. Their registration, rights and expulsion are governed by the Refugee Act of 1983. This Act defines a refugee in the following terms:

> (1) subject to subsection (2), a refugee is any person who,
>
> (a) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,
>
> (i) is outside the country of his nationality is unable or owing to such fear is unwilling to avail himself protection of that country or
>
> (ii) not having a nationality, and being outside the country of his former residence, is unable or owing to such fear is unwilling to return to it, or
>
> (b) …
>
> (c) belongs to a class of persons declared by the Minister to be refugees for purposes set out in paragraphs (a) or (b).

[861] Prevention and Combating of Torture of Persons Act 2013 section 8(1). For a full discussion of the South African Prevention and Combating of Torture of Persons Act, see Mujuzi (note 844 above) 339.
[862] APT Guidelines (note 828 above) 47.
[863] Aliens Control Act section 38 (1).

Section 11 of the Refugee Act contains Lesotho's non-refoulement obligations. It provides that a person shall not be rejected at any Lesotho frontier or be expelled or otherwise compelled to return to or remain in a country:

> (a) where he seeks to leave or has left or outside of which he finds himself, for any of the reasons mentioned in section 3(1)(a) or (b) or
> (b) where he may be tried or punished for offences of a political nature.

The effect of this section is that Lesotho undertakes to protect from expulsion any person who faces the risk of persecution in his or her country of nationality or residence on the grounds of discrimination based on religion, political opinion, social class or others. However, the Act does not list the risk of torture as a ground on the basis of which the non-refoulement obligation may be invoked. This is inconsistent with Lesotho's obligation under customary international law and treaty law,[864] in that a person subject to being returned cannot invoke the Refugee Act on the grounds that he or she faces real, personal and present risk of being subjected to torture in the country to which he or she is being returned because it is not contained in the Refugee Act.

*3.3.2.3 Extradition laws*

As far as extradition is concerned, it is important to indicate at the outset that there is no law in Lesotho, which focuses exclusively on extradition. However, Lesotho has entered into several bilateral extradition treaties with other countries, such as South Africa and China. It is also a state party to the SADC Protocol on Extradition[865] and SADC Protocol on Mutual Legal Assistance in Criminal Matters.[866] The bilateral treaties, as well as the SADC Protocol are used for purposes of requesting and determining other countries' requests for extradition. These treaties contain offences for which the parties shall be requested to extradite the suspects or convicted offenders, as well as the procedures for both the request and extradition. With regard

[864] Non-refoulement is a norm of customary international law, derogation from which is not permitted. It is also a binding obligation under the UN Refugee Convention article 33, OAU Refugee Convention article 2(3), ICCPR article 7 & CAT article 3; UNHCR Advisory opinion (note 232 above); HRC, GC 31; Committee against Torture, GC 1.
[865] SADC Protocol on Extradition 2002.
[866] SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002.

to extraditable offences, the SADC Protocol provides that '…extraditable offences are offences that are punishable under the laws of both States Parties by imprisonment or other deprivation of liberty for a period of at least one year'.[867]

The challenge with the implementation of this provision against suspects of torture in Lesotho is that the law does not criminalise torture as a distinct crime and therefore does not prescribe penalties for its commission. Therefore, such suspects may only be extradited if charged with other offences, such as assault or assault GBH, a state highly discouraged by the Committee against Torture as it does not illuminate the gravity of the offence of torture.[868] Extradition for torture may also not be possible if another country, such as South Africa requests extradition of a suspect of torture because although torture is an offence under South African law, it is not a distinct offence in Lesotho and the Protocol requires an extraditable offence to be an offence in both jurisdictions. Therefore, Lesotho's failure to criminalise torture as a distinct crime is also failure to implement the obligation to recognise torture as an extraditable offence.[869] The Protocol on Extradition allows for the refusal of extradition if 'the person whose extradition is requested has been, or would be subjected to torture in the requesting state'.[870]

*3.3.2.4 Fugitive Offenders Act 1967*

Where no extradition treaty exists, extradition is dealt with under the Fugitive Offenders Act of 1967. The Act provides that:

> a person found in Lesotho who is accused of a relevant offence in any other country to which this section applies, or who is alleged to be unlawfully at large after conviction of such an

[867] SADC Protocol on Extradition article 3.
[868] See Committee against Torture, GC 2 para 11 in which the Committee stated that naming and defining the crime of torture will 'enhance the ability of responsible officers to track the specific crime of torture'.
[869] *Belgium v Senegal* (note 187 above) paras 120 & 121 in which the ICJ held that by failing to comply with its obligations under articles 6 and 7 of CAT, Senegal had engaged its international responsibility. It was then ordered to prosecute the Chadian President Hessen Hibre, failing which to extradite him.
[870] SADC Protocol on Extradition article 4(f).

> offence in such a country, may be arrested and returned to that country as provided by this Act.[871]

Restrictions on the return of a person under the Fugitive Offenders Act are contained in section 6. Amongst other restrictions, the Act provides that a person shall not be returned to the requesting country if it appears to the Minister or to the Court that:

> (b) the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinion;
> (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.[872]

The Act does not expressly list exposure to torture as one of the restrictions to the return of an alleged offender to the other country. However, such can be inferred from the above section, which provides that Lesotho shall be restrained if there is a possibility that the returned person shall be subjected to prosecution, punishment or detention based purely on prohibited grounds of discrimination. As discussed in chapter one, the CAT definition of torture categorises infliction of severe harm or suffering on the basis of discrimination as torture.[873] Therefore, section 6 of the Fugitive Offenders Act, to a large degree, complies with Lesotho's non–refoulement obligations where a returnee is likely to suffer torture in the form of persecution based on discrimination. This is in conformity with article 31 of UN Refugee Convention, article 2(3) of OAU Refugee Convention and article 3 of CAT. The Act also gives the Minister the discretion not to make an order for the return of a person to the requesting country if such person is accused or convicted of a relevant offence not punishable with death in Lesotho if that person could be or has been sentenced to death for that offence in the country requesting his return.

A shortcoming in the Act is that it does not lay down procedures for the determination of whether the return would expose a returnee to torture. In General Comment 3, the Committee against Torture laid down some criteria which may be

[871] Fugitive Offenders Act No. 38 of 1967, section 3(1).
[872] Fugitive Offenders Act section 6(1).
[873] CAT article 1(1).

used to determine whether the return of a person to another country would expose him to torture or not.[874] The criteria includes, but is not limited to the examination of the human rights situation in the country, which requests the return, whether the returnee has been subjected to torture before and whether he has participated in political activities, which expose him to the risk of prosecution or punishment based on discrimination on the grounds of political opinion.[875] The Fugitive Offenders Act, on the other hand, leaves the decision of whether or not to return, in the hands of the Minister, without guarantees to ensure that the Minister applies the discretion within the scope of Lesotho's standards against torture.

*3.3.2.5 Criminal Procedure and Evidence Act 1981*

The APT Guidelines on an anti-torture law state that a human rights compliant anti-torture law must have a provision, which contains an exclusionary rule. This element is by itself a torture prevention mechanism contained in article 15 of CAT.[876] The HRC has also interpreted states' obligations under article 7 of ICPR to include the obligation to exclude evidence, which has been obtained through torture from criminal proceedings.[877] In the African context, Robben Island Guideline 29 lists the exclusion of evidence obtained through torture as one of torture prevention measures compliant with articles 1 and 5 of the African Charter.

Although there is no law, which criminalises torture in Lesotho, the legal system complies with this aspect of the obligation to prevent torture in that section 228 of the Criminal Procedure and Evidence Act (CP&E) 1981 rejects the use of evidence that was obtained through the use of torture in judicial proceedings. It provides that:

[874] Committee against Torture, GC 3 para 8.
[875] As above; see also; *Paez v Sweden* (note 361 above) in which the Committee against Torture held that although Sweden attempted to deport the author due to his involvement in criminal activities, Swedish authorities had failed to consider that prior to seeking asylum in Sweden, Paez was involved in political activity and also came from a family of political activists, which exposed him to risk of torture if returned to Peru.
[876] CAT article 15 provides that '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'.
[877] *Sahadeo v Guyana* (note 257 above) para 9.3 and *Zhakhangir Bazarov v Kyrgyzstan* (note 258 above) para 6.4.

> (1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person provided the confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.
>
> (2) If a confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it is confirmed and reduced to writing in the presence of a magistrate.

This section was interpreted by the Lesotho Court of Appeal in the case of *Mabope and Others v Rex.*[878] In this case, the Court held that a pointing out, done consequent to torture of the person who makes it, is not free and voluntary and therefore inadmissible as evidence to prove commission of a criminal offence.[879] Section 228 thus fully complies with Lesotho's obligations under CAT,[880] ICCPR and African Charter.[881] However, when discussing section 218 of the Namibian Criminal Procedure Act, which is similar to Lesotho's section 228, Mujuzi argues that it is not enough for this exclusion to be contained in a subsidiary legislation and not in the Bill of Rights as a protected right from which there cannot be a derogation.[882] Mujuzi's concern was raised by the court's view in the case of *S v Minnies and another*, in which the Court held that it had discretion whether or not to admit such evidence.[883] While section 228 complies with Lesotho's human rights obligation, its inclusion in the Constitution as part of the right to a fair trial in section 12 of the Constitution or as a stand-alone right, would provide a stronger guarantee for prevention of torture.

[878] *Malefetsane Phala Mabope and Others v Rex* 1993/1994 *Lesotho Law Reports* 154.
[879] As above.
[880] CAT article 15; Robben Island Guideline 29; Mujuzi (note 404 above).
[881] The obligation to exclude torture-induced evidence in criminal proceedings was elaborated upon in the Robben Island Guidelines as one of states' obligations under article 5 of CAT.
[882] Mujuzi (note 404 above) 412.
[883] *S v Minnies and another* 1990 NR 177 (HC).

*3.3.2.6 Education Act 2010*

Section 4 of the Education Act provides that 'a learner shall not be subjected to cruel, inhuman and degrading punishment'.[884] Although section 4 does not mention torture, inclusion of torture in the prohibition may be inferred from the statement to the reasons and objects of the Education Act, which states that:

> The Bill abolishes corporal punishment at schools in accordance with section 8 of the Constitution which provides that a person shall not be subjected to torture or to inhuman or degrading punishment.[885]

By abolishing corporal punishment, the Education Act implements Lesotho's international obligations against torture of children in accordance with section 8 of the Constitution, as well as Lesotho's human rights obligations under article 5 of the Universal Declaration, article 7 of ICCPR, Article 2 of CAT and article 19 of CRC, all of which mandate state parties to adopt legislative measures to prevent torture.[886] It also responds to the concern of the Committee on the Rights of the Child which it had raised with regard to the practice of corporal punishment in Lesotho.[887] However, the Act has shortcomings similar to those in the Constitution in that it neither defines corporal punishment nor makes a list of acts, which constitute corporal punishment.[888] A definition of corporal punishment would enable analysis as to whether the Education Act covers acts of torture or CIDT. The second shortfall is that it does not criminalise corporal punishment and is silent as to the remedies, which a learner who has been subjected to corporal punishment, can pursue. The importance of the provision of reparation to victims of torture as an essential component of the obligation to prohibit torture has been emphasised by all the

[884] Education Act 2010 Section 4(4).
[885] Government Notice No. 18 of 2010 The Parliament of Lesotho Statement of Objects and Reasons of the Education Act, 2010 section 5.
[886] CRC, GC 8 para 18; HRC, GC 20 para 5; Report of the Committee against Torture, (1995), UN Doc A/50/44 para 169.
[887] CRC Committe, *Concluding observations on the initial report of Lesotho* 21 February 2001 UN Doc CRC/C/15/Add.147 para 31.
[888]GW Holden 'Perspectives on the effects of corporal punishment: Comment on Gershoff (2002)' (2002) 128 (4) *Psychological Bulletin* 590.

international human rights instruments discussed in chapter 2.[889] Failure to criminalise corporal punishment and to provide remedies available is thus inconsistent with Lesotho's obligations under CAT and CRC.[890] These shortfalls could be rectified by the enactment of an anti-torture law, which defines torture and CIDT and also prescribes punishments against perpetrators and remedies for victims.

#### *3.3.2.7 Penal Code Act 2010*

The Penal Code does not prohibit torture as a distinct crime.[891] As a result of this omission, acts, which amount to torture, are absorbed into other criminal offences, such as assault,[892] aggravated assault,[893] murder,[894] culpable homicide,[895] indecent assault,[896] and unlawful sexual acts.[897] This is inconsistent with Lesotho's obligations under articles 1, 2 and 4 of CAT. When interpreting states' obligations under these articles, the Committee against Torture has raised its concern that failure to criminalise torture as a distinct crime from assault creates loopholes for impunity.[898] It has also criticised the approach of charging perpetrators of torture with other offences other than torture as being inconsistent with the obligation to take legislative measures against torture.[899] It stated that this approach fails to highlight the gravity of the offence of torture and consequently perpetrators do not get the appropriate punishment and the victims are not availed the redress, which they deserve.[900]

[889] *Lopez Burgoz v Uruguay* (note 281 above), *Kennedy v Trinidad & Tobago* (note 282 above), *Evans v Trinidad & Tobago* (note 282 above), *Roy Manojkumar Samathanam v Sri Lanka* (note 270 above); CAT article 14; Committee against Torture, GC 3 para 2; *Addulrahman v Burundi* (note 378 above); CRC, GC 5 para 24; CWM, GC 2 para 21; *Mtikila & Others v Tanzania* (note 515 above).
[890] CRC GC 8 paras 31 & 31.
[891] Penal Code Act section 94 lists torture as one of the offences, which constitutes crimes against humanity, and section 95 lists torture as a war crime.
[892] Penal Code Act section 30.
[893] Penal Code Act section 31.
[894] Penal Code Act, sections 40 - 42.
[895] Penal Code Act, section 38.
[896] Penal Code Act, section 51.
[897] Penal Code Act, section 52; Sexual Offences Act section 3, which criminalises all sexual acts that take place under coercive circumstances.
[898] Committee against Torture, GC 2 paras 10 & 11.
[899] As above.
[900] As above.

Furthermore, this approach makes it difficult for the state to track, report upon and respond effectively to the incidences of torture.[901]

Lesotho ratified CAT, but so far has not submitted a state party report outlining measure it has taken to implement its obligations under CAT. The failure to submit state party reports may be attributed to the fact that torture is not proscribed as a distinct crime, therefore tracking its prevalence is difficult because the criminal statistical data shows other offences and not torture. As a result of the failure to submit the initial state party report on the implementation of CAT, Lesotho has not reviewed its laws, including the Penal Code. The state reporting process as well as the concluding observations could have been beneficial and could have created room for the review of the existing legal framework, its harmonisation with standards contained in CAT and thereby responding to the challenge of torture in Lesotho.

According to General Comment 2 of the Committee against Torture, criminalisation of torture is central to fulfilling the obligation to prohibit it.[902] Hence, after CAT entered into force and following lobbying of anti-torture organisations, such as the APT, a number of countries altered their national legal frameworks to include criminalisation of torture as a distinct crime. These countries include Uganda and South Africa.[903] Some countries, such as the Maldives and Philippines, have even gone as far as specifically stating in their laws that 'torture shall be considered a separate criminal offence,'[904] and that 'torture as a crime shall not absorb or shall not be absorbed by any other crime or felony committed as a consequence, or as a means in the conduct or commission thereof'.[905]

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[901] Redress 'Legal frameworks to prevent torture in Africa: Best practices, shortcomings and options for going forward' (March 2016) 10 www.redress.org/downloads/publications/1603anti-torture-legislative-frameworks-in-africa.pdf [Accessed 18 February 2017].
[902] CAT Committee, GC 2 para 8.
[903] Ugandan Prevention and prohibiting of torture Act, 2012 and South African Prevention of combating and torture of persons Act, 2013.
[904] Maldives, Act on the Prohibition and Prevention of Torture 2013, Law 13/2013 (23 December 2013), Law 13/2013, article 11 http://mvlaw.gov.mv/pdf/ganoon/chapterVIII/13-2013.pdf [accessed 3 May 2016].
[905] Philippines' Anti-Torture Act of 2009, Republic Act N°9745 (10 November 2009), section 15 http://www.congress.gov.ph/download/ra_14/RA09745.pdf [accessed 3 May 2016].

While anti-torture legislation is not in itself the sole barometer used to measure states' compliance with the obligation to prevent torture, the absence of such prohibits a state from implementing other substantive and procedural aspects of the obligations to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims. In the context of Lesotho, the Constitution, Children's Protection and Welfare Act, and Education Act reiterate the inherent right of all people to freedom from torture, but do not make the commission of torture a criminal offence. These pieces of legislation are also silent as to what constitutes torture. Therefore, non-incorporation of the definition of torture in any of these pieces of legislation weakens the state's ability to prevent it.

Over and above the requirement for the criminalisation of the direct commission or perpetration of torture, articles 1 and 4 of CAT also require state parties to criminalise and hold people who get involved in torture through other means accountable. Article 1 makes it an offence for a person acting in an official capacity to instigate or incite torture, as well as to consent to or be acquiescence to its commission. Article 4 further requires anti-torture legislation to impose criminal liability on those who attempt to commit torture or participate through complicity or any other form. The requirement for anti-torture legislation to cover modes of liability beyond the direct commission of torture has been confirmed by the Committee against Torture in its General Comment 2 in which it stated that:

> States are obliged to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in act of torture as defined in the Convention.[906]

The need for these modes of liability to be reflected in the national anti-torture legislation was emphasised by the Committee against Torture in its Concluding Observations on Gabon and Morocco.[907] In these concluding observations, the Committee stated that state parties have an obligation to make necessary

[906] Committee against Torture, GC 2 para 17.
[907]Committee against Torture *Concluding Observations on Morocco's initial report* 21 December 2011, UN Doc CAT/C/MAR/CO/4; Committee against Torture *Concluding Observations on Gabon* 17 January 2013 UN Doc CAT/C/GAB/CO/1.

modifications to explicitly criminalise attempts to commit torture and acts constituting complicity or participation in torture and to define them as torture.[908] The sad consequence of Lesotho's failure to criminalise torture and all its modes of liability is that even the obligation to prescribe 'appropriate penalties' on those convicted of torture is also compromised as the Penal Code Act does not contain any punishments for the crime of torture.

It is important to note that the failure of the Penal Code Act to proscribe torture has also left sexual violence, which meets the requirements of CAT (sexual torture) in the purview of the Sexual Offences Act. The Sexual Offences Act prohibits sexual offences generally and does not specifically focus on sexual offences in which those in an official capacity take advantage of their position and commit sexual offences against victims subject to their control or under their detention for purposes prohibited under article 1.[909] Criminalising sexual torture in the same manner as other sexual offences fails to take into account the gravity of sexual torture and also fails to prescribe penalties that are appropriate for the offence of torture. Attah raised similar concerns when analysing the omission of rape and sexual offences in the Nigerian's anti-terrorism law, arguing that rape and sexual violence by Boko Haram in northern Nigeria amounts to torture and terrorism.[910]

#### *3.3.2.8 Children's Protection and Welfare Act 2011*

The Children's Protection and Welfare Act (CPWA) protects the right of children not to be subjected to torture. It provides that:

> (a) A child has a right to be protected from torture or other cruel, inhuman or degrading treatment or punishment, including any cultural practice, which degrades or is injurious to the physical, psychological, emotional and mental well-being of the child.

[908] Committee against Torture *Concluding Observations on Morocco's initial report* (note 908 above) para 5. See also Committee against Torture *Concluding Observations on Gabon* (note 908 above) para 8.
[909] Sexual Offences Act section 3.
[910] Attah (note 575 above).

(b) A child shall be chastised in accordance with his age, physical, psychological, emotional and mental condition and no discipline is justifiable if by reason of tender age or otherwise the child is incapable of understanding the purpose of the discipline.[911]

Similar to the Constitution and Education Act, the CPWA protects children's right to freedom from torture, but does not define torture nor distinguish it from other CIDT. It also does not criminalise torture or contain any provisions with regard to the redress of children who are victims of torture. It does not contain any specific measures, which the government would put in place in order to prevent torture of children. The African Commission in the case of *Equality Now and Ethiopian Women Lawyers Association v Ethiopia* held that in addition to prosecution, the state had an obligation to adopt preventive measures.[912] In its General Comment on states' obligations under article 2 of CAT, which mandates state parties to adopt legislative measures to prevent torture, the Committee against Torture has emphasised that the obligations under article 2 include protection of groups of people who are marginalised or discriminated against on various grounds, including age. Therefore, in the absence of anti-torture legislation in Lesotho, the protection of children under the CPWA could have been broader and encompassed standards against the torture of children as contained in ICCPR, CAT, African Charter, CRC and African Children's Charter.

*3.3.2.9 Anti-trafficking in Persons Act 2011*

The Anti-trafficking in Persons Act (Anti-trafficking Act) was enacted with the objective of curbing the high rate of women, girls and sometimes men who are trafficked into South Africa under the pretence of employment in the domestic, farming and mining industries, only to be forced into servitude, sexual exploitation, drug smuggling and prostitution.[913] The Act is relevant for purposes of implementing Lesotho's obligations against torture because trafficking, which meets the

[911] Children's Protection and Welfare Act 2011 section 16.
[912] *Equality Now and Ethiopian Women Lawyers Association v Ethiopia* Communication 341/2007 African Commission), November 2015. In this communication the Commission held that rape is a serious violation of the victim's human rights and the state's failure to protect her through legislative measures amounts to violation of articles 1 and 5 of the African Charter.
[913] United States Department of State, *Trafficking in persons report* (2011) http://refworld.org/docid/4e12ee6837.html [accessed 7 April 2017].

requirements of article 1 of CAT, amounts to torture, while some forms of trafficking may amount to CIDT.[914]

The Anti-trafficking Act contains provisions aimed at preventing and prohibiting torture by trafficking, punishing its perpetrators and providing redress and support to its victims. With regard to prevention, it provides for the launching of public awareness campaigns, which aim at educating people about human trafficking, about how traffickers operate and also that it is a criminal offence.[915] The obligation to prohibit torture is implemented through criminalising the offence of trafficking,[916] acts, which promote or facilitate trafficking,[917] smuggling of persons,[918] as well as engaging in services of a victim of trafficking.[919] Most importantly, section 7(d) of the Act provides that when these acts are committed by a public figure or officer, they do not only amount to the offence of trafficking but aggravated trafficking which attracts a heavier sentence upon conviction. The Act complies with article 68 of the CMW in that it provides for the prevention and elimination of trafficking in persons and smuggling of migrant workers for purposes of trafficking.[920]

The Act also contains a number of provisions aimed at the practical implementation of the prohibition, ranging from port and border control,[921] identification of victims,[922] arrest of suspected perpetrators both by police officers and private persons,[923] prosecution of such perpetrators and imposition of heavy penalties upon conviction.[924] The Act pays special attention to victims of trafficking by detailing how

[914] UN Human Rights Council 'Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2008) UN Doc A/HRC/7/3 para 56; Committee against Torture, *Concluding Observations on the third periodic report of Azerbaijan*, 8 December 2009 UN Doc CAT/C/AZE/CO/3 para 20; Committee against Torture, *Concluding Observations on the second periodic report of Belgium*, 19 January 2009 UN Doc CAT/C/BEL/CO/2 para 25.
[915] Anti-trafficking Act section 43.
[916] As above section 5.
[917] As above section 6.
[918] As above section 12.
[919] As above section 8.
[920] *Lesotho initial report to CMW* para 41.
[921] Anti-trafficking Act section 14.
[922] As above sections 22 - 35.
[923] As above sections 20 & 21.
[924] Anti-trafficking Act section 5 provides for a penalty of a fine of 1 million Maloti (about 67 000 USD) or imprisonment for a period of 25 years. Where the victim is a child, the fine is doubled or liable to life imprisonment, which is similar to an offence of aggravated trafficking, which is where a child is adopted under the laws of Lesotho with the sole purpose of prostitution, pornography, sexual

they shall be protected during investigation, criminal proceedings and post proceedings against the perpetrator. Some protection includes the prohibition of summary deportation of victims of trafficking,[925] establishment of centres for victims and a fund aimed at assisting victims,[926] rehabilitation of victims, including the provision of healthcare.[927] The Anti-trafficking Act also provides for redress to victims of trafficking in accordance with the recommendations of the HRC, CAT, as well as the Robben Island Guidelines as discussed in detail in chapter 2.

*3.3.2.10 Amnesty Bill 2016*

The Amnesty Bill is still awaiting debate and approval by parliament. If approved in its current form, the primary object of the Amnesty Bill is:

> To make provision for the granting of amnesty to certain persons who may be liable for criminal prosecution or disciplinary proceedings or civil litigation for certain acts or omissions of offences done or purported to have been done during the period 1 January 2007 to 31 December 2015 by such persons in the execution of their duties or in pursuit of any political objective.[928]

The Bill provides specifically that when enacted, the Amnesty Act will exempt from prosecution, disciplinary action and even civil litigation, members of the LDF, LMPS, NSS and LCS who have committed offences, such as treason, sedition, subversion, murder, mutiny, other acts of violence against persons, malicious damage to property, kidnapping, desertion, incitement to commit a crime and contravention of the Internal Security Act during the mentioned period. It also provides that charges, which have already been instituted, shall be withdrawn and those officers imprisoned shall be released from detention and formally retired. Although not yet tabled for debate, the Bill has been criticised by political opposition parties as a smokescreen to exonerate officers of the LDF who have been implicated in the death of the former military commander in June 2015 and the torture of soldiers who were detained for

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exploitation, labour exploitation, slavery or debt bondage or the act is committed by a public officer. See Anti-trafficking Act section 7.

[925] Anti-trafficking Act sections 28 & 29.

[926] As above sections 44 to 49.

[927] As above sections 36 to 42.

[928] Amnesty Bill section 1.

almost two years on charges of mutiny.[929] It is viewed as creating a breeding ground for impunity and further violation of human rights.

As a way of addressing public concerns about the rights of those affected by the crimes committed during the period covered by the Bill, section 4 provides for their mandatory compensation by the government. It further provides that its provisions are without prejudice to the right of a person who is not satisfied with such compensation to access the courts of law for an appropriate relief.[930] Although section 4 caters for the compensation for victims of human rights violations, including torture, the Bill is incompatible with Lesotho's human rights obligations under customary international law as well as all the international human rights instruments discussed in chapter 2. In terms of customary international law, absolute prohibition of torture is a peremptory norm of international law derogation, which cannot be justified by a domestic legislation.[931] The obligation to prohibit torture has been interpreted by the HRC in General Comments 20 and 29 to entail the duty to investigate all allegations of torture and also to prosecute and punish its perpetrators.[932] Similarly and perhaps more explicitly, the Committee against Torture has interpreted the obligation to prosecute and punish to entail the duty to remove amnesties and other impediments, which 'preclude or indicate unwillingness' to prosecute and punish perpetrators of torture.[933] The African Commission, in the case of *Malawi African Association & Others v Mauritania*, held that '…an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by victims or their beneficiaries…cannot shield that country from fulfilling its obligations under the Charter'.[934] The Bill cannot therefore be justified on any

[929] More details on these events are discussed in the next chapter under prevalence of torture within the LDF during the seven-party coalition government.
[930] Amnesty Bill section 4(2).
[931] Dugard (note 132 above) 43; Juma (note 183 above) 279; *SAPS v SALC* (note 188 above) 81.
[932] HRC, GC 20 para 1; HRC, GC 29 para 3.
[933] Committee against Torture, GC 2 para 5.
[934] *Malawi African Association & Others v Mauritania* (note 500 above). This communication involved challenges against an amnesty law, which granted amnesty to members of the security forces who had committed torture and other crimes in Mauritania between 1986 and 1992; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (note 496 above) para 201 in which the African Commission held that [t]here has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights violations has become a rule of customary international law'.

grounds as it is against Lesotho's international human rights obligations against torture.[935]

## 3.4 Institutional framework against torture in Lesotho

As illustrated in section 3.3 above, the effectiveness of Lesotho's legal framework to implement the international human rights standards against torture is challenged by the absence of specific anti-torture legislation, which would define torture, prohibit it as a distinct crime, and stipulate sentences for its commission and also means through which its victims would be redressed. The implementation of these obligations depends on the capacity of Lesotho's institutional framework. In this section, the existing institutions are analysed and it is concluded that the flaws in the legal framework also pose institutional challenges. The institutions are analysed in line with the standards and obligations relating to the investigation of allegations of torture, prosecutions and punishment of perpetrators of torture, granting of amnesties and immunities, as well as provision of adequate redress to its victims. Institutions, which are analysed, include the LMPS, which is tasked with the investigation of criminal offences and the apprehension of offenders, the PCA, which is a civilian body tasked with police oversight, the Office of the Ombudsman who has the mandate to receive complaints related to maladministration, injustice and human rights, as well as the DPP who is responsible for the prosecution of all criminal cases. The establishment, mandate and effectiveness of these institutions *vis-à-vis* Lesotho's human rights obligations against torture are considered in the next section.

### *3.4.1 Lesotho Mounted Police Service*

The LMPS is governed by the Police Service Act of 1998. It is an institution responsible for the investigation of torture and the training of law enforcement officials on human rights and rules of interrogation. Its mandate, includes: to uphold the law, to preserve the peace, to protect life and property, to detect and prevent crime, to arrest offenders and to bring them to court.[936] According to the international

[935] MP Sharf 'Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti' (1996) 31*Tex International Law Journal* 38.
[936] Constitution section 147; Police Service Act section 4.

human rights standards discussed in the previous chapter of this thesis, the investigation of allegations of torture is at the centre of states' obligation to prohibit torture as it leads to prosecution and punishment of its perpetrators, as well as the provision of redress to its victims.[937] In its General Comment 2, the HRC stated that allegations of torture must be investigated by competent authorities.[938] For Lesotho to fully comply with its obligation to investigate allegations of torture, the LMPS must therefore have competence to investigate.

Apart from being contained in the international human rights instruments, the obligation to investigate allegations forms part of customary international law. In the case of *National Commissioner of the South African Police Service v Southern African Litigation Centre and Another,* the South African Constitutional Court held that the South African Police Service (SAPS) does not only have power, but a duty to investigate allegations of torture.[939] In this case, the Court held that this duty is not only confined to the investigation of acts alleged to have been committed in South Africa or those concerning South Africans, but because of its customary international law nature, the obligation includes investigation of allegations of torture committed in Zimbabwe by Zimbabwean authorities against Zimbabwe nationals.[940]

To illustrate the importance of investigation to states' obligation to prohibit torture, failure to carry out investigation of acts committed by third parties amounts to such acts being attributed to the state.[941] That is, state authorities are considered to be authors of such acts because of having failed to investigate them and to bring those responsible to justice.[942]

[937] CAT articles 12 & 13; *Abdulrahman Kabura v Burundi* (note 378 above) para 9.3; *Dmytro Slyusar v Ukraine* (note 59 above) para 9.3; *Elaiba v Tunisia* (note 377 above) para 7.6.
[938] HRC, GC 20 paras 14 & 15.
[939] *SAPS v SALC* (note 188 above) 81.
[940] As above.
[941] Committee against Torture, GC 3 para 7; See also McGregor (note 78 above) 211; Clapham (note 78 above) 342. See also McCorquodale & La Forgia (note 78 above) 217.
[942] HRC, GC 31, HRC stated that states' failure to investigate acts of third parties amounts to violation of article 2 of ICCPR which contains general obligations; Committee Against Torture GC 2, *Bleier v Uruguay* and *Centre for Human Rights (University of Pretoria) and another v Senegal* (note 533 above).

The preceding discussion on the legal frameworks against torture in Lesotho has clearly shown that the absence of an anti-torture law in Lesotho is inconsistent with Lesotho's international human rights obligations against torture. This absence also has catastrophic effects on the ability of the LMPS to investigate allegations of torture in as much as the crime of torture is non-existent in the penal system of Lesotho. However, turning a blind eye and assuming that the Penal Code prohibition of other acts of violence, such as assault and murder could, while the Act is being awaited, be the basis for investigation, the question, which then arises, is whether the LMPS is competent to carry out investigations and take perpetrators to court. The answer to this question is no, as the discussion in the next chapter shows that in the majority of cases of torture, officers of the LMPS are the main perpetrators of torture. They use torture as an interrogation tool during investigations. When analysing human rights violations in criminal investigations in Lesotho, Lenka concludes that due to serving undemocratic governments over a long period, the LMPS has been involved in several human rights violations despite the change in the legal framework, which governs it.[943] In the next chapter, it will be illustrated through cases that this remains to be the case to date. Great involvement of members of the LMPS in acts of torture thus limits its competence and impartiality to investigate allegations of torture in accordance with international standards.

The competence of LMPS officers to investigate allegations of torture is also dependent upon the type of training, which they receive. Hence, the training of law enforcement officers on human rights is listed as one of states' obligations against torture as illustrated in the previous chapter.[944] The Constitution of Lesotho provides that Lesotho shall ensure that education is available to all in an endeavour to strengthen respect for human rights.[945] The Police Training College (PTC) offers human rights training as part of syllabi for newly recruited, as well as serving officers. However, as reflected in the next chapter, incidents of torture occur nonetheless. This, therefore, questions the manner in which the training is offered and illustrates that the use of torture in interrogation is an imbedded culture in the LMPS, which needs more effort in order for it to be rooted out.

[943] Lenka (note 716 above) 313.
[944] CAT article 10; *Elaiba v Tunisia* (note 377 above) para 7.4; HRC, GC 20 para 10.
[945] Constitution section 28 (a).

### *3.4.2 Police Complaints Authority*

The Police Complaints Authority (PCA) is a statutory body established in terms of section 22 of the Police Service Act.[946] It is a civilian body with mandate to oversee policing. Its mandate include:

> … the responsibility for investigating and reporting to the Police Authority [who in terms of the Act is the Minister] on any complaint referred to it by the Police authority or the Commissioner, which is a complaint from the members of the public about the conduct of a member of the Police Service.[947]

Because of its mandate to oversee police-public relations, the PCA can be categorised as a torture-prevention mechanism as it is an institution outside the police service and has the mandate to investigate allegations of torture made against members of the police service.[948] However, the institutional independence of the PCA is compromised by the manner in which its members are appointed.[949] In terms of the Police Service Act, members of the PCA shall be appointed by the Police Authority, the Minister.[950]

Apart from political influence of the appointment of members of the PCA, other factors, which determine competence of the PCA are also compromised. These include inaccessibility and lack of any power beyond investigation.[951] As far as accessibility is concerned, Murtaugh and Poe argue that one of the most important functions of a police oversight body is to provide information to the public about the police service in general, as well as about the complaints procedure where there are

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[946] Police Service Act No.7 of 1998, section 22.
[947] Police Service Act section 22 (3).
[948] *Alexander Gerasimov v Kazakhstan* (note 382 above) para 12.4 in which the Committee against Torture held that an investigating authority in the same chain of command as the regular police force is incapable of conducting impartial investigations. See also *Evloev v Kazakhstan* (note 111 above) para 4 in which the Committee against Torture held that there cannot be impartiality where investigations are conducted by the same institution alleged to have committed torture.
[949] HRC, Summary record of 1743rd Meeting 1 April 1999, UN Doc CCPR/C/SR.1743 para 58 in which members of the HRC questioned the independence of the PCA under the authority of a Minister.
[950] Police Service Act 1998 section 22(3).
[951] R Crawshaw, S Cullen & T Williamson *Human Rights and Policing* (2007) 413.

human rights violations or other grievances.[952] However, in its report on the human rights situation in Lesotho, the SADC Lawyers' Association notes that Lesotho's PCA is unknown amongst the populace.[953] This, therefore, renders the PCA ineffective as the majority of the people of Lesotho do not know about it and therefore do not benefit from its establishment.

As far as procedural accessibility is concerned, in terms of section 22 of the Police Service Act, members of the public do not have direct access to the PCA, but have to either go through the Commissioner of Police or the Police Authority who then forwards such complaints to the PCA.[954] There is no written procedure for channelling complaints to the Police Authority. Therefore, although this is a route seldom used, probably because the public is not aware of it, or because of political reasons, it seems easier than the alternative of channelling through the Commissioner of Police, which entails cumbersome bureaucratic processes. With regard to complaints, which reach the PCA through the Commissioner of Police, such complaints must have gone through the following channels.[955] The complaint is submitted to the Commissioner by the office of Inspectorate, Complaints and Discipline (IC&D) having followed the following processes: the complainant has to first go to the station commander (also referred to as officer commanding or OC) where the police officer who is facing the complaint is stationed and report the ill-treatment, use of force or any unsatisfactory conduct, which is the basis of the complaint. The OC would then take up the matter with the officer concerned. If the issue is not resolved, then the complainant or the OC would take the matter to the officer in charge of the district (Dispol) who is then mandated to investigate the matter and solve it, failing which the matter may be referred to the officer in charge of the region (Regipol) who would then take it to IC&D. The IC&D may investigate the matter or refer it to the PCA. If upon investigation, the IC&D finds that the officer has used unlawful and impermissible force, the Commissioner directs Dispol to hold a

[952] Murtaugh C & Poe M *Establishing an independent Police Oversight Body* INPROL Responses 2010 available at www.inprol.org [accessed 13 June 2013].
[953] SADC Lawyers Association *Report on human rights situation in Lesotho* (2013).
[954] Police Service Act section 22 provides that the PCA shall investigate complaints from members of the public, which are brought to its attention through the Commissioner of Police and Minister of Police.
[955] This procedure is not contained in the Police Service Act, but forms part of the standard procedure adopted by the LMPS throughout the country.

disciplinary hearing against the officer complained of in accordance with the Police Service Act.

Because of the many channels through which complaints go before reaching the Commissioner of Police, very few of them are taken to the PCA; most of them are dealt with internally by the OC, Dispol, Regipol or IC&D while in some cases, the complainants become weary and abandon the complaints midstream. This also 'leads to lack of transparency, abuse of power and unnecessary delays'.[956] As a result, many victims of police brutality have opted to bypass this procedure and lodge delictual claims against the Commissioner of Police directly in the courts of law as opposed to using the PCA as a police oversight body.[957]

The second challenge is with regard to powers, which the PCA has over the cases, which have been submitted to it. According to section 22, the powers of the PCA do not go beyond investigating and reporting such complaints to the Minister. The PCA does not have the power to institute any legal or disciplinary proceedings against the officer complained of, but may in its report, make recommendations to the Commissioner or Police Authority. When such recommendations have been made, the disciplinary proceedings are not carried out by the PCA, but by the Commissioner of Police in accordance with the procedures contained in the Police Service Act. Because the PCA does not have the power to follow up on whether the recommendations have been implemented, the investigations carried out often end up with no action being taken against the concerned police officers. It must be noted that in 1999, when Lesotho's initial report to the HRC was considered, the Lesotho delegation welcomed the Committee's suggestion that the PCA should be empowered to give effect to its findings,[958] yet two decades later the law governing the PCA remains the same.

[956] *Lesotho initial report to CMW* para 38.
[957] The majority of these cases are discussed in the next chapter under prevalence of torture within the LMPS.
[958] HRC Summary Record 1744th Meeting 1 April 1999, UN Doc CCPR/C/SR.1744 para 10.

### *3.4.3 Office of the Ombudsman*

The Office of the Ombudsman is established in terms of sections 134 and 135 of the Constitution. The nature, mandate and powers of the Ombudsman are described in the Ombudsman Act of 1996. The Ombudsman is appointed by the King, acting on the advice of the Prime Minister.[959] The mandate of this office is to investigate and recommend preventative and remedial action on complaints related to maladministration, corruption, injustice, human rights, corruption and degradation of the environment.[960] This office is therefore mandated to receive complaints on human rights violations, including torture.

The main function of the Ombudsman is to receive and investigate complaints from aggrieved persons, against government agencies, including law enforcement institutions and to recommend remedial action where he finds the complaint justified.[961] Complaints are received directly from members of the public, who may do so in person at the office of the ombudsman or through the post or by telephone. The investigators then embark on an investigation and determine whether the complaint is legitimate, within the jurisdiction of the Ombudsman and whether available remedies have been exhausted. If the investigation done reveals that the complainant's rights have been violated, the investigator then writes a report and recommends remedial action to the Ombudsman. If the Ombudsman is satisfied with the report and recommendation, he then writes to the head of the concerned government agency and recommends an appropriate remedial action. Unlike the PCA, if the Ombudsman's recommendation is not implemented within a stipulated time, then the Ombudsman may make a special report to parliament.[962] The possibility of the matter being reported to parliament increases the rate at which government agencies comply with recommendations by the Ombudsman in order to avoid naming and shaming.

[959] Constitution section 135 (1).
[960] Ombudsman Act section 7.
[961] Ombudsman Act section 7(4).
[962] Ombudsman Act section 7(5). This a report, which may be filed at any time of the year apart from the annual reports, which the Ombudsman files to parliament in terms of section 135(3) of the Constitution and section 16(1) of the Ombudsman Act.

However, as far as torture is concerned, the Ombudsman usually refers complaints against members of the police service to the IC&D office for investigation. The Ombudsman then requests reports and makes follow-ups as to the extent to which the allegations of torture have been investigated. The office does not embark on the actual investigations. As illustrated earlier, the competence and impartiality of the police to investigate allegations of torture are highly compromised. This practice therefore also negatively affects the work of the Ombudsman as far as allegations of torture by the police are concerned.

The establishment of national preventive mechanisms (NPMs) whose powers include visits to places of detention and receipt of complaints regarding conditions of detention is an international human rights obligation, which states have to fulfil.[963] As illustrated above, the Ombudsman also plays a role in torture prevention by visiting places of detention and receiving reports on general conditions of detention. The 2016 report of the Ombudsman to parliament which covers the period between 2012/2013 submitted in terms of section 16 of the Ombudsman Act shows that the Ombudsman has over the years, visited places of detention, focused on conditions of detention such as overcrowding but did not pay particular attention to torture and CIDT in the police and correctional detention facilities.[964] It can therefore be concluded that the office of the ombudsman also fails to effectively implement Lesotho's international human rights obligations against torture.

### *3.4.4 Director of Public Prosecution*

The DPP is established in terms of section 141 of the Constitution. The mandate of the DPP is prescribed in section 5 of the CP&E as 'institution and undertaking of criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed by that person'. While the primary mandate to prosecute is invested in the DPP, effective prosecution of

[963] Robben Island Guidelines (note 103 above); *Alexander Gerasimov v Kazakhstan* (note 382 above) para 12.4.

[964] The challenge is, however, that the Ombudsman does not submit annual reports on time. The latest report covering 2012/2013 was submitted in 2016. This report does not cover torture or complaints against the police. It only reports on visit of 28 police stations and 6 correctional centres, which was done after six years. Recommendations made in the report addressed working conditions of the police and correctional officers and nothing on allegations of torture or conditions of detention.

suspects of torture is highly dependent on the ability of investigation officers to gather evidence on the basis of which the suspected perpetrators are prosecuted.[965] Lack of anti-torture legislation in Lesotho has proven to be a challenge to the capacity of institutions, such as the LMPS to investigate allegations of torture. This in itself presents challenges to the ability of the DPP to prosecute suspects and of the courts of law to impose appropriate sanctions.

As will be illustrated in the next chapter, of the many cases of torture committed by members of the police, the army and the correctional service, very few are investigated and ultimately prosecuted. In the next chapter, it is illustrated that although there is an appalling number of civil claims against the police and the military for torture, there are spotted corresponding criminal cases against the officers implicated. Failure to prosecute perpetrators of torture therefore amounts to violation of the state's international obligation to punish torture.[966]

### 3.5 Universal Periodic Review and African Peer Review Mechanisms

Apart from the state reporting obligations discussed in the previous chapter, both the United Nations and the African Union have established mechanisms through which states' implementation of standards contained in the human rights instruments may be assessed. The Universal Peer Review (UPR) was established by the UN General Assembly in 2006 when the Human Rights Council was established.[967] It is a mechanism for the Human Rights Council to monitor in a non-adversarial manner, states' human rights implementation on the ground.[968] At the regional level, the New Partnership for Africa (NEPAD) Heads of State and Government Implementation Committee established the African Union has established the African Peer Review Mechanisms (APRM) in 2003. The APRM is an instrument voluntarily acceded to by members of the AU to self- monitor their performance in governance by fostering the

[965] CAT articles 12 & 13.
[966] CEDAW Committee, GR 19 para 11; Committee against Torture, GC 2; HRC, GC 31; *Centre for Human Rights & Another v Senegal* (note 533 above) para 68. See also See also McGregor (note 78 above) 211. See also Clapham (note 78 above) 342. See also McCorquodale & La Forgia (note 78 above) 217.
[967] General Assembly Resolution 60/251 3 April 2006, UN doc A/Res/60/251 article 5(e).
[968] As above.

adoption of policies, values, standards and practices of political and economic governance that lead to political stability amongst others.[969]

Although both the UPR and APRM are not strictly legal and therefore non-binding, they however, provide an introspection for states parties and are also platforms in which states publicly declare their status as far as implementation of their international human rights obligations are concerned. Lesotho's commitment towards its obligations against torture are reflected in the reports of both mechanisms as illustrated below.

### *3.5.1 Universal Periodic Review (UPR)*

Lesotho participated in this review in June 2010. Following an interactive dialogue between Lesotho's delegation and other states which took part in the review, Lesotho supported several recommendations which have a bearing on its obligations against torture. For instance, it supported: the recommendation by Chad to integrate ratified international human rights instruments relating to torture and the state of prisons into its domestic legislation;[970] France's recommendations to combat prison overcrowding and to establish 'credible mechanisms' for investigation of human rights violations committed by security forces, to compensate victims and to prosecute and punish perpetrators of such violations;[971] Netherlands' recommendation to 'reinforce its legislative framework to protect children from all forms of sexual abuse and exploitation, including in the family' and to investigate and prosecute cases of all forms of domestic violence and ensure that perpetrators are punished;[972] and Brazil's recommendation to abolish corporal punishment.[973] Recommendations made by Argentina, Germany and Sudan for Lesotho to adopt legislative measures and to eradicate the practice of FGM were however not

[969] African Union 'African Peer Review Mechanism' available at https://au.int/en/organs/aprm [accessed 10 November 2017].
[970] Human Rights Council *Report of the working group on universal periodic review: Lesotho* 16 June 2010, UN doc A/HRC/15/7, para 97.3.
[971] As above paras 97.4 and 97.38.
[972] As above, paras 97.12 and 97.36. A similar recommendation against domestic violence was made by Germany at para 97.37.
[973] As above para 97.34.

supported by Lesotho.[974] Lesotho also undertook to ratify international human rights instruments such as the Optional Protocol to the Convention against Torture 2002 (OPCAT) and the Optional Protocol to CRPD and the International Convention for the Protection of all Persons from Enforced Disappearances 2006 (ICPED).[975]

### *3.5.2 African Peer Review Mechanism (APRM)*

Lesotho acceded to the APRM on 8 July 2004 and its first review was in June 2010. As far as Lesotho's obligations towards torture are concerned, the APRM panel raised several concerns including non-domestication of CAT and Lesotho's failure to establish a national human rights commission,[976] as well as weak institutional frameworks. It recommended that Lesotho must strengthen its oversight agencies such as the Office of the Ombudsman and the PCA which are weakened by lack of transparency, exclusion of the public participation and inability to follow up on their recommendations.[977] The report also indicated that due to backlog of cases in the courts of Lesotho, and the parliament's failure to enact laws timeously which are matters of governance, torture, abuse, poor prison services and lengthy pretrial detentions are some of specific areas of concern in the realm of the judiciary in Lesotho.[978]

## 3.6 Conclusion

The central theme in this research is that in order to eradicate torture at the national level, domestic laws must be harmonised with international standards against torture. Before delving into the extent to which Lesotho's legal and institutional frameworks comply with the international human rights standards against torture, the two main theories of incorporation of international law into national legal systems: monism and dualism were investigated in this chapter. The conclusion was drawn

[974] As above paras 99.1, 99.2 and 99.5. Lesotho's position could have been influenced by the fact that it has not been established that FGM is practiced in Lesotho.
[975] Human Rights Council Human Rights Council *Report of the working group on universal periodic review: views on conclusions and/ or recommendations, voluntary commitments and replies presented by the state under review -Lesotho* 15 September 2010, UN doc A/HRC/15/7/Add.1 paras 1 and 6.
[976] APRM *Kingdom of Lesotho country review report no.12* June 2010 para 222.
[977] As above paras 175, 223 and 229.
[978] As above para 220.

that although Lesotho is often categorised as dualist and therefore requiring an Act of Parliament before the courts of law could apply an international norm, jurisprudence of the courts of Lesotho reflects that, in Lesotho, there is no strict adherence to dualism as sometimes the courts of law apply international law in a manner best described by the theory of monism. A further conclusion is that this mixture of approaches confirms that reliance on the two theories of monism and dualism when assessing the implementation of international standards in a particular state, has become outdated and that in the human rights discourse, what must be focused on is the content of a pedigree and not its source. That is, as far as torture is concerned, the focus must shift from whether its prohibition is a rule of international law to the results, which its prevention, prohibition, punishment of perpetrators and provision of redress to its victims yield for the citizenry of that particular country.

Discussions of the laws and institutions has highlighted that the legal and institutional frameworks in Lesotho are very weak as far as the implementation of the state's international human rights obligations against torture are concerned. The legal system is weakened by the absence of a law, which prohibits torture as a distinct crime. This law would enable the implementation of other obligations such as the obligation to define torture in accordance with article 1(1) of CAT and the obligations, to investigate allegations of torture and prosecute its perpetrators. It would also prescribe the appropriate punishment which takes into account the heinous nature of the offence of torture. The absence of an anti-torture law has also affected the obligation to provide appropriate redress to victims of torture. Because of the weak legal framework, the institutions, which would be expected to implement Lesotho's obligations against torture, are also weakened. For instance, the PCA's investigation powers are very limited, it does not have the power to prosecute and therefore relies on the police to charge and take the police and army officers alleged to have committed torture to court. The end result of this vicious circle is impunity, which is illustrated more fully in the next chapter.

# CHAPTER 4

# PRACTICE OF TORTURE IN THE LAW ENFORCEMENT INSTITUTIONS IN LESOTHO

## 4.1 Introduction

Electric shocks, beatings, solitary confinement, deprivation of sleep and water boarding are some of the acts, which have been declared unlawful by national and international courts and tribunals.[979] When expressing displeasure against practices of torture, the Namibian Supreme Court in the case of *Namunjepo & Others v The Commanding Officer, Windhoek Prison & Another* held that:

> Whatever the circumstances, the practice to use chains and leg-irons on a human being is a humiliating experience, which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray.[980]

Despite the unanimous condemnation of torture by most countries of the world, 'every day across every region of the world, these unimaginable horrors are a reality for countless men, women and children'.[981] In his statement on 26 June 2012, a day marked as the international day to support victims of torture, former UN Secretary General, Ban Ki-moon, described torture as a cruel and dehumanising practice often committed with the intention of destroying one's sense of dignity and human worth.[982] He stated further that in some cases, torture 'is part of deliberate state policy of instilling fear and intimidating its population'.[983] The former Secretary General also stated his concern that:

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[979] *Angel Estrella v Uruguay* (note 51 above) para 10; *Alan v Switzerland* (note 58 above) para 14. See also *Malawi African Association & Others v Mauritania* (note 500 above). See also *Evloev v Kazakhstan* (note 111 above); *Dmytro Slyusar v Ukraine* (note 59 above); *Sathasivam & Saraswati v Sri Lanka* (note 48 above); *Grasimov v Kazakhstan* (note 61 above).
[980] *Namunjepo & Others v Commanding officer, Windhoek Prison & Another* (2000) 6 BCLR 671 (Namibian Supreme Court) 9 July 1999 para 23.
[981] Amnesty International *Torture in 2014: Thirth years of broken promises* (2014) 5.
[982] UN SG, *Secretary-General's message on the international day in support of victims of torture* 26 June 2012 www.un.org/sg/STATEMENTS/index.asp?nid=6158 [accessed 8 April 2016].
[983] As above.

> In too many countries, people's legitimate demands for freedom and human rights are met with brutal repression. Even when regimes change, torture often persists and a culture of impunity remains.[984]

Lesotho is no stranger to this reality. Although not often reported, torture has taken and continues to take place in Lesotho. In this chapter, the task will be to illustrate through the analysis of reports compiled by different human rights organisations, the media, as well as reported court cases that torture is practised in Lesotho.[985] The argument advanced in this chapter is that, the failure to incorporate international human rights standards against torture into the national legal system, coupled with the political instability with which the country has been grappling since independence, contributes to the occurrence of torture in Lesotho.

According to human rights reports compiled by international and national organisations, torture, cruel, inhuman and degrading treatment or punishment of citizens by the police, as well as societal abuse of women and children are amongst the most pressing human rights issues in Lesotho.[986] The link between torture and political instability is supported by the number of cases by Amnesty International and other human rights organisations compiled in the 1980s and those compiled recently which give details of cases in which various forms of torture were committed and continue to be committed against suspects of crime in Lesotho.[987] In some cases,

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[984] As above.

[985] HRC *Concluding observations on Lesotho's initial report* 8 April 1999 UN Doc CCPR/C/79/Add.106 paras 14, 16 - 19 in which the Committee raised its concerns about numerous instances of torture of persons in custody, excessive use of force, prolonged detention as well as impunity for crimes and abuses committed by members of the military. CEDAW Committee, *Concluding observations on the combined initial to fourth periodic reports of Lesotho* 8 November 2011, UN Doc CEDAW/C/LSO/CO/1 - 4 para 20 in which the Committee raised concerns about stereotypes and harmful practices, which perpetuate violence against women, paras 22 & 23 in which the Committee raised concerns about the high prevalence of domestic and sexual violence against women, and paras 24 - 25 in which the Committee raised concerns about the high prevalence of trafficking of women and girls and the low rate at which it is being reported; CRC, *Concluding Observations' on Lesotho's initial report* (note 128 above) para 31.

[986] United States Bureau of Democracy Human rights and Labour *Country Reports for Human Rights Practices for 2011: Lesotho* (2012); Freedom House *Country ratings and status: Freedom in the World 1973-2012* (2012); SADC Lawyers Association *Report on the overview of human rights situation in Lesotho* (2013).

[987] This chapter relies more on reports compiled by Amnesty International and the US Department of States due to the fact that such information is not easily accessible from the LMPS and other government sources.

the worst forms of torture have resulted in the death of its victims.[988] According to Bertelsmann Stiftung's Transformation Index (BTI) 2016 evaluation report, the collapse of the 2012 coalition government resulted in instability in the country, with several instances of brutality and torture, as well as political interference with the judiciary.[989] Thus, the human rights situation in Lesotho is closely linked to the political landscape in the country. As a result, the incidences of torture have fluctuated depending on the level of political stability.

Because torture mainly takes place in the shadows, an assessment of its scale in a comprehensive, categorical and statistical manner is impossible.[990] However, despite the absence of statistical data, which illustrates the magnitude of torture in Lesotho, this research illustrates in the next sections that human rights reports and reported case law show that torture and related offences have been committed at differing degrees from the time Lesotho gained independence to date. The analysis also indicates that in the majority of the reported cases of torture, perpetrators are members of the security forces and that they commit such acts with impunity. They also indicate that the commission of torture is rifer during political instability.

Torture as defined in article 1(1) of CAT is capable of being committed in various settings. However, the focus of this chapter is on the extent of torture within the law enforcement institutions in Lesotho. In this research, the law enforcement institutions are also referred to as security forces or agencies. The security forces in Lesotho are made up of the LDF, LMPS, NSS and LCS.[991] The LDF is a military force tasked with the maintenance of all external security issues,[992] although when the Commissioner of Police so requests, it may assist the LMPS, which is tasked with maintenance of

[988] United States Bureau of Democracy (2012) (note 975 above) 1 which reports that in 2011, three people died in police custody and the United States Bureau of Democracy (2014) 3, which reports that in 2013 five prisoners died while one suspect died in police custody; M Mokotjo 'Family wants answers after a man dies in custody' *Lesotho Times* 8 January 2016; A Dissel & C Frank *Policing and Human Rights: Assessing southern African countries' compliance with the SARPCCO code of conduct for police officials* (2012) 48.

[989] Bertelsmann Stiftung's Transformation Index (BTI) Lesotho Country Report 2016 (2016) 6. It reports that the number of victims of police brutality has increased significantly since the last review in 2015.

[990] Amnesty International (note 970 above) 10.

[991] Constitution of Lesotho section 146 - 149.

[992] Constitution section 146.

law and order as part of internal security.[993] The NSS is an intelligence unit responsible for the provision of information that poses a threat to the country's internal or external security.[994] The LCS is an institution responsible for the administration of prisons,[995] although the terms 'prison' has been replaced with 'correctional institution'.[996]

The commission of torture in each of these law enforcement institutions can be attributed to different factors. The most apparent factor is political instability. Literature in the form of case law and human rights reports points to the fact that the type or form of torture as well the reasons for which it is committed differ from one institution to another. Cases in which the police have or are alleged to have tortured people, mostly involve the use of torture as an interrogation tool during criminal investigations.[997] Conversely, torture in the LDF is resorted to as a training method against newly recruited members of the army,[998] as a tool of discipline against serving members of the army,[999] as well as a political tool used by those in government to suppress opposition.[1000] Correctional officers are alleged to sometimes resort to torture as a means of disciplining inmates.[1001] There is no case law or anecdotal report, which implicates members of the NSS in cases of torture. This may be attributed to the fact that officers of the NSS do not have physical contact with suspects of crime, but refer cases to the police for action. Therefore, the analysis will be limited to the three institutions being the LMPS, LDF and LCS.

Because of the link between the occurrences of torture and political history in Lesotho, cases of torture involving the security forces considered in this chapter are

[993] LDF Act section 190.
[994] Constitution section 148.
[995] Constitution section 149.
[996] Fifth Amendment to the Constitution, Act No. 8 of 2004 section 4.
[997] Lenka (note 716 above) 10.
[998] Sechele (note 141 above) 6.
[999] *Mathabeng Lechalaba v Commander LDF and Others* CIV/T/142/2001 (High Court of Lesotho) unreported.
[1000] Following the 2015 elections, members of the army who were thought to be supporters of the previous Prime Minister, Thomas Thabane, were arrested on allegations of having plotted mutiny against the command of the LDF.
[1001] *Letlaka Banyane v Commissioner of Correctional Services & Another* CIV/APN/80/2008 (High Court of Lesotho) [2010] LSHC 13 9 March 2010 in which the applicant, an officer of the LCS who had been found guilty of torture of inmates in disciplinary proceedings challenged the reduction of his salary, which was punishment for the offence.

analysed from a perspective of Lesotho's political history. The involvement of each security institution in cases, which amount to or are related to torture, is analysed with reference to seven main political phases after Lesotho's independence from Britain. For the purposes of this illustration, Matlosa and Pule's categorisation of these periods into four, namely the era of embryonic democracy (from 1965 to 1970), the era of de facto one-party rule (from 1970 to 1986), the era of military authoritarianism (from 1986 to 1993) and the era of fragile democracy (1993 to 1998) is used. When discussing civil military relations during the era of fragile democracy, Matlosa and Pule refer to the period between 1993 and 1998.[1002] Matlosa and Pule's analysis was limited to 1998 because it was done in 1999. Post 1999, the political landscape in Lesotho changed several times, which changes also affected the legal and institutional frameworks, as well as the extent of torture. Hence, the analysis in this chapter extends the political phases discussed by Matlosa and Pule by expanding the embryonic democracy to 2012, and adding the era of coalition governments (between 2012 and 2016). In their research, Matlosa and Pule argue that 'for much of the post-colonial period, the military was used as a tool, politicised and partisan'.[1003] In this instance, cases of torture are used to illustrate that while this observation was made in the 1990s, it remains true to date. The incidences of torture committed by both the police and the military has been and continues to be influenced by the political landscape of the country.

This chapter is divided into four sections: in section one, the practice of torture within the LMPS during each political phase is discussed. The cases in this section are derived from human rights reports of Amnesty International and the United States department of state, Lesotho's initial report to the HRC, media reports and the High Court of Lesotho. In section two, the occurrences of torture within the LDF are discussed. The discussion entails allegations of torture committed against newly recruited members during their training, cases of torture against serving members of the LDF and torture of civilians during the LDF's operations related to the preservation of internal order. In section three, the focus is on the LCS. Because

[1002] K Matlosa & NW Pule 'Civil-military relations in Lesotho, 1966-1988: Problems and prospects' in R Williams, G Cawthra & D Abrahams (eds) *Ourselves to know: Civil military relations and defence transformation in Southern African* (2003) 39.
[1003] As above.

there are no cases, which link torture within the LCS to the political environment, this section is categorised into two broad sections: firstly, incidents in which inmates have been subjected to torture by officers of the correctional institutions, and secondly, the conditions of the detention facilities, which amount to torture. In section four, a conclusion is drawn that despite not being regularly reported, torture is high in Lesotho, perpetrators of torture go unpunished and its victims remain without redress.

### 4.2 Torture within the Lesotho Mounted Police Service

The role of a modern police service in society has been summarised by Dunham and Alpert as being to 'represent and implement the government's right to use coercion and force to guarantee certain behaviours from its citizens'.[1004] Likoti enhances this definition by arguing further that in a liberal dispensation, the police service is perceived as a law enforcer and crime fighter whose main mandate is the detection of crime and 'catching' criminals.[1005] Therefore, since torture is a crime, the general expectation is that members of the police service should not be engaged in the commission of torture. Rather, they should detect cases of torture, apprehend those suspected of its commission and take them before courts of law for prosecution. However, as pointed out in the previous chapter, in Lesotho, torture is not criminalised as a distinct crime. Therefore the police do not have a basis for charging a person with torture and taking him to court for prosecution for the crime of torture. Over and above this limitation, the human rights reports and jurisprudence of the courts of Lesotho discussed in this section show that members of the LMPS are often implicated in the commission of torture.

[1004] RG Dunham & GP Alpert 'The foundation of the police role in society' in RG Dunham & GP Alpert (eds) *Critical issues in policing* (2015) 3.
[1005] Likoti (note 145 above) 201.

### *4.2.1 Overview of the LMPS*

The LMPS was established on 26 October 1872 by the British administration prior to Lesotho's independence from Britain.[1006] It was then known as the Basutoland Mounted Police (BMP), which was mainly made up of chiefs' sons and magistrates.[1007] While the magistrates had judicial powers, the other officers' main duties were to assist the magistrates as interpreters and to work as messengers in the Magistrate Courts.[1008] Other functions of the police included the collection of revenue, customs and gaol duties.[1009] Since the BMP was the only disciplined force in Lesotho, which was then called Basutoland, it carried out duties of both internal and external security.[1010] In 1965, the Basutoland Police Proclamation of 1957 was amended to expand the functions of the police force to include the preservation of peace, the prevention and detection of crime, the apprehension of offenders and the collection and communication of intelligence affecting public peace.[1011] It also authorised the police officers to carry arms.[1012]

Prior to this amendment, which expanded the scope of work for the police, a 'special operations unit', called the Police Mobile Unit (PMU), was established within the Basutoland Mounted Police in 1963.[1013] The PMU was mainly tasked to control political conflict, which the colonial administration thought would ensue during the 1965 elections, which was to usher in Lesotho's independence from being a British Protectorate. The PMU was established mainly because the colonial administrators perceived one of the political parties that would contest the elections, the Basotho Congress Party (BCP), as a dangerously militant organisation, which needed to be suppressed.[1014] Political analysts, Matlosa and Pule, argue that there was a general belief amongst the populace in Lesotho that from its inception, the PMU was meant to protect supporters of the Basotho National Party (BNP), another political party,

[1006] PE Garner 'Policing in Lesotho' (1971) 44(1) *The Police Journal: Theory Practice and Principles* 42; 'Lesotho Mounted Police Service: About us' www.lmps.org.ls [accessed 20 October 2015].
[1007] Likoti (note 145 above) 203.
[1008] As above.
[1009] As above.
[1010] Dissel & Frank (note 977 above) 38.
[1011] BMP Proclamation No. 27 of 1957 section 6.
[1012] As above.
[1013] Rosenberg & Weisfelder (note 677 above) 472.
[1014] As above.

which was believed to be favoured by the colonialists, and to ensure that it won the elections against the BCP.[1015] The general perception was that colonial administrators favoured the BNP because they perceived it as more conservative, non-violent and therefore posing a lesser threat to the colonial administrators than the BCP.[1016]

The BNP won the 1965 election. On 4 October 1966, Lesotho officially gained independence from Britain[1017] and the BNP government took over as the first democratically elected government. During this time, the police service changed its name to the Lesotho Mounted Police Force (LMPF).[1018] In terms of section 8 of the Police Force Order, the Minister could deploy the police in times of war to defend the country. This task was entrusted to the PMU. The police force continued to carry out the dual functions of internal order and external security until 1980 when the PMU was abolished with the formal establishment of a national military force.[1019]

As will be illustrated later on in this chapter, Lesotho had a bumpy political landscape with a number of political challenges, including the declaration of a state of emergency, the suspension of the Constitution in 1970, unconstitutional changes of government through *coups*: the 1970, 1986, 1990, 1998 and a controversial attempted *coup* in 2014. Most general elections have also been characterised by pre-, during and post-election violence. The changing political landscape posed several challenges to the Lesotho police. It came with change in command, and a change in policing strategies and policies, as well as change of the entire legal framework governing the police. These changes in turn impacted on the efficiency of the police as an institution, the laws governing the institution, the criminal laws passed, as well as the prevalence of human rights violations, including torture, during each political phase. Below is a trajectory of the incidents of police torture during each political phase and an analysis of how the political landscape influenced and continues to influence the prevalence of torture within the LMPS.

[1015] Matlosa & Pule (note 146 above) 62.
[1016] As above.
[1017] Lesotho Independence Act of 1966.
[1018] Rosenberg & Weisfelder (note 677 above) 162.
[1019] Acts of torture, which are alleged to have been committed by the PMU during the time when the police and the army were one organisation are discussed in the next section under the LDF.

### *4.2.2 Torture during the period of embryonic democracy (1965 - 1970)*

As indicated above, at the time of the first election in Lesotho, security tasks were carried out by the BMP through its special operations unit, the PMU. In their analysis of the relationship between the military and the general public, Matlosa and Pule canvass different views that different people held towards the PMU. On the one side, Leeman's opinion was that from its establishment in 1963, the PMU was forced to ensure that the BNP maintained its grip on power.[1020] Conversely, for Sixishe, the PMU was a force necessary to maintain law and order in the country.[1021] Leeman's view finds support in the number of arrests, detentions and killings of supporters of the opposition BCP and other critics of the BNP government, which were allegedly committed by members of the PMU.[1022] Similarly, Sixishe's view is supported by arguments that such deaths occurred in the course of the maintenance of public order, which was disturbed by attacks launched by the military wing of the BCP, the Lesotho Liberation Army (LLA), against civilians and government's essential services.[1023] In support of the necessity to use force, the PMU commander, Fred Roach, emphasised that public order had to be preserved at all cost, including the decisive use of force, against an alleged communist-backed opposition.[1024] Although the two views expressed by Leeman and Sixishe are different, what they have in common is the acknowledgment that human rights violations, including excessive use of force, did take place within the police service during this period. The difference lies in whether such violations were proportionate to the harm that the country was facing at the time and therefore justified or not.

Noted incidents in which the PMU used force against BCP supporters include the Thaba-Bosiu killings of December 1965 in which ten people died when opposition and monarchy supporters clashed with the state security forces when their meeting was intercepted pursuant to a law inherited from the colonial administration.[1025]

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[1020] Matlosa & Pule (note 146 above) 41; RS Weisfelder 'Free elections and political instability in Lesotho' (2015) 14 (2) *Journal of African Elections* 52, who argues that the BNP, which had lost to the BCP retained power with the help of Lesotho's security forces.
[1021] As above.
[1022] As above.
[1023] Lenka (note 716 above) 55.
[1024] As above.
[1025] Matlosa & Pule (note 146 above) 41.

Although the Thaba-Bosiu killings do not amount to torture, one could argue that the PMU's use of force against the BNP's political opponents in 1965 set precedence and created a culture that could facilitate the use, by those in government, of excessive force, including torture against political adversaries in violation of Lesotho's international human rights obligations. There is no case law or human rights report, which shows that the families of the people, who died in the Thaba-Bosiu killings, received any form of compensation from the government. Nor were there investigations or criminal and disciplinary action taken against members of the PMU who were involved in this operation. The pattern of killings with impunity started from this period of embryonic democracy and the discussion relating to other political phases in the next sections will reflect that this state of affairs persists to date, fifty years after independence.

In the majority of cases in which members of the police service committed human rights violations, including torture, they acted on the basis of laws, which justified their actions. One of the laws, which created space for the arrest, detention and ultimately torture of people, mainly political adversaries, during this period, was the Internal Security (General) Act (ISA) 1967. Although it was later repealed and replaced by two others,[1026] the 1967 Act allowed police officers to arrest suspects without warrants and to detain them without charges for prolonged periods.[1027] It is during the prolonged detentions that the rights of suspects were violated. Many were subjected to torture as a result of which some died in police custody.[1028] In its analysis of factors, which expose individuals to torture, the APT has identified detention as a major factor.[1029] Therefore, by authorising prolonged detention, the Internal Security Act created an environment conducive for politically motivated torture.

The political situation immediately after independence was fairly stable until the next elections in 1970. However, Matlosa and Pule argue that the sour fruits of human rights violations, including torture during the one party rule from 1970 to date, were

[1026] ISA 1982 & ISA 1984.
[1027] ISA 1967 allowed detention for up to 60 days.
[1028] Amnesty International report 1972.
[1029] APT (note 1 above).

sown during the BNP's five year rule from 1965 to 1970.[1030] This argument is supported by Rosenberg and Weisfelder's observation that during the period of embryonic democracy, the majority of police force personnel were drawn from BNP supporters.[1031] One could therefore argue that this selective recruitment based on political membership created a partisan police force, which would easily follow orders to use force and even torture, against political opponents. Matlosa and Pule argue further that the sourcing of police personnel from the ruling party of that time, provided a back-up for the then Prime Minister, which in turn encouraged him to declare a state of emergency and stage the 1970 *coup*.[1032] During the state of emergency, a number of political opponents were arrested and detained. Cases of torture following the 1970 declaration of a state of emergency are discussed below.

### *4.2.3 Torture during the period of a state of emergency (1970 - 1986)*

As alluded to earlier in this chapter, the BNP won the 1965 election and was to be the ruling party until the following election in 1970. However, during the 1970 election, before the results for all constituencies could be announced, the Prime Minister and leader of the BNP, acting in terms of section 21 of the Constitution of 1966 and the Emergency Powers Act of 1966,[1033] declared a state of emergency,[1034] annulled the elections[1035] and suspended the Constitution.[1036] Although the Prime Minister claimed that the election had not been free and fair because threats had been made against BNP supporters, constitutional and political analysts, such as Maqutu and Matlosa, argue that the Prime Minister was aware that the BCP had won most constituencies, and would defeat the BNP and therefore declared the state of emergency in order to maintain his grip on power, which he did for almost sixteen

[1030] Matlosa & Pule (note 146 above) 66.
[1031] Rosenberg & Weisfelder (note 677 above) 472.
[1032] Matlosa & Pule (note 991 above) 42.
[1033] Emergency Powers Act No. 14 of 1966.
[1034] Proclamation No. 1 of 1970.
[1035] Annulment affirmed by the Council of Ministers through The General (Invalidation) Order No.4 of 1970.
[1036] The 1966 Constitution was suspended and replaced with Lesotho Order No.1 of 1970 which created amongst others, the executive and the legislative arms of government. The suspension was confirmed by The Constitution (Suspension) Order No.2 of 1970 made by the Council of Ministers.

years thereafter.[1037] A conclusion that could be drawn from Maqutu and Matlosa's observations is that the Prime Minister found comfort in the BNP's hegemony and control over state security apparatus which he would then use to cling to power until 1986 when his government was ousted through a military *coup*.

Following the declaration of a state of emergency, the banning of political parties and the suspension of the 1966 Constitution in 1970, Lesotho experienced both political and legal instability. The instability was a result of the animosity between the self-imposed BNP government and supporters of the opposition BCP. This era was characterised by many incidents of violence, arrests and detentions of political activists and critics of government, as well as the enactment of draconian laws, which justified and created space for human rights violations, as will be illustrated below. Because official records reflecting the number of people who were detained in this era under the Internal Security (General) Acts of 1967, 1974 and 1984 are not available from official police records, analysis in this section of the research is based on data reported in the annual reports of Amnesty International.[1038]

BCP supporters who opposed the Prime Minister's move to annul the elections were arrested and detained under the Internal Security Act (General) of 1967, which permitted *in communicado* detention for up to sixty days.[1039] One could therefore argue that increased periods of detention under the Internal Security (General) Act of 1967 coupled with a huge number of political detainees during the state of emergency, contributed to the occurrence of torture in Lesotho. In the majority of reported cases, torture was alleged to have been committed by the police during interrogation.[1040]

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[1037] Maqutu (note 703 above) 33*;* K Matlosa 'Lesotho' in G Cawthra, A du Pisani & A Omari (eds) *Security and democracy in Southern Africa* (2007) 81; J D'Oliveira 'Lesotho: 20 years of iron-fisted rule comes to an end' (1986) 16 (1) *Africa Insight* 7.

[1038] Amnesty International has compiled reports of human rights abuses in all parts of the world, Lesotho included. Its work covers acts of torture and CIDT and contributed to the international ban on torture and the adoption of international standards against torture. Since it is an international organisation, which had no political interest in Lesotho, its findings are credible and are not influenced by the political ideologies, which prevailed in Lesotho at a particular period.

[1039] ISA 1967 section13.

[1040] Amnesty International Report (1972) 24.

An undisclosed number of members and supporters of the BCP, including its leader, Ntsu Mokhehle, were detained under ISA Act 1967 in 1970.[1041] There were allegations that during their detention, some of the detainees were subjected to various forms of torture.[1042] Many of the detainees were released in January 1972.[1043] Their release was commended by Amnesty International as a positive step towards eradication of torture in Lesotho and 1973 was marked as the period during which Lesotho politics were normalised.[1044]

Contrary to the political normalisation that Amnesty International had forecasted in 1973, in the following years, Lesotho experienced worse political instability and cases of torture increased.[1045] Supporters of the BCP, including those who had been released from detention went into exile in neighbouring South Africa. While in exile they formed a paramilitary organisation, the Lesotho Liberation Army (LLA).[1046] The LLA claimed responsibility for attacks launched against government's essential facilities, such as hospitals, police stations, post offices, the international airport, two main hotels, as well as the deaths of government ministers and officials.[1047] In 1974, there was also an abortive *coup*, which attempted to oust the BNP government.[1048] These attacks and the abortive coup, Lenka argues, precipitated the enactment of the Internal Security (General) Act of 1974, which replaced the 1967 Act. [1049] About 170 people were arrested pursuant to the ISA 1974, but only 40 of them were tried and convicted for treason, while others were released without charges.[1050]

Apart from the recorded detentions, the Internal Security (General) Act of 1974 became a basis for arrest and detention without trial of several other people who were linked to BCP and activities of its military wing, the LLA. Although it did not authorise torture, the 1974 Act had provisions, which insulated the commission of

[1041] As above.
[1042] As above.
[1043] Amnesty International Report (1973) 29 - 32.
[1044] As above.
[1045] Amnesty International Report (1982).
[1046] ML Pherudi 'The Lesotho Liberation Army: Formation, mission and schism' (2001) 45 *South African Historical Journal* 266.
[1047] Amnesty International Report (1980) 52.
[1048] Amnesty International Report (1980) 53
[1049] Lenka (note 716 above) 55.
[1050] Amnesty International Report (1980) 53.

torture. It retained the *in communicado* detention for up to sixty days, which was in the ISA 1967.[1051] It also ousted courts' jurisdiction in relation to people detained under its provisions.[1052]

Because of extensive detention powers under the 1974 Act, the police used it to arrest and detain government critics, only to release them later without any charges. In 1980, four academic staff of the National University were arrested and detained for several weeks and released later without any charges.[1053] In 1981, 40 other people were arrested and detained in relation to the airport and hotel bombings.[1054] In the same year, an undisclosed number of college students were arrested and detained *in communicado* in relation to bombings, which took place in Teya-Teyaneng.[1055] The following year, 1982, the LLA launched further attacks, which claimed the lives of two government ministers. Following this attack, an undisclosed number of suspects were arrested and detained under the ISA 1974.[1056]

Amnesty International and other international organisations condemned the arrests and the Internal Security Act's failure to comply with international standards. Consequently, it was repealed and replaced with Internal Security (General) Act of 1984. The ISA 1984 contained some safeguards meant for the protection of detainees. For instance, it reduced the period of detention without trial from 60 days to 14 days. Further detention of up to 28 days could only be done with the approval of the commissioner of police (COMPOL). A further period of up to 42 days had to be authorised by the Minister.[1057] However, it was also incompatible with international human rights standards against torture in that it retained a provision in terms of which the police could not be prosecuted for acts committed in the preservation of public order and national security.[1058] The granting of immunity to perpetrators of human rights violation is tantamount to robbing victims off justice for such violations,

[1051] ISA 1974; Amnesty International Report (1980) 53.
[1052] Maqutu (note 703 above) 67.
[1053] Amnesty International Report (1981) 52.
[1054] Amnesty International Report (1982) 49.
[1055] As above.
[1056] Amnesty International Report (1983) 52.
[1057] ISA1984 sections 13 & 14; *Maseko v Attorney General & Another* (Court of Appeal) 24 January 1990 [1990] LSCA 9, paras 14 & 47.
[1058] As above.

as it fails to provide them with full reparation and the guarantee of non-repetition of such acts. This practice is incompatible with states' obligations under ICCPR, CAT and the African Charter.[1059]

Despite the reduction of the detention period under the ISA 1984, the police continued to detain people suspected of political offences *in communicado* beyond the permitted periods. For instance, despite the permitted 14 days without a charge, one, Thakane Mohapi, who was then pregnant, was arrested, detained and only released 17 days later without charge.[1060] Hape Tsakatsi and his sister, Maleopo Tsakatsi, were detained *in communicado* for over a month and then released without charges.[1061] Hape reported that he had been assaulted by the police during interrogation.[1062] Although the exact numbers are not ascertainable from its report, Amnesty International also discovered that there were other people who were detained for three or more months and then released without any charges.[1063] Their detentions had not been authorised by the Minister as required by ISA1984.[1064] Therefore, despite some safeguards, which were contained in the Internal Security Act, in practice human rights violations continued to take place. The culture of prolonged detention and detentions as forms of punishment with no intention to prosecute continued. It could therefore be argued that because of the immunisation provision in the Act, the police detained people and released them without charges, knowing that no consequences in the form of criminal or civil litigation would follow such wrongful detentions.

Amnesty International reports also show that, although the number of people could not be verified, the majority of the political detainees who gave account of their arrests and detentions alleged to have been tortured by the police during

[1059] HRC, GC 20 para 1; HRC, GC 29 para 3; Committee against Torture, GC 2 para 5 in which the Committee against Torture reiterated states' obligation to remove amnesties and any impediments, which preclude prosecution and punishment of perpetrators of torture.
[1060]See Joint Applications of *Masebitsa Molise v Commander of Police & Others* and *Mamokhele Mohatla v Commissioner of Police & 2 Others* CIV/APNS/107 and 108/1983 (High Court) 28 June 1983. See also Amnesty International Report (1984) 61.
[1061] Amnesty International Report (1986) 59.
[1062] As above.
[1063] Amnesty International Report (1984) 61.
[1064] ISA 1984 section 15.

interrogation.[1065] Some allegations of torture were also reported during criminal trials. An example is the case in which one woman and eleven men were arrested, detained, charged and prosecuted for treason. All twelve were, however, acquitted.[1066] During trial, one of the accused persons testified that he was subjected to torture during interrogation. His evidence was that he was blindfolded and severely beaten by the police to the point that he confessed to being a member of the LLA.

The allegations of torture and ill-treatment by the police also resulted in the deaths of about five detainees recorded by Amnesty International to have died in police custody under suspicious circumstances.[1067] However, since there were no proper detention records within the police stations, there could have been more deaths than those formally recorded. Following the detention of college students in October 1981, the government announced that one, Setipa Mathaba, who was amongst the detained students, died in custody.[1068] In violation of the obligation to prohibit torture by promptly investigating its allegations and punishing its perpetrators, no investigations were made into circumstances, which led to Mathaba's death until four years later.[1069] However, information obtained by Amnesty International was that his death resulted from being assaulted by the police while in detention.[1070] The following year, Sophie Makhele was also reported to have died in custody.[1071] Details of her death were not disclosed.

Although the police reported that some suspects had committed suicide while in detention, medical reports often suggested that the suspects had been killed and that the alleged suicide was faked.[1072] Daniel Moeketsi was found dead, hanging

[1065] Amnesty International Report (1981) 52; Amnesty International Report (1982) 51.
[1066] Amnesty International Report (1985) 58.
[1067] Amnesty International Reports (1981 to 1992).
[1068] Amnesty International Report (1982) 51.
[1069] *SAPS v SALC* (note 188 above) 81 in which the South African Constitutional Court held that the obligation to investigate allegations of torture is an obligation *erga omnes* with which all states have to comply; CAT article 12; *Abdulrahman Kabura v Burundi* (note 378 above) paras 3.4 & 7.4.
[1070] Amnesty International Report (1986) 59.
[1071] Amnesty International Report (1983) 52.
[1072] Amnesty International Report (1983) 52 gave account of Moeli Tšenoli who the police said burnt himself alive for fear of being detained again; Amnesty International Report (1985) 58. In this report, Khahlanyetso Masheane was found dead in a police cell and the police claimed that he had committed suicide by hanging himself with his belt in the cell. A medical report, however, indicated that

over a cliff after he was arrested and detained.[1073] The police claimed that he had disappeared from police custody and presumably threw himself over the cliff to avoid being re-arrested.[1074] However, the medical report suggested that he must have been pushed over the cliff whilst still handcuffed.[1075] The circumstances under which detainees died in police custody, the post-mortem reports by pathologists, as well as allegations of torture by other detainees lead to a conclusion that such deaths were a result of torture. Amnesty International attributed the deaths to what was discovered as '*prima facie* evidence of brutal and potentially fatal systems of interrogation and cruel and inhuman conditions of detention', which it had uncovered during its investigations in Lesotho.[1076]

Despite it having an international obligation to do so, [1077] the government of Lesotho failed to thoroughly investigate the allegations of torture stipulated above. It also took an unreasonably long time to investigate the deaths of suspects who died at the hands of the police.[1078] In the limited cases in which investigations were made, no action was taken against responsible police officers. For instance, inquests were made in relation to some of the above cases including the deaths of Motuba, Masheane and Mathaba.[1079] A pathologist, who carried out the post-mortem examination, reported the cause of death to be injuries sustained during interrogation.[1080] The Magistrate referred the matters to the DPP for prosecution.[1081] Although it may be argued that the inquests were carried out in fulfilment of Lesotho's obligation to investigate allegations of torture, the inquests can be criticised for failure to adhere to the international human rights standards discussed in chapter 2 for two reasons: firstly, although the causes of death were identified as

considering the position in which his body was found, he must have died prior to being hung with the belt to simulate suicide.

[1073] Amnesty International Report (1985) 56; Lenka (note 716 above) 55.

[1074] As above.

[1075] As above

[1076] Amnesty International Report (1985) 58.

[1077] *SAPS v SALC* (note 188 above) 81; CAT article 12; *Abdulrahman Kabura v Burundi* (note 378 above) paras 3.4 & 7.4.

[1078] *Halimi-Nedzibi v Austria* (note 383 above) para 13.5 in which the Committee against Torture considered a period of 15 months before initiating investigations to be unreasonably long.

[1079] Amnesty International Report (1985) 58.

[1080] As above.

[1081] As above.

assault, police officers responsible for such assaults were not identified.[1082] Secondly, despite the magistrates' referral of the cases to the DPP, no criminal proceedings were instituted against the implicated officers. The failure to prosecute could also be attributed to the insulation of impunity by the immunisation provision which was contained in both ISA 1974 and ISA 1984 in violation of Lesotho's international human rights obligations.[1083]

During the state of emergency, the BNP government enacted the Human Rights Act of 1983, which entered into force in 1985. The Human Rights Act was a reaction to pressure from the international community, which vehemently condemned human rights violations, which were taking place in Lesotho.[1084] The Human Rights Act was, however, criticised for having flaws, which made it fall short of human rights protection. For instance, Lenka argues that it did not rescue the situation because although it was a human rights Act, it did not have a Bill of Rights, which was previously enshrined in the 1966 Constitution.[1085] Secondly, the guarantees it provided for were subject to the existing laws, including the ISA. The effect of this was that, although it provided for the right to be tried within a reasonable time and for freedom from torture and CIDT,[1086] such reasonable time was subject to the 60 days under ISA 1974.[1087] The Human Rights Act was also compromised by the provision of immunity to the police and other officials from civil or criminal prosecution when they acted in preservation of 'good order or public safety and to prevent internal disorder'.[1088] A consequence of immunising the police from prosecution is that victims of torture and members of their families did not get any form of redress in violation of Lesotho's obligation to provide redress to victims of torture and other human rights violations.[1089]

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[1082] *Elaiba v Tunisia* (note 377 above) para 7.6 *F.K. v Denmark* para 7.7 (note 389 above); *Dzemajl v Yugoslavia* (note 380 above) para 9.4 in which the Committee against Torture held that the purpose of an investigation must be to establish the nature of the alleged acts, as well as to identify persons who committed them.

[1083] HRC, GC 20 para 1; HRC, GC 29 para 3; Committee against Torture, GC 2 para 5.

[1084] Lenka (note 716 above) 55.

[1085] As above.

[1086] Human Rights Act section 3 on limitation of rights and section 11 on freedom from torture. See the criticism of the Human Rights Act in Amnesty Internal Report (1985) 57.

[1087] ISA 1974 section12; *Sello v Commissioner of Police* (note 780 above) 13.

[1088] Lenka (note 716 above) 55.

[1089] ICCPR article 2(3); In *Roy Manojkumar Samathanam v Sri Lanka* (note 270 above) para 8, the HRC reiterated that states' obligations under ICCPR article 2(3) to provide full reparation for human

An unstable political climate during the state of emergency and the BNP one-party rule from 1970 resulted in a military *coup* in 1986. The RLDF deposed the BNP government by force and took over government.[1090] Lesotho was then under military rule and the police service also under direct control of the army. The impact on police torture that was brought about by the change of government is discussed below.

### *4.2.4 Torture during the period of military rule (1986 - 1993)*

The BNP's sixteen-year rule ended in 1986 when the RLDF, led by Major General Metsing Lekhanya, toppled it through a military *coup*.[1091] Following this coup, senior officers and other members of the RLDF who had opposed the *coup* were arrested.[1092] They were allegedly subjected to torture by members of the Lesotho Mounted Police.[1093] The alleged torture led to the death of some officers in police custody and some shortly after being released from detention. Brigadier Ramotšekhoane, Colonel Sehlabo and Sergeant Tjane are some of the victims of police torture who died in police detention during this period.[1094] The three died around March 1986. Inquests were made into the deaths of the two senior officers and none was made with respect to the sergeant's death.[1095] The inquests revealed that Brigadier Ramotšekhoane died from respiratory failure as a result of cerebral trauma caused by blows to the head while he was in custody, while Colonel Sehlabo died from secondary septicaemia, which resulted from infection to the burns, which had been inflicted on him while in detention.[1096] The inquests identified the cause of the deaths, but failed to identify the perpetrators in violation of the obligation to

rights violations include compensation; *Urmatbek Akunov v Kyrgyzstan* (note 272 above) para 10 in which full reparation was interpreted to also include investigation of allegations; Committee against Torture, GC 3 para 2; *Bendib v Algeria* (note 113 above) para 6.7; *Mtikila & Others v Tanzania* (note 515 above) para 124 in which the African Court for the first time held that article 5 of the African Charter also carries an obligation to provide compensation for torture.

[1090] H 'Nyane 'The place of the army in the constitutional democracy in Lesotho' (2015) 22 (1& 2) *Lesotho Law Journal* 70.

[1091] As above.

[1092] Amnesty International Report (1992) 171.

[1093] As above.

[1094] Amnesty International Report (1987) 65.

[1095] Failure to launch an inquest into the death of sergeant Tjane violates Lesotho's obligations under articles 2(3) and 7 of ICCPR, as well as article 12 of CAT.

[1096] Amnesty International Report (1988) 39.

investigate allegations of torture in order to establish the nature of the acts, the circumstances under which they occurred, as well as to identify the persons who were involved in such acts.[1097]

Other people who were subjected to torture by members of the LMPS during this period include Lakia Pholo who was an official of Lesotho Bank.[1098] He was arrested in July 1989 on suspicion of the commission of a crime. In his evidence in a civil case for damages against the state, he testified that on arrival at the police station, a blanket was thrown over his head, tied with a rope and a tyre thrown around his neck.[1099] He was then handcuffed and stripped of his trousers and underpants.[1100] Crushed stones were put in his shoes and he was ordered to jump up and down. He was beaten on the hands and thighs and pinched on the thighs with an object, which he identified as a pair of pliers.[1101] He lost consciousness and when he regained it, he found that the blanket had been removed. He was ordered to stand and when he could not because of the pain and numbness in his hands and feet, his interrogators inserted a stick into his anus, pulled it out and put it in his mouth.[1102] He was finally given his clothes, handcuffed and forced to spend most of the night standing. He was released two days later without a charge.[1103] He lodged a case for damages, which the High Court awarded because the Attorney General, who represented government, did not deny the alleged torture. However, despite the Court's finding in the civil claim for damages that Lakia had been tortured, no criminal investigations were carried out to identify the perpetrators so that they could be prosecuted and punished accordingly. This could be influenced by the fact that there is no law, which criminalises torture law in Lesotho. The absence of an anti- torture law in Lesotho, which resulted in the failure to investigate with the view to prosecute and punish, thus violated a number of Lesotho's international human rights obligations to

[1097] *Elaiba v Tunisia* (note 377 above) para 7.6; *F.K. v Denmark* para 7.7 (note 484 above); *Dzemajl v Yugoslavia* (note 380 above) para 9.4; *Abad v Spain* (note 379 above).
[1098] Amnesty International Report *Lesotho: Torture, political killings and abuses against trade unionists* (1992) 7.
[1099] As above.
[1100] As above.
[1101] As above.
[1102] As above.
[1103] As above.

criminalise torture,[1104] to investigate its allegations[1105] and to prosecute and punish its perpetrators.[1106]

The military regime ruled through a Military Council, which enacted laws referred to as Orders.[1107] It issued a number of Orders in terms of which people who were tortured during this period could not lodge claims against the state. For instance, in August 1987, the families of Sehlabo and Ramotšekhoane lodged claims for damages against the government, but could not obtain any form of redress because of an Order in terms of which the state was granted immunity from civil litigation concerning all acts committed between 1986 and January 1988.[1108] After 1988, civil claims, such as the one of Lakia Pholo were entertained and victims redressed although no criminal charges were lodged against implicated police officers.

In 1991, another military *coup*, headed by Ramaema, toppled the Lekhanya-led government.[1109] This group justified the *coup* on the ground that it was meant to restore power to the civilians.[1110] In 1992, general elections were held and in 1993, a new government led by the BCP, which had won the democratic elections by an overwhelming majority, took power.

### *4.2.5 Torture during the period of fragile democracy (1993 - 2012)*

In 1993, Lesotho returned to multi-party democracy and adopted a new Constitution. The 1993 Constitution established several organs of state, including the Police Force.[1111] Lesotho experienced a number of political upheavals, which resulted in civil unrest, mutiny, killings, torture and detention during the period between 1993

[1104] CAT article 4.
[1105] CAT articles 12 & 13; *Abdulrahman Kabura v Burundi* (note 378 above) para 3.4 in which the Committee against Torture held that where there is a complaint about torture, the state has an obligation to promptly investigate such allegation.
[1106] CAT article 4; HRC, GC 20 paras 14 & 15 in which articles 2(3) and 7 were interpreted to entail the duty to prosecute and punish perpetrators of torture.
[1107] National Constituent Assembly Order, 1990 section 13(2) which provided that 'All laws made by the Military Council shall be styled "orders"…; *Tsang & Others v Minister of Foreign Affairs & Others* (High Court) 25 February 1992 [1992] LSHC 23. para 3.
[1108] Amnesty International Report (1988) 49.
[1109] 'Nyane (note 1079 above) 72.
[1110] As above.
[1111] Constitution section147.

and 2012, hence, Matlosa and Pule categorised this era as a period of fragile democracy.[1112] Most of the political instability centred on the involvement of the army in politics and resulted in clashes within the army, between the army and the police, as well as within the police itself.[1113] Later on, when efforts to civilise and professionalise the police were amplified, the police force was moved from the Ministry of Defence to the Ministry of Home Affairs and Public Safety.[1114] This was followed by the repeal of all laws, which governed the police, amendment of the Constitution to remove the word 'force' and promulgation of the Police Service Act of 1998.[1115] Matlosa rightly points out that the change to Police Service was one of the steps to professionalise, depoliticise and demilitarise the police in order to ensure efficiency and to eradicate corruption, as well as human rights violations, including torture of suspects.[1116]

The Police Service Act must be commended for an attempt to implement Lesotho's human rights obligations against torture in several ways although it still faces some challenges. Firstly, the Act does not have a provision, which immunises the police from prosecution. Section 43 of the Act provides for discipline of the police while section 54 provides for their criminal prosecution. That is, under this Act, the police can no longer commit criminal offences with impunity. Secondly, the Act establishes the PCA, a civilian body with a mandate to oversee the operations of the police service.[1117] These two major steps notwithstanding, the main challenge of the Police Service Act, which falls short of implementation of the obligation under article 4 of CAT, is that the Act does not list torture as one of the offences for which disciplinary action or criminal prosecution may be taken against the police.

The period between 1993 and 1998 did not only see change in attempts to professionalise the police and the military, but Lesotho also began submitting state

[1112] Matlosa & Pule (note 991 above).
[1113] 'Nyane (note 1079 above) who analyses the involvement of the army in Lesotho politics from 1993 to the present.
[1114] Dissel & Frank (note 977 above) 6.
[1115] Third Amendment to the Constitution Act 1997 section 2.
[1116] Matlosa (note 1026 above) 85.
[1117] Police Service Act section 22.

party reports to various human rights treaty bodies, including the HRC.[1118] In 1998, Lesotho's initial report to the HRC, which was due in 1993, was submitted, five years after its due date.[1119] In this report, as well as in the meetings held between the Committee and Lesotho's delegates, members of the HRC raised concerns that '[t]here had also been numerous reports of the widespread torture and ill-treatment of detainees and of extrajudicial killings'.[1120] In response, the delegates admitted that there had been torture in Lesotho, which was influenced by political instability prior to 1998, but which had since stopped.[1121] Another concern was that Lesotho 'seemed to focus more on protecting detainees from torture rather than on suppressing and criminalising the practice of torture'.[1122] The member also 'wondered, in fact, whether national law characterized torture as a crime and, if so, how it was punished'.[1123] He stated that '[i]t was not enough to ratify the Convention against Torture', but there should be a step further to investigate the reports of torture and to punish the perpetrators.[1124]

During the same year, Lesotho submitted a combined seventh to fourteenth report to the Committee on Elimination of Discrimination.[1125] These reports were due between 1984 and 1998 and were considered on 17 and 20 March 2000. The combined report did not contain any information relating to the protection from violence as required by CERD article 5. In its concluding observations, the CERD Committee raised concerns about expressions of xenophobia, which result in racial discrimination, as well as the absence of a law, which criminalises and penalises

[1118] HRC, *Initial report of Lesotho* 16 October 1998, UN Doc CCPR/C/81/Add.14 paras 58 & 59 in which Lesotho acknowledged that the ISA 1984 had been used by previous governments to justify detention of political opponents and other human rights violations. The government also undertook that victims may approach courts of law for compensation despite the amnesty granted to members of defence forces and LLA.
[1119] *Lesotho's initial report to the Human Rights Committee* (note 1107 above); 1743rd Meeting (note 950 above) para 55 in which a Committee member stated that there was no justification for the delay as the political instability, which was raised by the Lesotho delegation took place in September 1994 and the report could have been submitted thereafter.
[1120] Summary Record 1743rd meeting (note 950 above) para 77; HRC, *Concluding Observations on Lesotho's initial report* (note 974 above) para 16.
[1121] As above.
[1122] As above para 79.
[1123] As above.
[1124] As above.
[1125] CERD Committee *Seventh to fourteenth periodic report of Lesotho* 8 September 1998, UN Doc CERD/C/337/Add.1

such acts.[1126] The Committee also urged Lesotho to establish effective remedies to comply with obligations under articles 2, 4 and 6 of CERD.

Lesotho's initial report to the CRC Committee was also submitted in 1998 although it was considered in 2001.[1127] In its concluding observations, the CRC Committee raised its concern that the legal framework of Lesotho did not fully implement CRC and that there were acts of violence against children, including corporal punishment,[1128] and beatings by law enforcement officials whose acts were not investigated and subjected to the criminal justice system.[1129] The Committee recommended the establishment of a child-friendly complaint and investigation system and to ensure that perpetrators of violence against children do not enjoy impunity.[1130] This recommendation was heeded in the Education Act 2010 and CPWA 2011, which are discussed in the previous chapter.

Despite the change in political landscape from 1993 to 2012, as well greater observance of human rights as illustrated by the fulfilment of reporting obligations, incidents of torture continued to take place within the LMPS although most of them were not outlined in the state party reports. This dire situation is reflected in the number of civil claims for damages arising out of torture, as well as anecdotal reports of torture considered below.

In the case of *Commissioner of Police and the Attorney General v Neo Rantjanyana,*[1131] Rantjanyana, a police officer was awarded damages for unlawful arrest, pain and suffering. In the High Court, the Commissioner of Police who was then the first defendant admitted that Rantjanyana was unlawfully arrested by another policeman on the allegation that he had aided Phakiso Molise to escape from prison. Rantjanyana was detained for three days, during which he was severely

[1126] CERD Committee *Concluding observations to Lesotho's combined seventh to fourteenth report* 19 April 2000, UN Doc CERD/C/304/Add.99 para 7.
[1127] *Lesotho's initial report to CRC*
[1128] CRC *Concluding observations on Lesotho's initial report* para 31.
[1129] As above para 33.
[1130] As above para 34.
[1131] *Commissioner of Police and the Attorney General v Neo Rantjanyana* (2011) LSCA 42.

assaulted and then released without a charge.[1132] After his release, he lodged the civil claim for damages against the Commissioner of Police for the torture he suffered. However, the LMPS did not investigate the allegations and no criminal prosecutions were carried out. That is, although the obligation to provide redress to the victim of torture as per article 14 of CAT has been fulfilled, this case also shows failure to comply with the obligation to investigate allegations of torture and to prosecute its perpetrators as mandated by articles 4, 12 and 13 of CAT.

In *Taole v Sehloho and others,*[1133] Taole, the plaintiff, alleged that he was arrested on suspicion of having stolen a laptop at his workplace. He was questioned about the laptop and when he indicated that he knew nothing about it, a police officer by the name of Sehloho, the first defendant, told him that he was going to 'vomit the laptop'.[1134] He was then handcuffed and ordered to take off his clothes still handcuffed. He was left naked and assaulted by the first defendant, who also kicked him in the ribs. He was then suffocated with a tube as a result of which he fainted about three times, and as this process was being repeated, vomited blood and urinated on himself.[1135] The defendants, Sehloho and the Commissioner of Police, did not dispute liability, but challenged the amount he claimed as damages. The claim was upheld and Taole was awarded damages for the assault, unlawful arrest and detention and for medical expenses.[1136] The Court expressed great concern about the practice of torture in police stations in Lesotho and noted that 'it is a pity that it is always money coming from the government coffers that is going to be paid as compensation'.[1137]

In *Motiane v Officer Commanding Mabote Police Station and others,* Hlajoane J awarded Motiane, the plaintiff, damages for pain and suffering, *contumelia* and medical expenses.[1138] The Plaintiff had testified before the Court that he was arrested on suspicion of having killed Malitonki. Upon arrest, he was taken by four

[1132] As above para 3.
[1133] *Taole v Sehloho and others* (2012) LSHC 68.
[1134] As above para 6.
[1135] As above paras 12 - 15.
[1136] As above para 46.
[1137] As above para 33.
[1138] *Motiane v Officer Commanding Mabote Police Station and others* (2010) LSHC 81.

police officers to an old building that used to be a hotel.[1139] He was ordered to take off his clothes, handcuffed and tied with a rope. Whilst on the ground, one police officer sat on his back, he was suffocated with a tube, cold water was poured over him and he was ordered to wear wet clothes, not allowed to use the toilet, given stale bread and then released three days later without a charge. The Commissioner of Police, who was first defendant in the matter, did not dispute liability, but the amount in damages claimed. The Court stated in obiter that the 'plaintiff was assaulted by the police in an effort of forcing him to admit that he had killed Malitonki'. This obiter thus highlights the motive for which the complainant was tortured, which is one of the prohibited purposes in article 1(1) of CAT. [1140] In a fashion similar to *Sehloho* case above, the Court awarded damages and no further criminal proceedings were initiated against the perpetrators. That is, states' obligation to investigate and prosecute perpetrators of torture was not complied with.

The case of one, Tšeliso Thatjane, who was arrested for suspicion of having stolen a DVD, is one of those cases, which although not taken to court, attracted international and local media attention.[1141] It was reported that Thatjane's wife was arrested and held in custody until Thatjane surrendered himself to the police. He was beaten and suffocated several times while in police detention.[1142] The victim in this case did not lodge a case against Compol. This case represents many other cases which reflect the lack of access to justice for victims of police torture.[1143] There are many factors, which influence this status: lack of information on human rights, including absolute prohibition of torture, lack of finances to lodge civil claims against the government, failure of the LMPS to carry out investigations and take perpetrators, who are mostly members of LMPS to the courts of law and failure of institutions, such as the PCA and Office of the Ombudsman to publicise their mandate to the people of Lesotho. All these factors stem from Lesotho's failure to incorporate the international human

[1139] As above (unnumbered pages and paras).
[1140] As above (unnumbered pages and paragraphs). In *Evloev v Kazakhstan* (note 111 above) para 9.2, the Committee against Torture held that similar acts of beatings and choking amount to torture as defined in article 1 of CAT.
[1141] US Department of State *Country Reports on Human Rights Practices for 2011: Lesotho* (2012) 2.
[1142] As above.
[1143] Due to limited knowledge about their rights and how and where they can vindicate them, many victims of torture in Lesotho do not report it.

rights standards against torture into the national legal and institutional frameworks as illustrated in chapter 3.

### *4.2.6 Torture during the period of coalition government (2012 - 2016)*

#### *4.2.6.1 First three-party coalition government*

Lesotho had the first coalition government following general elections in May 2012 whose results were such that no political party obtained an outright majority on the basis of which it could form a government.[1144] Three political parties, the All Basotho Convention (ABC), the Lesotho Congress for Democracy (LCD) and the Basotho National Party (BNP) formed a coalition government which was led by Thomas Thabane of ABC who became Lesotho's Prime Minister and was deputised by the leader of the LCD, Mothetjoa Metsing.[1145] The three-party coalition government shuffled ministries that existed in the previous government and also created new ones. Amongst the changes were the removal of the police service from the Ministry of Home Affairs and the creation of a new Ministry of Police.[1146] The Minister of Police became the Prime Minister, Thomas Thabane, who was Minister of Home Affairs and therefore responsible for the police in the previous LCD government.

Thabane took a very hard stance towards crime prevention and stressed that his Ministry would not to go easy on criminals, and urged the police to use force, to 'fight fire with fire.[1147] Although the statements did not specifically authorise torture, they could, however, be interpreted as condoning torture as they encouraged the use of force where such would be justified as a crime-prevention strategy. The view that Thabane's government condoned the use of torture as an interrogation tool could also be supported by the fact that during his two-year rule, there were more civil suits and media reports about police torture than in any other period.[1148] In a media report,

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[1144] TW Letsie 'The 2012 general elections in Lesotho: A step towards the consolidation of democracy' (2013) 12 (1) *Journal of African Elections* 66. See also Weisfelder (note 1009 above) 51.
[1145] As above.
[1146] Legal Notice of 2012.
[1147] B Ntaote 'Jail or death' *Lesotho Times* 10 October 2013 www.lestimes.com/jail-or-death/ [Accessed 16 April 2017].
[1148] United States Department of State *Lesotho 2012 Human Rights Report* (2013) 1; United States Department of State *Lesotho 2013 Human Rights Report* (2014) 2; United States Department of State

two men of Tšakholo and Ha Keketsi died in Mafeteng Police Station in January 2013.[1149] At the time of this research, about three years after the deaths, investigations have not been carried out and no criminal prosecutions have been undertaken. These cases may, therefore, be amongst those in which torture is committed with impunity in Lesotho.

The cases of *PM v Commissioner of Police* and *MM v Commissioner of Police and others* present a sexual form of torture, which was inflicted on female suspects.[1150] In both cases the victims of torture are women who were arrested on 28 December 2012.[1151] Upon their arrival at the police station, they were ordered to take off their clothes, to sit down with their legs apart and the male police officers inserted fingers and sticks in their genitalia.[1152] In the process, some police officers insulted them and assaulted them with sticks and fists.[1153] The complainants lodged cases for damages in the High Court. The Commissioner of Police did not dispute liability but negotiated with the complainants' lawyer that the amounts claimed in the summons be reduced. A settlement was reached and the matter was settled out of Court.[1154] Both criminal and disciplinary action was taken against the two police officers who had been identified by the victims as the perpetrators. The alleged police officers were remanded on bail. However, they fled and the disciplinary and criminal cases are still pending.[1155] In these cases, the LMPS must be commended for implementing Lesotho's obligations under ICCPR, CAT and African Charter to investigate allegations of torture, to prosecute its perpetrators and provide redress to its victims.

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*Lesotho 2014 Human Rights Report* (2015) 2. The reports reflect a total number of 12 deaths in police custody, 32 cases of torture, which were investigated and the torture of 129 villagers who were arrested during a police operation to search for illegal firearms in their village.

[1149] 'Police Brutality causes unnecessary expenses' *Informative* 14 January 2013 http://informativenews.co.ls [accessed 26 November 2013].

[1150] *PM v Commissioner of Police* CIV/T/264/2012 (unreported) and *MM v Commissioner of Police and others* CIV/T/310/12 (unreported). The cases in the High Court are cited in the full names of the victims. However, due to the sensitivity of the facts, the author has elected to identify the case by using initials only.

[1151] Plaintiff's Declaration annexed to the Summons (unreported)

[1152] As above.

[1153] As above.

[1154] Deed of Settlement filed of record (unreported)

[1155] Information supplied by the lawyer representing the two victims in *PM v Commissioner of Police* and *MM v Commissioner of Police* (note 1139 above).

In joint police and military operations, villagers have complained of being physically and emotionally tormented by both the police and soldiers who forced them to give information relating to illegal firearms. For instance, the police officers of Berea raided the village of Thota-peli in the district of Berea in the early hours in search of illegal firearms. Many villagers, men and women, including pregnant women were, regardless of their age, dragged to the chief's place where they were collectively beaten and men's private parts pulled while the women were ordered to roll in the cold morning dew. [1156]

In 2013, the LMPS investigated about twenty-four cases in which the police were alleged to have tortured suspects. For instance, on 1 January 2013, the Tšakholo Police arrested and interrogated the brother of a suspected rapist. The US Department of State report indicates that according to the LMPS, the police officers in this station tortured the brother and he died in police custody.[1157] In another case, on 27 June 2013, members of the LMPS at Roma Police Station arrested one, Kabelo Makateng, for allegedly assaulting a police officer. He was released without a charge seven days later. Kabelo alleges that during his detention, about four police officers blindfolded him, burned his arms with an iron rod, poured hot water on his torso and assaulted him with a knobkerrie.[1158]

In 2014, the LMPS investigated eight reported cases in which victims alleged to have been tortured at the hands of the police.[1159] These included the case of residents of Ha Hlalele who were allegedly subjected to torture by the police of Ha Mokhalinyane Police Station.[1160] The villagers claim that while the police were investigating one man for unlawful possession of a firearm, they dragged the villagers out of their beds at night, some naked while others semi-naked, assaulted them with blunt objects, including gun butts, sticks and knobkerries. Twenty-four residents, including women,

[1156]'Cops terrorise villagers' *Lesotho Times* 24 April 2010 http://www.sundayexpress.co.ls [accessed 11 November 2015].
[1157] US Department State *Lesotho 2013 Human Rights Report.*
[1158] At the time of submission of this research the case in which Kabelo Makateng sued Compol for damages is still pending before the High Court of Lesotho.
[1159] US Department of State *Lesotho 2015 Human Rights Report* (2016) 2.
[1160] As above.

were then arrested.[1161] Those who were arrested and detained claim that while in detention, women were denied sanitary pads and those seriously injured were not afforded medical attention.[1162]

The three-party coalition government was riddled with problems and it collapsed after two years in existence.[1163] The collapse was preceded by parliament prorogation in June 2014 and what some scholars have termed an attempted *coup* of 30 August 2014.[1164] The attempted *coup* involved the attack of the LDF's Commander Mahao's house, in the morning preceding his appointment, as well as the attack two of police stations and the State House by a group of soldiers.[1165] The Prime Minister was tipped off about the attack and he fled to South Africa before the attackers arrived at the State House.[1166] The BNP leader and other members of the LDF also fled to South Africa after being tipped off that they were going to be attacked.[1167]

The failed military *coup* shook Lesotho's rating as a free and democratic country as opposed to the ratings that it had in previous years after the restoration of democratically elected governments in 1993.[1168] These events led to SADC intervention.[1169] The final result of the talks and SADC intervention was for Lesotho to hold fresh elections as there was no longer co-operation within the coalition

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[1161] As above.
[1162] As above.
[1163]Legal Notice No.42 of 2014. For further reading on the collapse of the coalition government see RF Weisfelder (note 1009 above) 62; 'Nyane (note 1079 above) 79 who argues that civil-military relations were at the heart of collapse of Lesotho first coalition government.
[1164] Statement of Commonwealth Secretary General, Kamalesh Sharma 'Commonwealth Secretary General Statement on Lesotho' 30 August 2014 http://thecommonwealth.org/media/news/commonwealth-secretary-generalsstatement-Lesotho [accessed 16 April 2017].
[1165] 'Nyane (note 1079 above) 63.
[1166] As above.
[1167] As above.
[1168] For instance, Freedom House, in its *Freedom in the world - Lesotho* (2010), (2011), (2012), (2013) & (2014) rated Lesotho as a free country. However, in 2015 it gave Lesotho a downward arrow with a freedom rating of 2.5, a civil liberties rating of 3 and a political rights rating of 2. According to this report, the 2014 attempted *coup*, influenced the decline in the rating and increased the military influence in the government; Freedom House 2015, *Freedom in the World – Lesotho* http://www.refworld.org/country,,,LSO,,55cb45dc15,0.html [accessed 26 October 2015].
[1169] TW Letsie 'Lesotho's February 2015 elections: A prescription that never cured the sickness' (2015) 14 (2) *Journal of African Elections* 83.

government.[1170] In February 2015, elections were held. Similar to the 2012 elections, poll results yielded no party with an outright majority on the basis of which a single-party government could be formed.[1171] This time, it took seven parties to form a coalition government. The Democratic Congress (DC) joined seats with the LCD and five other smaller parties to form a government.[1172] The extent of torture within the LMPS during the two years of the seven-party coalition government is discussed below.

*4.2.6.2 Second seven-party coalition government*

It is important to indicate at the outset that at the time of submission of this thesis, the seven-party coalition government had just been dissolved after two years in existence, general elections were held on 3 June 2017 and the tenth parliament resumed on 12 June 2017. The dissolution of parliament follows the split of the DC and formation of a new political party, the Alliance for Democrats (AD) by the DC's deputy leader, Monyane Moleleki. On 1 March 2017, political opposition parties, including the newly formed AD, tabled a vote of no confidence in Prime Minister, Pakalitha Mosisili. Amongst reasons advanced for the lack of confidence in the Prime Minister were corruption, human rights violations and failure to implement recommendations of the SADC/Phumaphi Commission, which are considered later on in this chapter. The June 2017 election results yielded yet another coalition government composed of the ABC, AD, BNP and RCL, headed by the leader of the ABC, Thomas Thabane who has become Lesotho's Premier for the second time. Since the third coalition government had just been installed at the time of submission of this thesis, the cases during its reign are not covered in this research.

[1170] *Maseru Facilitation Declaration* 2 October 2014 www.dfa.gov.za [Accessed 16 April 2017]. It provided for re-opening of parliament and preparation for elections; *Maseru Security Accord* 23 October 2014 in terms of which the newly appointed Commander of the LDF, Mahao, and ousted commander Kamoli, as well as Commissioner of Police were to proceed on leave to enable stabilisation of the security institutions.
[1171] Letsie (note 1150 above) 82.
[1172] These parties are the Basotho Congress Party (BCP), the Lesotho Peoples' Congress (LPC), the Marematlou Freedom Party (MFP), the Popular Front for Democracy (PFD) and the National Independence Party (NIP).

Cases discussed in this section are those, which took place between January 2015 and October 2016. Similar to the previous political phases, the reported cases are mainly civil suits for damages with no corresponding criminal cases against the police officers who have committed the alleged torture. This leads to a conclusion that despite the change of governments, up to this stage, Lesotho has failed to comply with its obligations to investigate allegations of torture and prosecute its perpetrators. The only obligation, which has been fulfilled, is the obligation to provide redress to victims of torture. However, the challenge, which remains, is that only those who are aware of their rights and have finances to lodge claims against government are compensated while the majority of victims remain without redress.

Between 5 January 2015 and 20July 2017, the High Court registered about 229 civil cases against the Commissioner of Police.[1173] These cases were lodged by victims who alleged to have been tortured by different police officers in different police stations throughout the country. Due to the challenge of the backlog of cases, which the High Court is experiencing, all of these cases had not been adjudicated by the time of the submission of this thesis and therefore are listed in names only and not full citations. Only a few of these cases have been cited in this thesis to indicate the nature of torture allegedly committed by the police officers, as well as the purposes for which such torture is committed.

In the case of *Thabo Shao v Commissioner of Police & others*, the victim alleged that he was arrested and subjected to torture simply because he was wearing a T-shirt with colours of one of the opposition political parties. In the cases of *Sello Masunhloane v Commissioner of Police*, *Mohlanka Morai v Commissioner of Police, Ramosenyehi Lepitsi v Officer Commanding Peka Police Station, Khabisi Mosunkuthu v Officer Commanding Maputsoe Police Station, 'Manthatisi Qhabu v Commissioner of Police* and *Thabang Ntjolo v Commissioner of Police*, the victims claimed that they were subjected to both physical and psychological torture.[1174] In

[1173] Statistics obtained from the High Court Civil registry as at 21 July 2017.
[1174] *Sello Masunhloane v O/C Pitso Ground* CIV/T/530/16, in his declaration attached to the summons, the plaintiff alleged that he was severely assaulted by members of the LMPS at Pitso Ground police station. He alleges that he was beaten while his hands and feet were tied behind him and that due to the severity of the beatings, he defecated in the presence of female police officers.

the cases of *Teboho Moferefere v Compol*, *Thabo Mopeli v Compol and Masetelli Mopeli v Compol,* the victims alleged that they were subjected to severe beatings and suffocated with different objects.[1175] In the case of *Khauhelo Mabele v Compol,* the victim alleges that he was thrown out of a moving vehicle.[1176] A common factor in these cases is that the victims were detained for prolonged periods and they were released later without any charges.

During this period (2015-2017), Lesotho submitted its initial report to the CMW Committee in terms of article 73 of CMW. The report was due in 2007, but was only submitted on 1 December 2015.[1177] The CMW Committee considered the report on 12 and 13 April 2016. With regard to Lesotho's obligations against torture under the CMW, the report conceded to Lesotho's non-compliance with CMW in various aspects. For instance, Lesotho has not adopted legislative measures to domesticate CMW.[1178] Secondly, with regard to the obligation to protect migrant workers from arbitrary arrests and detention the Aliens Control Act authorises detention of migrant workers pending a decision on their status and because Lesotho does not have detention facilities specifically meant for migration-related detention, migrant workers are held in police and correctional service detention facilities,[1179] thus exposing them to torture. The report also stated that in terms of the Aliens Control Act, expulsion of migrant workers and members of their families is done pursuant to a decision taken by the Minister responsible for Home Affairs, which decision is not appealable as the Act does not set out a procedure for such appeal.[1180] In its concluding observations on this report, the CMW Committee raised its concerns about the lack of legislation to incorporate CMW into the legal system of Lesotho,[1181] as well as the lack of sufficient information and statistics on cases of exploitation and other forms of ill-treatment of migrant workers and members of their families.[1182]

[1175] *Teboho Moferefere v Compol* CIV/T/474/16.
[1176] *Khauhelo Mabele v Compol* CIV/T/531/16.
[1177] *Lesotho initial state party report to CMW UN Doc CMW/C/LSO/ 1*
[1178] As above para 1.
[1179] As above para 105.
[1180] As above para 112.
[1181] CMW Committee *Concluding Observations on Lesotho's initial report* paras 7 & 8.
[1182] CMW Committee *Concluding Observations on Lesotho's initial report* paras 27 & 28.

### *4.2.7 Concluding remarks on torture within the LMPS*

The cases of torture within the LMPS from 1965 to 2017 have three common features: Firstly, all of them fulfil the three elements of torture in article 1(1) of CAT. That is, in all of them, there is infliction of severe pain or suffering on the victim, which pain is inflicted for purposes of extracting information from the victim and the police do so in the cause of the performance of their official duty to detect crime and apprehend offenders. Secondly, in the majority of the cases, the Commissioner of Police did not dispute that the suspects were subjected to torture during investigations. Thirdly, in all the cases except two, there have not been corresponding criminal charges against the police officers implicated in the torture. This thus leads to a conclusion that the LMPS as an institution condones torture. As will be illustrated below, factors, which influence the resort to and condonation of torture within the LMPS, are different from factors, which influence the same within the military.

## 4.3 Torture within the Lesotho Defence Force

### *4.3.1 Overview of the LDF*

The LDF comprises the army and the air force of Lesotho. It was established sometime between 1978 and 1980, as a shoot off of the PMU.[1183] The primary role of the LDF is 'to protect the territorial integrity and sovereignty of Lesotho'.[1184] The secondary roles include assistance in the preservation of life, health and property, provision and maintenance of essential services, upholding law and order in support of the police as directed by Government, support to state departments as directed by Government, compliance with international obligations, such as peace-keeping support operations and regional military co-operation. [1185] In the discharge of the duties listed above, some members of the LDF are alleged to have committed torture

[1183] 'Nyane (note 1079 above) 62.
[1184] Ministry of Defence and National Security 'The role of Lesotho Defence Force' www.gov.ls/gov_webportal/ministries/defence%20and%national%security/defence.html [accessed 15 June 2016].
[1185] As above.

during different political phases during training of newly recruited members of the army,[1186] and also against members of the LDF suspected of military and criminal offences, as well as the use of torture against civilians in joint police and military operations in villages as discussed in detail in the next sections.

In this section, it is illustrated that similar to the LMPS, occurrence of torture within the LDF has been influenced by changes in the country's political landscape. However, discussion of its extent within the LDF is limited to three political phases because, unlike the police service, which existed prior to independence, the LDF was only established in the middle of the second phase of Lesotho's political history, the era of one-party rule, which started in 1970 and ended in 1986.

### *4.3.2 Torture during the period of one-party government (1980 - 1986)*

The LDF was established at the time when Lesotho was experiencing political and security instability characterised by attacks of essential facilities by the LLA and other BCP supporters.[1187] Apart from internal instability, there was animosity between Lesotho and neighbouring South Africa which was caused by South Africa's accusation that the government of Lesotho harboured African National Congress (ANC) members who were fighting against apartheid in South Africa.[1188]

Sechele argues that from the time when the LDF was established, torture was practised within the LDF. He asserts that inhuman and torturous training methods were used against newly recruited members of the army although the practice came to a halt around the year 2000.[1189] Apart from Sechele's work, there is no other literature, which confirms the practice of torture against new recruits and whether it has stopped or continues.

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[1186] Sechele (note 141 above) 33.
[1187] Matlosa & Pule (note 991 above) 42.
[1188] As above; J Ngwawi 'A historical perspective of Lesotho's political crisis' (2014) 14 (48) *Southern African News Features*; www.sardc.net/en/southern-african-news-features/a-historical-perspective-of-lesothos-political-crisis/ [accessed 16 April 2016].
[1189] Sechele (note 141 above) 33.

### *4.3.3 Torture during the period of military rule (1986 - 1993)*

As indicated earlier, in 1986, the LDF overthrew the BNP government and seized power by force. Following this *coup d'état* and military seizure of power, both soldiers and members of the public were subjected to torture at the hands of the LDF, which had then changed to the Royal Lesotho Defence Force (RLDF).[1190] Senior army officers who opposed the *coup* were arrested and tortured.[1191] Two of them died in police custody while about 23 were tried before a court martial, without due regard to international standards on fair trial.[1192] Most of the incidents of torture against members of the public as well as army officers were documented by Amnesty International in its 1992 report.[1193] Members of the army who were tortured during this period include, amongst others, Colonel Sekhobe Letsie and Sergeant Ngoana-Ntloana Lerotholi both of whom were charged with murder of two former ministers of the BNP government in 1986 (Bushmans Pass killings).[1194]

Other army officers subjected to torture include Captain Samuel Mokete Tumo who was arrested and kept in solitary confinement,[1195] kept naked, covered with wet blankets, had tyres placed over his head and was made to kneel on crushed stones.[1196] The arrest, detention and ultimate torture of the Colonel Sekhobe Letsie and Sergeant Ngoana-Ntloana Lerotholi was subjected to political criticism. Although they were charged with murder, which is not a political offence, it is argued that their prosecution was politically motivated because they were only put to book in 1990 when Lekhanya's government was toppled. Had political power struggle not come into play, they would have gone unpunished as many members of the army had committed political assassinations with impunity.[1197] This argument could be further

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[1190] 'Nyane (note 1079 above) 71 argues that the army's change of name to the Royal Lesotho Defence Force in 1986 after toppling the BNP government and establishing a convenience alliance with the Royalty is yet another sign of the army's political interference and dominance. See also

[1191] Amnesty International Report (1992) 13.

[1192] As above 8.

[1193] As above 7.

[1194] As above.

[1195] As above. Tumo's treatment was in contravention of Lesotho's obligations under ICCPR as interpreted by the HRC, GC 20 para 6 (note 42 above) and obligations under CAT as reiterated by the Committee against Torture *Concluding Observations to the Combined 3rd to 5th Periodic Reports of the United States*.

[1196] *R v Sekhobe Letsie & Another* 13 July (1990) LSCA 114.

[1197] Lenka (note 716 above) 58.

supported by Browde JA's dictum in which he said that '[an] inquest concerning the deaths was commenced in November, 1989 and it was not until 19th February 1990, after the change of government as a result of a *coup d'état* that the first appellant was arrested'.[1198] Similarly, Lenka argues that 'in fact it became apparent that if it were not for internal struggles, no further action was anticipated and hence cover-up was an inevitable result'.[1199]

As indicated in more detail in section 4.2 above, there was another military *coup* in 1990. The second military regime led by Ramaema did not spend much time in power, but prepared for democratic elections, which took place in 1992 and a civilian government was installed in 1993. Because there was at this time both internal and external political stability, the role to be played by the military in the years to come was expected to change. The military was to cease political participation and submit to civilian authority.[1200] However, as illustrated in the next sections, the LDF continued to be embroiled in political controversy and this in turn impacted on its involvement in human rights violations, including the practice of torture.[1201]

### *4.3.4 Torture during the period of fragile democracy (1993 - 2012)*

One of the major legal changes, which had been made during the period of embryonic democracy, was the promulgation of the 1993 Constitution, which is still in force currently. Chapter two of the 1993 Constitution entrenches fundamental human rights and freedoms. However, Amnesty International also remarked in its report that the Bill of Rights, in the then new (1993) Constitution did not provide an automatic guarantee that human rights violations would end.[1202]

The reasons, which demanded the establishment of the LDF, had vanished; the LLA and exiled BCP supporters had returned home, apartheid in South Africa had ended. Therefore, the LDF simply had no work to do as its primary role of defending territorial integrity had become moot and it was left with the performance of its

[1198] *R v Sekhobe Letsie & Another* (note 1177 above) para 246.
[1199] Lenka (note 716 above) 58.
[1200] 'Nyane (note 1079 above) 71.
[1201] As above.
[1202] Amnesty International Report (1992) 9.

secondary roles such as agricultural projects and assisting the LMPS in the preservation of internal order. In 1994, just a year into the new democratic dispensation, the LDF found itself at the centre of political controversy. Four ministers were abducted and Selometsi Baholo, a Minister of Finance, was assassinated by the LDF during a strike for salary increments.[1203] The Prime Minister, Ntsu Mokhehle, established a Commission of Enquiry into the events, which took place from November 1993 to April 1994 and the role of the LDF in those events. The Commission was also meant to recommend the incorporation of former members of the LLA into the army.[1204] The Commission recommended that the army should be restructured and professionalised.[1205]

As a result of the Commission's recommendations, the LDF Act of 1996 was enacted. It reinforced the protection of human rights as contained in the 1993 Constitution. However, in 1998, the LDF was at the centre of political disturbances, which resulted in SADC military intervention, and the arrest and detention of other members of the LDF.[1206] It is during this detention that torture is alleged to have been committed.[1207] In its concluding observations on Lesotho's initial report, the HRC raised a concern 'about the continuing influence of the military in civilian matters'.[1208] With regard to pre-trial detention, the Committee raised a concern about the detention of suspects for periods longer than 48 hours before they are brought before a magistrate. It noted that the army officers who were involved in the mutiny of 1994 were held for many months before the commencement of court martial

[1203] Matlosa & Pule (note 991 above) 54.
[1204] Legal Notice No. 61 of 1994; H Mothibe 'The military and democratisation in Lesotho' (1999) 5 (1) *Lesotho Social Science Review* 50, who argues that the inclusion of a recommendation of the incorporation of LLA members into the LDF fuelled the suspicion that the BCP government had a vendetta against the army and wanted to dismantle it. This was an incentive for the army to assist the King in what was termed the 'palace *coup*' of 1994; *Sekhonyana v Prime Minister of Lesotho (Dr Ntsu Mokhehle) & Others* (High Court of Lesotho) 25 September 1995 LSCA 143 in which Legal Notice No. 61 was challenged.
[1205] 'Nyane (note 1079 above) 75.
[1206] For a thorough analysis of events of the 1998 political disturbance, see FJ Likoti 'The 1998 Military intervention in Lesotho: SADC peace mission or resource war?' (2007) 14 (2) *International Peacekeeping* 251; 'Nyane (note 1079 above) 76.
[1207] *Rantuba & Others v Commander of LDF* (High Court) 27 November 1998 [1998] LSCA 110, 2 in which the wives of three of the soldiers who were arrested and charged with mutiny following the 1998 political unrest brought the matter to court. The applicants sought the production of the three soldiers in court for them to be inspected as there were allegations that they were tortured and denied medical treatment.
[1208] HRC *Concluding observations on Lesotho's initial report* (note 974) para 14.

proceedings as were the junior officers involved in the 1998 mutiny. It recommended that Lesotho must enforce compliance with the national laws, which prohibit detention for over 48 hours before being taken before a magistrate.[1209]

In the case of *Ntaote v Commanding Officer, LDF and Others* the plaintiff alleged that he was an armourer of the LDF. He was arrested following breaking into the armoury on suspicion that he had participated in the stealing of military rifles. In this case, he gave evidence that during his interrogation, he was repeatedly beaten and suffocated with a tube and plastic bag and forced to confess to the alleged theft; he was also denied medical attention.[1210] In *Mathabeng Lechalaba v Commander LDF and Others*,[1211] the applicant was arrested and detained at Ratjomose Barracks military detention centre on allegations of theft of military rifles. He alleged that he was tortured until his release 20 days later. In *Theko Lerotholi v Right Honourable Prime Minister Pakalitha Mosisili & Others,*[1212] the applicant was arrested and detained in December 2004 on suspicion of having stolen military rifles and he was subjected to torture until his escape about 10 days later.[1213] Subsequent to Theko Lerotholi's flight, Tlhoriso Letsie was arrested on suspicion that he assisted Theko Lerotholi to escape from detention.[1214] He was also subjected to torture until he was released by an order of *habeas corpus*, which was filed by his brother in *Tlali Letsie v Commander LDF and Others.*[1215] In *Motlemelo v The Commander LDF & Attorney General*, the plaintiff alleged that the said pain and suffering resulted from torture, which he was subjected to by members of the LDF.[1216]

The above cases have similar features. Firstly, all of them are civil claims for monetary compensation against the government through the Commander of the LDF

[1209] As above para 18.
[1210] *Ntaote v Commanding Officer, LDF and Others* CIV/T/142/2001 High Court (judgement of 26 May 2011).
[1211] *Mathabeng Lechalaba v Commander LDF and Others* (note 988 above).
[1212] *Theko Lerotholi v Right Honourable Prime Minister Pakalitha Mosisili & Others* (High Court of Lesotho) 7 September 2005 (unreported).
[1213] As above.
[1214] *Commander Lesotho Defence Force & Others v Letsie* (Court of Appeal) 22 October 2010 (2010) LSCA 26.
[1215] *Tlali Letsie v Commander LDF and Others* High Court judgment of 27 December 2004 (unreported).
[1216] *Motlomelo v The Commander LDF & Attorney General* High Court judgment of 5 October 2015 (unreported) para 1.

and the Prime Minister who was the Minister of Defence at that time. Secondly, in all of these cases, the Commander did not dispute that the torture was inflicted on the plaintiffs. Thirdly, although the complainants knew the officers who had ordered their torture, as well as those who inflicted the pain on them, they were not included in the civil proceedings. Fourthly, the allegations of torture were not investigated and the perpetrators were not prosecuted as there are no corresponding criminal cases. Lastly, the only form of redress, which the victims sought and the Court granted, was monetary compensation. It must be noted that at the time when all these cases were brought to court, Lesotho had already guaranteed the right to freedom from torture in section 8 of the Constitution and was already a party to ICCPR, African Charter and CAT, which contain specific measures, which must be put in place for the prevention and prohibition of torture, as well as the provision of an effective remedy to its victims, which effective remedy has been interpreted to include the investigation of allegations of torture, full rehabilitation of victims and change of national laws to ensure non-repetition of acts of torture.[1217] These cases are, therefore, missed opportunities through which the courts could have reminded the executive branch of government of its obligations under international law.

As far as Lesotho's obligation to investigate allegations of torture and to prosecute its perpetrators is concerned, an argument could be that it is not possible to implement this obligation in the absence of an anti-torture law. However, this argument is countered by an argument that if the absence of an anti-torture law was the only impediment, there could have been prosecutions for lesser offences under both the Penal Code Act and Common Law that proscribe violent acts, such as assault or assault with intent to cause grievous bodily harm (Assault GBH).[1218] A conclusion, therefore, is that there is more to the lack of prosecution than a weak legal framework, and that could only be the lack of political will and the state's condonation of torture. This also concerned the HRC as stated in its Concluding Observations on

[1217] CAT article 14 and Committee against Torture, GC 3; ICCPR article 2(3); *Roy Manojkumar Samathanam v Sri Lanka* (note 270 above) para 8 in which the HRC held that one of the remedies to which a victim of torture is entitled is harmonisation of the domestic laws with ICCPR to guarantee non-repetition of torture; *Bendib v Algeria* (note 113 above) para 6.7 in which the Committee against Torture held that effective remedy does not only refer to monetary compensation; *Abdulrahman Kabura v Burundi* (note 378 above) paras 7.6 in which the Committee against Torture held that in order to ensure non-repetition, the state has an obligation to investigate allegations of torture.
[1218] Penal Code Act sections 30 - 32.

Lesotho's initial report in 1999 in which it raised a concern 'about the climate of impunity for crimes and abuses of authority committed by members of the military'.[1219]

### *4.3.5 Torture during the period of coalition government (2012 - 2015)*

#### *4.3.5.1 First three-party coalition government*

As illustrated in section 4.2.6 above, Lesotho held elections, which led to a first coalition government in 2012. Following the 1998 political unrest, which was mostly caused by the involvement of the army in politics, an attempt was made to professionalise the LDF.[1220] It was not long after the attempt to retrain the LDF by the Indian army that, in 2014, the BTI indicated that the government of Lesotho retained its monopoly on the use of force.[1221] This monopoly, it is argued, was one of the warning signs that the army was not fully void of politics and that there could be a challenge for civilian authority to control the army.[1222] It was not long after the BTI report that the challenge identified became a reality and once again the LDF was mired in political controversy.[1223] The controversy led to yet another intervention by SADC, 2015 snap elections and a resultant seven-party coalition discussed in the previous section.

#### *4.3.5.2 Second seven-party coalition government*

The term of the seven-party coalition government began in 2015 and was to end in 2020.[1224] However, at the time of completing this thesis, the seven-party coalition government, which had only lasted two years and was dissolved by His Majesty the

[1219] HRC *Concluding observations on Lesotho's initial report* (note 974 above) para 14.
[1220] 'Nyane (note 1079 above) 77.
[1221] BTI (note 978 above).5
[1222] As above.
[1223] Fearing a motion of no confidence, which was looming, in June 2014, the Prime Minister of the three-party coalition government prorogued parliament. On 29 August 2014, he appointed Mahao as the new army commander and removed Kamoli from the LDF command. See Legal Notice No. 64 of 2014, which repealed Legal Notice No.41 of 2012 in terms of which Kamoli had been appointed as commander. The following day the house of the new commander, the State House and a few police stations were attacked by members of the LDF. The Prime Minister fled the country and sought asylum in South Africa.
[1224] Constitution section 83(2) provides parliament with a five-year term unless dissolved earlier.

King in March 2017 following a motion of no confidence, which had been passed against the Prime Minister, Pakalitha Mosisili.[1225] In this section, it is illustrated that the politics surrounding Lesotho's second coalition government also influenced the commission of torture within the LDF.

When it came to power, the seven-party coalition government removed Mahao from army command and reinstated Kamoli.[1226] Following Kamoli's return to command, about fifty soldiers were arrested in terms of section 86 of the LDF Act 1996 on charges of plotting a mutiny against Kamoli's command in favour of Mahao.[1227] Following Kamoli's return to army command from 14 to 29 May 2015, several soldiers were arrested and about twenty-three were detained. Several *habeas corpus* applications were brought to the High Court by relatives, mainly wives of the arrested soldiers, who claimed that their husbands had been kidnapped as they had not been told of their whereabouts. Six of these applications were later consolidated into one in *Jobo and others v Commander LDF and others.*[1228] In this case, the six applicants were all wives of soldiers who were detained on different dates. The Court granted interim orders for the production of the detained soldiers in Court. They were each brought to Court on different dates. All were escorted to Court by heavily armed military personnel who covered their faces with masks.[1229] They came in with their feet shackled, blindfolded or hooded and handcuffed.[1230] They each separately told the court that they had been subjected to torture and CIDT and they also had fresh cuts and bruises on their wrists, which could be attributed to the tightened handcuffs.[1231] In considering the *habeas corpus* applications, the Court went further to order that the said ill-treatment must stop forthwith.[1232] The court categorically stated that such treatment violates section 8 of the Constitution of Lesotho, which

[1225] Legal Notice No. 22 of 2017.
[1226] Legal Notice No.60 of 2015, which re-appointed Kamoli to the office of Commander of the LDF and removed Mahao.
[1227] OHCHR *Letter to the Government of Lesotho 'Mandates of the Working group on Arbitration; the Special Rapporteur on independence of judges and lawyers; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment'* 30 November 2015. https://spdb.ohchr.org/hrdb/31st/public_-_UA_Lesotho_30.11.2015_(1.2015).pdf [accessed 17 April 2017] (Letter of Special Mandates) 1.
[1228] *Jobo and others v Commander LDF and Others* (note 841 above).
[1229] As above para 5; Letter of the Special Mandates (note 1216 above) 2.
[1230] *Jobo and others v Commander LDF and Others* (note 841 above) para 46.
[1231] As above para 5.
[1232] As above para 7.

guarantees the right to freedom from torture and other CIDT and further that it is not attenuated by section 24 of the Constitution, which states that the right to freedom from torture and CIDT cannot be deviated from pursuant to the law of disciplined forces, such as the LDF.[1233] The Court equated the shackling of detained solders to slavery and warned the Ministry of Defence, the Commander of the LDF and the Director of the Military Intelligence of the irreparable damage that these acts could cause to the image of Lesotho in the eyes of the international community.[1234]

Following the detention of the soldiers suspected of mutiny, the ousted army commander, Mahao, was killed under controversial circumstances on 25 June 2015.[1235] The government and the army contended that Mahao died in an exchange of fire while he was resisting arrest, whereas his family says he was assassinated.[1236] The then Prime Minister, Pakalitha Mosisili, requested the SADC's intervention.[1237] Consequently, the SADC Troika established a Commission headed by Justice Phumaphi of Botswana to enquire into Mahao's death, the alleged mutiny and other factors, which in the opinion of the Troika, were responsible for political instability in Lesotho.[1238] The Troika made a decision that the Court Martial, which was meant to adjudicate the mutiny charges, should be suspended to allow the Commission to make its investigations.[1239] This decision was, however, later withdrawn.[1240] Prior to its withdrawal, the LDF issued a directive indicating that the detained soldiers would be under closed arrest until the Court Martial was convened.[1241] Three of the detained soldiers lodged a case challenging this directive as a violation of Regulation 29 of the LDF (Discipline) Regulations of 1998 in terms

[1233] As above para 6.
[1234] As above para 9.
[1235] News 'Fired Lesotho army commander shot dead' *New Zimbabwe* 28 June 2015. www.newzimbabwe.com/news-23431-Axed+Lesotho+army+chief+shot+dead/news.aspx [accessed 17 April 2017] J Brock 'Killing former Lesotho army chief deepens instability' *Mail & Guardian* 29 June 2015.
[1236]SADC Commission of Enquiry to the Kingdom of Lesotho: 20 July 2015 - 6 November 2015 (SADC/Phumaphi Commission) Report (2015) paras 42 - 49: evidence of Mahao's wife giving details on earlier attempts to kill Mahao, including 30 August 2014.
[1237] SADC/Phumaphi Commission Report (note 1225 above) 6.
[1238] The SADC/Phumaphi Commission was domesticated through Legal Notice No. 75 of 2015, which was amended by Legal Notice No.88 2015 after the former was criticised for having included issues, which were not contained in the SADC Communique. Both Legal Notices were passed pursuant to Public Enquiries Act 1994 section 3.
[1239] Letter of Special Mandates (note 1216 above) 3.
[1240] As above.
[1241] LDF Directive of 10 July 2015 signed by Major General Poopa.

of which members were not to be detained for more than 42 days without trial.[1242] Two of the applicants had been in detention for 70 days while one had been in for 54 days.[1243] The High Court had ordered that the acts of torture and CIDT must be stopped.[1244] The Court of Appeal found that detention beyond 42 days provided for in the in Regulation 11 of the LDF Regulations was unlawful.[1245] Despite a finding that the alleged acts were unlawful, the Court did not order the release of the applicants. The Court of Appeal ordered that the only appellant (Jobo) who had pursued the appeal while the two others withdrew, must be placed under open arrest.[1246]

Shortly after the commencement of the proceedings of the Phumaphi Commission, the LDF issued the detained soldiers with a notice indicating that the Court Martial be convened from 14 September 2015 to commence the mutiny trial.[1247] The notice also indicated that the soldiers would remain in army detention throughout the trial.[1248] The detained soldiers then lodged an urgent application in the High Court of Lesotho in *Mareka and others v Commander LDF and others.*[1249] In the High Court, the applicants challenged the decision of the Minister of Defence and the LDF Commander to convene a Court Martial to try them for the same issues, which the SADC Commission of Enquiry had been set up to investigate and also their denial to participate in the Commission's proceedings.[1250] They sought the order that the said closed detention is unlawful.[1251] In response to this challenge, the LDF Commander and the Minister of Defence stated that the Court Martial was convened in order to comply with the provisions of the LDF Act, which requires that a detained soldier must be brought to court within a reasonable time.[1252] On 5 September 2015, Makara J held that the holding of applicants under closed arrest without giving them a hearing is unlawful and cannot be justified under section 24(3) of the Constitution.

[1242] *Commander LDF & Others v Mohasi & Others* C of A (CIV) 46/ 2015 [2015] LSCA 38.
[1243] As above para 67.
[1244] As above para 12.
[1245] As above para 73.
[1246] Open Arrest is defined as a form of military bail.
[1247] Letter of Special Mandates (note 1216 above) 4.
[1248] As above.
[1249] *Mareka and others v Commander LDF and others* (Court of Appeal) 29 April 2016 [2016] LSCA 9.
[1250] As above para 1.
[1251] As above.
[1252] *Mareka and others v Commander LDF and others* (High Court) unreported.

The learned judge went further to hold that although section 24(3) limits the rights to which members of the disciplined forces are entitled, it does not replace the common law principles of natural justice, which entail, amongst others, the right of everyone to be given a hearing before an adverse decision can be made against him or her.[1253]

When it had completed the enquiry, the Phumaphi Commission made four recommendations, which were endorsed by the SADC. These recommendations were:

1. Expeditious and comprehensive investigation into Mahao's death;[1254]
2. Removal of Kamoli from the LDF command;[1255]
3. Security Sector reforms; and
4. Granting of Amnesty to soldiers charged with mutiny in order to ensure their release and return of those who had fled the country.[1256]

While the foregoing discussion was concerned with cases of torture against members of the LDF, there are also cases in which the LDF has been alleged to have committed torture against civilian members of society in operations intended for the preservation of internal order, in search of illegal firearms and in areas where they are deployed to combat stock theft. Deployment of the army in the preservation of internal order has been criticised as a recipe for human rights violations by William Adama in the following words:

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[1253] Despite this order, the applicants were not released from detention. See also Letter of the Special Mandates (note 1216 above) 7 in which the government of Lesotho was requested to provide detailed information as to the legal ground for continued detention of the soldiers. It was requested further to release them, pending its response to the letter of the Special Mandates. The soldiers were only released after a period of about 18 months due to pressure on government to implement the recommendations of the SADC-Phumaphi Commission.

[1254] SADC Commission of Enquiry to the Kingdom of Lesotho, *Final Report* 61. See also *Press Statement issued by the Mahao family on SADC Report* (16 February 2016) 1 www.lcn.org.ls/news/FAMILY%20STATEMENT%20ON%20PHUMAPHI%20REPORT%202016.PDF [accessed 17 April 2016]. In this statement, the family expressed its concerns about the failure of the Phumaphi Commission to 'uncover the names of all LDF personnel who participated in the operation that killed Lt General Mahao…as well as a complete ballistics portfolio of evidence necessary in a criminal case.'

[1255] SADC Commission of Enquiry Final Report (note 1243 above) 61.

[1256] As above 62. The fourth recommendation is rather contradictory, as the Commission starts by considering that the torture of suspects in order for them to confess to having taken part in the mutiny, makes the case of mutiny highly suspect. Yet instead of unequivocally recommending their release, recommends amnesty, which suggests that mutiny had in fact been committed.

> There's a reason you separate the military and the police. One fights the enemies of the state, the other serves and protects the people. When the military becomes both, then the enemies of the state tend to become the people.[1257]

When admitting that it was wrong to have deployed the South African Defence Force who killed and tortured members of the community in the search for illegal firearms in Msinga, KwaZulu Natal, Mosiuoa Lekota, who was then South African Minister of Defence, said 'we train our soldiers to kill and not to arrest. I do not want them among communities because they can be dangerous when provoked'.[1258] That is, by authorising members of the LDF to undertake operations of the preservation of order, the LDF Act leaves room or creates an environment for the violation of human rights. This loophole has been summarised by Costa and Medeiros when they distinguished the police from the armed force in terms of the degree of force they are trained to use. They argue that the armed forces are not concerned about controlling the amount of force they use, while the police are trained to use minimal force, commensurate to the harm that is being averted.[1259]

Deployment of the military in the preservation of internal order in Lesotho has resulted in human rights violations, including the deprivation of life, torture and CIDT. For instance, in Lebakeng, a remote area in the highlands of Lesotho, members of the LDF were deployed to assist in the prevention of stock theft across the borders of Lesotho and South Africa. While there, a report was made by villagers that one woman had insulted her aunt. She was brought to the military camp where she was assaulted with spades by the army officers and she died on the way to the clinic. The cause of death was certified to be the severe beatings to which she was subjected.[1260]

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[1257] W Adama 'Battlestar Galactica, Miniseries Quotes' http://www.quotes.net/show/-1 [accessed 17 April 2016].
[1258] X. Vapi 'Lekota tackles anger over soldiers' 29 June 2001 *IOL News*, www.iol.co.za/dailynews [Accessed 18 April 2016].
[1259] A Costa & M Medeiros 'Police demilitarisation: Cops, soldiers and democracy' (2002) 28 (2) *Conflict, Security and Development* 25.
[1260] Development for Peace Education (DPE) (unpublished report) 2016.

### *4.3.6 Concluding remarks on torture within the LDF*

An observation that can be made, based on the analysis of cases of torture within the LDF, is that the civil-military relations in Lesotho have been highly influenced by political waves since Lesotho gained independence. The impact of these relations is characterised by the army's violation of human rights with impunity, reflecting the states' failure to implement the international human rights obligations to refrain from committing torture and CIDT, [1261] to investigate its allegations, [1262] to prosecute and punish its perpetrators and to provide its victims with redress beyond monetary compensation. The trend of non-prosecution of members of the LDF seems to have been a policy of the current command of the LDF. The Commander has refused to co-operate with the police in cases where members of the LDF are implicated in criminal cases. Two recent examples, which are not related to torture, but instructive to the present discussion are: a case in which about eight members of the LDF were alleged to have bombed the residence of the former Commissioner of Police and two other residences; the second case is the one, which involved the circumstances surrounding the death of the former Commander of the LDF, Mahao. In both cases, the Commander of the LDF refused to hand over the suspected members of the LDF to the police. Instead, the members of the LDF who were implicated in both cases were promoted to higher ranks shortly after the incidents in question.

## 4.4 Torture within the Lesotho Correctional Service

As in the case of the other two law enforcement institutions discussed above, resort to torture in the LCS also has a long history, spanning from the time of independence to date. The difference with the correctional institutions is that cases of torture are not as many as the ones within the LMPS and LDF. The other difference is that cases of torture within the correctional institutions can be divided into two categories:

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[1261] *Mulezi v Democratic Republic of Congo* (note 268 above) 5.3 and *Abdulrahman Kabura v Burundi* (note 378 above) para 3.7 in which the HRC and Committee against Torture respectively, held that the state's obligations against torture also include the obligation to treat detained people in a humane manner. See also *Namunjepo v Commanding officer, Windhoek Prison & Another* (note 1117 above) para 23.

[1262] ICCPR article 2(3), HRC, GC31. See also CAT articles 12 and 13 see also *Abdulrahman Kabura v Burundi* (note 378 above) paras 3.4 & 7.4 on states' obligation to investigate allegations of torture; Robben Island Guidelines 17, 18 & 19; *SAPS v SALC* (note 188 above).

The first category is that of physical torture in which warders inflict severe physical or mental pain or suffering on inmates as a form of punishment. The second category is that of poor living conditions in most correctional institutions, which may reach the level of torture. Each of these categories is discussed in detail below.

### *4.4.1 Overview of the LCS*

The LCS is an institution responsible for the administration of correctional institutions in Lesotho. It was first established as the Basutoland Prison Service in 1957[1263] and changed to the Lesotho Prisons Services in 1993[1264] and then to Lesotho Correctional Service in 2004.[1265] It is governed by the Correctional Service Act of 2016, which details the main function of the LCS as 'the performance of all work necessary for, arising from, or incidental to the safe custody and rehabilitation of inmates in relation to the administration of correctional institutions and such duties as may be assigned by the Commissioner'.[1266] With regard to the treatment of inmates, section 40 of the Correctional Service Act provides that '[n]o inmate shall be subjected to torture, cruel, inhumane or degrading treatment or punishment'. It must be noted that even prior to enactment of the Correctional Service Act, the Prisons Proclamation, as well as section 8 of the Constitution prohibited torture of inmates. Despite this clear prohibition in the law, the practice took place at Lesotho's correctional institutions as illustrated in the discussions below.

### *4.4.2 Torture of inmates by correctional facility warders*

Torture, which takes place in most correctional institutions, is not reported. As indicated in the previous chapter, the Ombudsman visits Lesotho correctional services once in a number of years. The earliest records of torture are those compiled by Amnesty International in its 1992 Report. It records the case of John Ralengana and Khabele Khaeeane who were subjected to torture by prison warders in the Maseru Central prison on 31 August 1991. The prison warders found food in

[1263] Basutoland Prisons Proclamation 1957.
[1264] Constitution of Lesotho 1993 section 149.
[1265] Fifth Amendment to the Constitution, Act No. 8 of 2004 section 4.
[1266] Lesotho Corrections Service Act No. 3 of 2016 section 6.

the cells of convicted inmates, which was then a breach of discipline, as only inmates awaiting trial were allowed to have food brought from outside the institution. Ralengana was punished by being subjected to solitary confinement. The other inmates protested and started breaking down their cells. The warders dispersed the rioting prisoners by use of guns and teargas and Ralengana was shot with a pellet gun on two thighs. The injured inmates were taken to hospital, but returned without treatment. On arrival at the correctional institution, Ralengana was stripped naked and placed in solitary confinement in a cell deliberately flooded with water.[1267] In its concluding observations on Lesotho's initial report on the implementation of the ICCP, the HRC expressed its concern about the treatment of detainees in contravention of articles 7 and 10 of the Covenant.[1268]

In August 2012, six inmates at the Leribe Correctional Facility were stripped naked, locked in a cell and given only two meals per day for four days as punishment for having fought amongst themselves.[1269] Following a strike in July 2013 by the Correctional Officers at Maseru Central Prison, about 13 inmates were shot and injured in a fracas, which ensued between themselves and the senior warders who were on duty as the junior correctional officers were on a go-slow.[1270] Thus, while no information was sought from the inmates by the prison warders, they were subjected to injuries by firearms, as well as assaults and insults for purposes of intimidating them. It is argued that these acts also fit the definition of torture stipulated in article 1(1) of CAT.

From January to October 2014, there were two complaints of assault of an inmate at the Leribe Correctional Facility and one in Maseru Female Juvenile Facility.[1271] Although neither of the two complaints amounted to torture, they are, however, indicative of a possibility of torture taking place in the correctional facilities. The LCS authorities investigated both cases and disciplinary action was taken.[1272] The officer

[1267] Amnesty International Report (1992) 172.
[1268] HRC, *Concluding observations on Lesotho's initial report* (note 974 above) para 20.
[1269] US Dept of State, 2013 Human Rights Report for Lesotho (2014) 2.
[1270] 'We are competent enough to run LCS' *Public Eye* 16 August 2013.
[1271] US Dept of State, 2014 Human Rights Report for Lesotho (2015) 7.
[1272] Information obtained from the legal officers of the LCS, but the author did not have access to the disciplinary records.

implicated in the Leribe cases was dismissed while the two implicated in the Maseru case were placed on special probation. However, no criminal charges were laid against any of the officers.

### *4.4.3 Prison conditions that amount to torture*

According to reports compiled by the Ombudsman, as well as the US Department of State, prison conditions in Lesotho are in an appalling condition. According to the US Department of States' 2014 human rights report, prisons remained overcrowded as at 30 August 2014, with an adult prison population of 2 023, comprising 1 963 men and 60 women and a juvenile population of 50, made up of 36 boys and 14 girls. Pre-trial detainees constitute about 20% of the prison population.[1273] The Maseru Central Prison, which is newly renovated and extended, had a capacity to hold 650 inmates yet it housed 850. The poor quality of the food, and lack of sanitation and ventilation also contributed to the poor conditions. According to the CAT Committee, these dire conditions amount to torture.

### *4.4.4 Concluding remarks on torture within the LSC*

The foregoing discussion has shown that unlike the LMPS and LDF, torture within the LCS is not influenced by political instability, but by the failure of the government of Lesotho to implement the minimum standards on the treatment of inmates. One factor whereby the LCS is similar to the LMPS and LDF is that there is a culture of impunity for officers who commit torture in as much as no criminal proceedings are taken against them and very lenient sanctions are imposed on those who are found guilty in disciplinary proceedings.[1274]

## 4.5 Conclusion

The cases discussed in this chapter show that although not widely publicised, torture in Lesotho is rife. Apart from the cases, which have been adjudicated upon by the

[1273] United States Department of State Human Rights Report on Lesotho (2013) 4.
[1274] *Letlaka Banyane v Commissioner of Correctional Services & Another* (note 990 above).

courts of law, there are also anecdotal reports in both print and audio media, which show a huge number of torture cases in which the perpetrators, being members of the three disciplined forces, go unpunished and the victims thereof go without redress. Despite some isolated disciplinary measures against those responsible, impunity for acts of torture seems to be the order of the day. The impunity of law enforcement officers is also reflected by the 2013 and 2016 Afrobarometers, which indicate that the government's failure to prosecute police officers for acts of torture and corruption had resulted in the decline of public trust in the police service in 2013,[1275] and also that in 2016, 37% of the Basotho were not happy with the way democracy works in Lesotho.

In this chapter, it has been argued that although it may not appear to be *prima facie*, the use of torture as an interrogation tool by the police is also political. It is political because it is influenced by the failure of different regimes to enact anti-torture legislation and to prosecute under common law, members of the security forces who are implicated in the reported torture cases. The political motivation for the absence of a legal framework against torture, as well as the non-prosecution of those alleged to have committed torture, is discerned from the statements made by leaders of political parties during public rallies. These statements greatly reflect a lack of political will to have an anti-torture legal framework in place, as well as the lack of a political will to prosecute those responsible for torture. This status, therefore, encourages members of the law enforcement institutions, the police and the military, to use excessive force, which sometimes amounts to torture, with impunity. It is further argued that the political leaders make these statements in order to appease the electorate because many people in Lesotho subscribe to the notion that torture is an effective interrogation tool and a quick way of lowering the high crime rate.[1276]

The occurrences of torture, coupled with the government's failure to prosecute those responsible, as well as the failure to provide redress to victims of torture are a clear picture of two things: one, that the national legal framework is not adequate to protect the citizens from torture; and two, that there is a problem with the

[1275] Afrobarometer (May 2013).
[1276] This is in accordance with the Sesotho saying the 'Lesholu ke ntja le lefa ka hlooho ea lona' loosely translated to mean that a thief must pay back with his head.

implementation of the existing inadequate legal framework. The problem of Lesotho's implementation of international standards against torture confirms that the ratification of international human rights instruments alone is not enough to avert acts of torture, but that 'prevention requires an effective national legal framework that incorporates international human rights standards and includes specific provisions to prohibit and prevent torture'.[1277] In the next chapter, it is argued that, in order for Lesotho to comply with its human rights obligations, the ratification of treaties alone without the implementation of their provisions at the domestic level would not guarantee the enjoyment of the right to freedom from torture. Recommendations are therefore made aimed at ensuring the effective implementation of international human rights standards against torture in Lesotho.

[1277] Association for Prevention of Torture (note 1 above).

# CHAPTER 5

# CONCLUSION AND RECOMMENDATIONS

## 5.1 Conclusion

This study was conducted with the general objective of evaluating the domestic implementation of international human rights standards against torture in Lesotho. In order to achieve the main objective, the study started by discussing the international human rights standards against torture as contained in various human rights treaties and under customary international law. It then used these standards as a yardstick against which Lesotho's legal and institutional frameworks were measured. This normative approach was also used to highlight the relevance of international human rights standards to the development of human rights, specifically the right to be free from torture, in Lesotho. Thus, a discussion of the place of international law in the legal system of Lesotho and how adherence to international law has helped to develop both laws and jurisprudence, particularly in the field of human rights, was undertaken. In this regard, the redundancy of the two theories of monism and dualism was highlighted and a conclusion made that by ratifying international human rights instruments, Lesotho has created law for itself and is therefore bound to comply with the said instruments.

In this study, it has been demonstrated that the prohibition of torture is at the core of human rights protection. It has been illustrated that torture is one of the worst scourges of humanity, which has pushed the international community into adopting uniform standards to ensure that it is prohibited in all its forms. These standards have been adopted at the global (UN), as well as regional[1278] levels through binding, as well as non-binding instruments, all aimed at ensuring that torture is prevented and prohibited, that its allegations are investigated and that those found liable are prosecuted and punished accordingly, and its victims are awarded appropriate redress. In the study, it was also illustrated through case law and anecdotal reports

[1278] This study limited itself to the African regional human rights system, which is applicable to Lesotho.

that the practice of torture in Lesotho is as a result of two factors: firstly, failure to implement at the domestic level, the international human rights standards against torture; and secondly, political instability in the country.

In line with the objectives set out in chapter 1 of this study, it has been illustrated that the legal system of Lesotho is international law friendly in that, from the formation of the Basotho nation, international law played a major role in settling boundary disputes and establishing relationships between Lesotho and other countries. From the time when Lesotho was a British Protectorate to date, Lesotho continues to be part of the international community and to adhere to some principles of international law, which are contained in both international treaties and customary international law. This is illustrated by the massive ratification of international instruments, as well as the application of international law in national courts. It has also been shown that although in theory, because of its Roman Dutch Law heritage, Lesotho has been categorised as a dualist state in which international instruments cannot be directly applied in domestic courts unless domesticated, the jurisprudential trend is slowly changing as the courts now lean more towards the protection of human rights and interpretation of domestic laws in accordance with the state's international obligations. The courts have also asserted that the ratification of international human rights instruments should be viewed as a state's indication to be bound by the ratified instruments and therefore should not be taken for granted, even in the absence of corresponding domestic laws.

Several international human rights instruments were analysed in this research on the basis of which it is concluded that all core human rights instruments adopted at the global, as well as regional levels, explicitly, while some implicitly, proscribe torture in all its forms. From these instruments, the research categorised all the obligations placed on state parties into four broad categories, being the obligations to prevent and prohibit torture, to punish its perpetrators, to provide redress to its victims and to report on measures taken against torture.

In the study, it has also been concluded that although Lesotho has ratified a number of international human rights instruments, which contain obligations and standards

against torture, the major problem lies with the practical implementation of the said instruments. The failure to implement international standards against torture is illustrated by the fact that apart from guaranteeing the right to freedom from torture in the Bill of Rights, torture is not proscribed as a distinct crime. That is, there is no domestic law, which criminalises torture and lists its elements in accordance with article 1(1) of CAT. Because of the failure to criminalise torture as a distinct crime, the Constitution and the Penal Code Act have also failed to reflect the gravity of the offence of torture. Secondly, the law neither prescribes punishment to be imposed on those found guilty of committing torture nor spells out the form of redress to which victims of torture shall be entitled.

Linked to the absence of anti-torture legislation is also weak investigation machinery, as well as a culture of impunity amongst law enforcement officers who are implicated in cases of torture. In this study, it has been highlighted that there are a number of cases in which the police are sued for civil damages arising out of torture, as well as those reported to the Office of the Ombudsman and the Police Complaints Authority in which the police are alleged to have committed torture. However, since investigative powers are vested in the police service itself, the Office of the Ombudsman and the Police Complaints Authority are unable to carry out their own investigations, but have to refer the cases to the police for investigation. The police in turn fail to take appropriate action against fellow police officers. In cases, which involve members of the army, the command of the LDF inhibits the police from making investigations. In cases where the courts have made findings in civil cases that police officers and army officers have committed torture, the Director of Public Prosecution has not lodged corresponding criminal proceedings against the implicated officers. This thus leads to a conclusion that torture is condoned by those in authority and therefore institutionalised.

The government of Lesotho has also failed in its obligation to submit state party reports to relevant treaty bodies on measures taken to ensure full realisation of the right to freedom from torture. In limited cases, where state party reports have been filed, such as to the CMW, CEDAW and CRC Committees, the absence of specific laws and mechanisms that focus on torture has contributed to the government's

inability to include relevant statistical data on torture in the reports. If torture was prohibited as a distinct crime, there would be statistics which highlight its prevalence as opposed to the current situation in which torture is absorbed by and recorded under other offences, such as assault. For instance, there would be clear statistics on gender-based torture submitted to the CEDAW Committee as required by CEDAW GR 12 and GR 19 and clear statistics of the torture of children as required by the CRC. Torture-specific laws and mechanisms would have also been useful in informing the design of appropriate means of intervention in order to prevent and prohibit torture, to punish its perpetrators, as well as the design of other forms of redress for victims other than monetary compensation, which has been the only form of redress given to those who successfully prove to have been tortured.

## 5.2 Recommendations

On the basis of the foregoing conclusion, it is recommended that in order to successfully implement its international human rights obligations against torture, Lesotho must adopt a multi-pronged approach, which involves the alignment of the national legal framework with international standards, the establishment of national torture-prevention mechanisms, holding perpetrators of torture accountable and punishing them accordingly, compiling statistics on torture and also putting in place mechanisms to redress victims of torture.

Furthermore, the political history of Lesotho has reflected that members of the LDF have been involved in many human rights violations, including torture. An analysis of the relevance of the army in this day and age has also shown that for a long time, the army has done more harm than good to Lesotho as a nation. The recommendation in this regard, is that Lesotho should engage in the process of demilitarisation and the LDF should be abolished. The practical implementation of each of these recommendations is discussed below.

### *5.2.1 Domestication of international human rights instruments*

When a state has ratified a treaty, it has an obligation to incorporate the provisions of that treaty into its domestic legal system. The international human rights instruments discussed in chapter 2 provide clear guidelines on measures which states must take to prevent and prohibit torture, to punish its perpetrators and to provide redress to its victims. It is therefore recommended that in order for the aspirations contained in these treaties to be accessible to the people of Lesotho and for the practice of torture to be eradicated, these instruments must be incorporated into Lesotho's national legal system. The benefits of domestication are that Lesotho would be complying with its treaty obligations; there will be direct application of the aspirations contained in these instruments in the courts of Lesotho without questioning their source and the citizens will be in a position to hold state officials accountable for commission of torture. Domestication may also include constitutional reform as well as enactment of an anti-torture law as further recommended next.

### *5.2.2 Constitutional reform*

It is recommended that the Constitution of Lesotho be amended so as to include a provision on the application of international law in Lesotho. That is, Lesotho must adopt an approach, which Zimbabwe has adopted with respect to the application of international law. As regards customary international law, the Constitution of Zimbabwe clearly stipulates that '[c]ustomary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament'.[1279] As regards conventional international law, a similar approach is adopted in relation to the interpretation of the human rights chapter of the Constitution that '[w]hen interpreting this Chapter, a court, tribunal, forum or body, must take into account international law and all treaties and conventions to which Zimbabwe is a party'.[1280]

[1279] Constitution of Zimbabwe, 2013 section 325 (1).
[1280] Constitution of Zimbabwe, 2013 section 46; Sloth-Nielsen & Hove (note 668 above); Article 33(6) of the Constitution of Cape Verde (1980) which provides that '[a]ll evidence obtained by torture; coercion; assault on physical or moral integrity; illegal invasion of correspondence, telephone, domicile, or privacy, or other illicit means, shall be null and void'.

The recommended reform should also include practical aspects of prohibition against torture, such as the inclusion of a provision in the Constitution, which obliges courts to exclude evidence obtained through human rights violations. In this regard, there are two options, which different countries in Africa have adopted. The first one is the inclusion of a specific provision on the exclusion of evidence as has been done in the constitutions of Cape Verde,[1281] Ethiopia,[1282] Guinea Bissau,[1283] Liberia,[1284] Mozambique,[1285] Somalia[1286] and Sudan.[1287] The second option is to include this aspect as part of the right to a fair trial. The latter approach has been adopted in the Constitutions of South Africa,[1288] Kenya,[1289] and Zimbabwe.[1290]

[1281] Article 33(6) of the Constitution of Cape Verde (1980) which provides that '[a]ll evidence obtained by torture; coercion; assault on physical or moral integrity; illegal invasion of correspondence, telephone, domicile, or privacy, or other illicit means, shall be null and void'.

[1282] Article 19(5) of the Constitution of Ethiopia (1994) provides that '[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible'.

[1283] Article 35(6) of the Constitution of Guinea-Bissau 1984 provides that '[a]ny evidence or confession … obtained by torture, coercion, or physical or mental harm shall be null and void'.

[1284] Article 21(c) of the Constitution of Liberia (1986) provides that '[e]very person suspected or accused of committing a crime shall immediately upon arrest be informed in detail of the charges, of the right to remain silent and of the fact that any statement made could be used against him in a court of law. Such person shall be entitled to counsel at every stage of the investigation and shall have the right not to be interrogated except in the presence of counsel. Any admission or other statements made by the accused in the absence of such counsel shall be deemed inadmissible as evidence in a court of law'.

[1285] Article 65(3) of the Constitution of Mozambique (2004) provides that '[a]ll evidence obtained through the use of torture, coercion, offences against the physical or moral integrity of the person, the abusive intrusion into their private and family life or into their home, correspondence or telecommunications, shall be invalid'.

[1286] Article 35(4) of the Constitution of Somalia (2012) provides that '[e]very person may not be compelled to self-incriminate, and a verdict may not be based on evidence acquired by means of coercion'.

[1287] Article 156(c) of the Constitution of Sudan provides that '[p]ersonal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in the court of law'.

[1288] Sec 35(5) of the 1996 Constitution of South Africa provides that '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

[1289] Article 50(4) of the 2010 Constitution of Kenya provides that [e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice'.

[1290] Section 70(3) of the 2013 Constitution of Zimbabwe provides that '[i]n any criminal trial, evidence that has been obtained in a manner that violates any provision of this chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest'.

### *5.2.3 Enactment of anti-torture legislation*

It is recommended that in order for Lesotho to effectively implement the international human rights obligations against torture, the first step must be to adopt anti-torture legislation, which conforms to, at the very least, the obligations contained in CAT. In terms of the APT Guide, anti-torture legislation will be CAT compliant if it takes into account all the provisions of CAT, as well as the general comments and concluding observations of the Committee against Torture. Such legislation must at the minimum contain the following elements:

- Criminalise torture as a distinct crime and also cover other modes of liability, such as attempt to commit torture as well as participating in any manner in the commission of torture.
- Define torture in accordance with article 1(1) of CAT. The definition in section 94 of Penal Code Act may be used as it complies with article 1(1) of CAT.
- Prescribe an appropriate punishment for those convicted. The APT Guide recommends imprisonment for not less than six years without an option of a fine.
- Prescribe redress for victims of torture, which is not limited to monetary compensation, but also includes medical treatment and psychological support of the victim.

An anti-torture legislation will be useful to the entire criminal justice system in that it will enable the police to investigate allegations of torture with a clear understanding of the elements of torture and how it is distinguished from other criminal offences. With this knowledge, prosecutors would be able to lead relevant evidence that is essential to secure a conviction against perpetrators of torture. The law will also assist the judicial officers with respect to sentencing as it must prescribe the appropriate sentence to be imposed on those convicted of torture. Over and above this, the government of Lesotho will be able to identify suitable forms of redress for victims of torture as the law will provide for redress, including counselling and rehabilitation of victims of torture.

It is also recommended that where the government is reluctant to enact an anti-torture law, civil society organisations (CSOs) in Lesotho should take the lead and champion enactment of the said law. A similar approach was adopted in Kenya and Uganda where CSOs engaged parliamentary committees and individual parliamentarians to sponsor private member bills, which led to the Kenyan and Ugandan anti-torture laws.

### *5.2.4 Compilation of statistics on torture*

It is recommended that Lesotho must establish mechanisms through which statistics on the practice of torture in all public institutions, including police, military, correctional and health detention facilities are compiled. The said statistics will enable the country to be cautious of the prevalence of torture, to formulate responses to it and also to include such statistics in the periodic reports as recommended next. These statistics may be compiled by the Human Rights Commission which although not yet operational, shall in terms of its establishing legislation, have mandate over human rights issues in Lesotho.

### *5.2.5 Regular and timeous submission of state party reports*

It is recommended that in compliance with its obligations under various human rights treaty bodies, Lesotho must regularly and timeously submit the periodic reports which stipulate measures it has adopted to combat the practice of torture in Lesotho. The state reporting process would facilitate continuous introspection on the extent to which Lesotho complies with its international treaty obligations. It would also help to reflect on the prevalence of torture and factors which influence its practice in Lesotho. Lesotho would thus benefit from the concluding observations of various treaty bodies which would enable the state to formulate appropriate responses aimed at prevention and prohibition of torture, punishment of its perpetrators as well as provision of effective redress to the victims.

### *5.2.6 Effective implementation of existing laws as an interim measure*

While it is highly recommended that there be an anti-torture law in Lesotho, it is also recommended that while enactment of such a law is awaited, the existing laws should be fully implemented. This is where the role of lawyers and CSOs become important. There should be engagement in strategic litigation to ensure that cases of torture are brought to the courts of law and that they reflect the magnitude as well as methods of torture in Lesotho. There should also be advocacy, which makes the people of Lesotho aware of the gravity of the offence of torture, their rights and remedies where torture has been committed, as well as naming and shaming government officials and institutions, which are involved in or participate in the commission of torture.

### *5.2.7 Establishment of national prevention mechanisms, reform of the judiciary, the police, the LCS and abolition of the LDF*

It is recommended that the Human Rights Commission, which is created in terms of the sixth amendment to the Constitution and the Human Rights Commission Act, must be established. Its existence would assist in the fulfilment of Lesotho's obligations to prevent torture through the training of the public and law enforcement officers, through visits to places of detention, as well as receipt, investigations and adjudication over cases in which the law enforcement officers are alleged to have committed torture.

There should be institutional reforms – specifically, reform of the judiciary, the police and the LSC. As far as the judiciary is concerned, the reforms should be directed at ensuring the independence of the judiciary as an institution, ensuring non-interference by the executive, as well as competence and independence of individual judges. In this study and previous research, it has been reflected that the judiciary in Lesotho has been reluctant to apply international law in some cases and ignorant of international law in others.[1291] The courts have also dealt with cases of torture as

[1291] For a general discussion of courts' reluctance to apply international law see chapter 3 of this thesis.

pure civil claims without taking into account Lesotho's human rights obligations against torture. For instance, in all the cases discussed in chapter 4, the Court awarded damages to victims of torture, but did not order that the implicated officers must be prosecuted for the alleged torture. Therefore, to ensure that domestic laws are interpreted in line with Lesotho's international human rights obligations, there should be continuous legal training for all judicial officers from the magistrate courts to the highest court in Lesotho. The judiciary should also be reformed to eradicate the backlog of cases. This would enable the implementation of the obligation that Lesotho must establish competent and impartial courts to adjudicate over cases of torture.

As illustrated in the history of the LDF in chapter 4 of this thesis, the main purpose for which the LDF was established was to ward off the attacks by the LLA during the liberation struggle from the authoritarian BNP government. However, when Lesotho became democratic, the LDF's main objective became defunct. As a result of being an idle army, the LDF became involved in politics and consequently human rights violations. A rehabilitation programme worked for a very short time and the LDF did not totally cease being involved in politics. It is, therefore, recommended that amongst the security sector reforms, Lesotho should consider phasing out the army. This would be a torture-prevention measure, as well as ensuring stability in Lesotho. Due to Lesotho being enclaved within South Africa, which has a stronger defence force, the LDF is not capable of carrying out the main functions of an army, which is defence of territorial integrity. It is, therefore, recommended that there should be a plan not to recruit more members to the LDF and to phase out the current force within the next ten years.

### *5.2.8 Redress for victims of torture*

As illustrated in chapter 4 of this thesis, redress to victims of torture is limited to monetary compensation despite the fact that other remedies would also be suitable – and even necessary − in some cases. It is thus recommended that the government effectively implements the obligation to provide full reparation, which has been interpreted to include other forms of redress, such as the provision of medical care

and psychological support of victims of torture and/or members of their families, investigation of allegations of torture,[1292] and prosecution of perpetrators,[1293] review and reform of the legal framework, as well as monetary compensation.[1294]

### *5.2.9 Tackling impunity and holding perpetrators of torture accountable*

In order to deal with the culture of impunity for perpetrators of human rights violations, including those who commit or participate by other means in the commission torture, there must be proper investigation and prosecution of all allegations of torture. While prosecution under anti-torture legislation would be ideal, in the absence of such, it is recommended that those who participate in the commission of torture must, in the meantime, be prosecuted under the existing criminal law regime. The Penal Code Act 2010 already contains the offences of murder, assault and aggravated assault.[1295] Law enforcement officers, alleged to have inflicted severe pain or suffering on any person should be prosecuted under the Penal Code Act. If the severe pain resulted in death, such deaths must be investigated and those responsible prosecuted for murder. That is, monetary compensation to the victims and or members of their families should not replace criminal prosecution.

In order to ensure that there is genuine investigation, the institutions, which are already given the mandate to oversee the protection of human rights, should be strengthened both in law and through adequate financial and human resources to carry out investigations of allegations of torture and to report same to the DPP to

[1292] ICCPR article 2(3), HRC, GC31; CAT articles 12 & 13; *Abdulrahman Kabura v Burundi* (note 378 above) paras 3.4 & 7.4; Robben Island Guidelines 17, 18 & 19; *SAPS v SALC* (note 188 above).
[1293] *Zhakhangir Barazov v Kyrgyzstan* (note 272 above) in which the HRC held that article 2(3) of ICCPR mandates states to investigate allegations of torture; the HRC made similar findings in *Urmatbek Akunov v Kyrgyzstan* (note 272 above) para 10 and *Manojkumar Samathanam v Sri Lanka* (note 270 above) para 10.
[1294] *Sergio Lopez Burgos v Uruguay,*(note 281 above); *Kennedy v Trinidad and Tobago* (note 282 above) para 9. In this communication, the state party was ordered to compensate the author, to consider his early release and to take measures to prevent similar violations in the future; *Kouider Kerrouche v Algeria (*note 261 above*)* para 10 in which the HRC held that the state party has an obligation to provide the author with an effective remedy in the form of full and effective investigation as well as prosecution and punishment of his torturers; *Evans v Trinidad and Tobago* (note 282 above); *Teesdale v Trinidad and Tobago* (note 45 above) para 11, *Boodoo v Trinidad and Tobago* (note 282 above) para 8.
[1295] Penal Code Act sections 30, 31, 40, 42 & 52.

indict the implicated individuals and state officials. Such institutions include the Police Complaints Authority, the Office of the Ombudsman and the Human Rights Commission.

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