



**independent  
complaints directorate**

Department:  
Independent Complaints Directorate  
**REPUBLIC OF SOUTH AFRICA**



AFRICAN POLICING CIVILIAN OVERSIGHT FORUM

# **Investigating Torture: The New Legislative Framework and Mandate of the Independent Complaints Directorate**

**Wednesday 24 and Thursday 25 March 2010,  
Leriba Lodge Centurion Pretoria**

## Table of Contents

Introduction.....	4
1. OPENING AND WELCOME .....	6
2. DEFINING TORTURE IN SOUTH AFRICA.....	8
2.1 Torture .....	8
2.2 Cruel Inhumane and Degrading Treatment .....	10
2.3 Defining Torture in South Africa .....	11
2.4 Conclusion.....	11
3 THE PREVELANCE OF POLICE TORTURE IN SOUTH AFRICA.....	12
3.1 Prevalence of Torture in the SAPS .....	12
3.2 The Impact of definitions of torture on understanding prevalence .....	14
4 CRIMINALISING TORTURE.....	15
4.1 Introduction .....	15
4.2 Recent history.....	16
4.3 The prohibition of torture.....	16
4.4 Why criminalise the act of torture in domestic law?.....	17
4.5 Defining Torture.....	18
4.6 Components of the crime of torture .....	18
4.7 Additional legal measures.....	19
4.8 The duty to investigate .....	20
4.9 Common challenges in investigations: .....	21
4.10 Redress for victims of torture .....	22
4.11 Punishment for the crime of torture .....	24
4.12 Discussion .....	24
5 SUPPORTING VICTIMS OF TORTURE .....	25
5.1 Introduction.....	25
5.2 Types of Torture .....	25
5.3 Effects of Torture .....	26
5.4 Interventions .....	26
5.5 Impact of Torture.....	27
6. CHALLENGES IN INVESTIGATING TORTURE – AN ICD PERSPECTIVE .....	28
6.1 Introduction .....	28

6.2	Case Studies .....	29
6.3	Challenges.....	31
7	CHALLENGES IN INVESTIGATING TORTURE CHALLENGES FROM A CIVIL SOCIETY AND FORENSIC PERSPECTIVE .....	32
8	CLOSURE .....	34

## Introduction

On 24 and 25 March 2010 the Independent Complaints Directorate (ICD) and the African Policing Civilian Oversight Forum (APCOF) hosted a workshop entitled “Investigating Torture: The New Legislative Framework & Mandate for the Independent Complaints Directorate (ICD) at Leriba Lodge in Centurion. The workshop considered the review of the ICD mandate to include:

- any deaths in police custody or deaths as a result of police action;
- rape by a police officer, whether the police officer is on or off duty;
- rape by another complainant while the complainant is in police custody;
- any complaint of torture;
- systemic corruption by the police;
- any matters that are referred to it, by the Minister or a MEC or the Executive Director; and
- matters of criminality involving the police.

Participants debated the merits of expanding the ICD mandate to include torture, the evident challenges with regard to defining and investigating torture, the required regulations to support the legislation and the implications for operating procedures and training for the ICD investigators.

The workshop participants were drawn from different government departments tasked with safety and security as well as civilian oversight issues. The departments represented were:

- Secretariat for Safety and Security;
- South African Police Service (SAPS);
- Metropolitan Police Service;
- Independent Complaints Directorate;
- Provincial Secretariats for Safety and Security;
- Department of Correctional Services; and
- Judicial Inspectorate of Correctional Services (JICS).

The police unions Police and Prison Civil Rights Union (POPCRU) and South African Policing Union (SAPU) also attended along with non-governmental organisations with an interest in civilian oversight of the police, including the following organisations:

- Institute for Security Studies (ISS);
- Centre for the Study of Violence and Reconciliation (CSVR);
- Open Society Foundation for Southern Africa (OSF-SA);
- Institute for Democracy in South Africa (IDASA);
- African Policing Civilian Oversight Forum (APCOF);

- Wits Law Clinic;
- De Meyer and De Vries Attorneys;
- Civil Society Prison Reform Initiative(CSPRI);
- South African No Torture Consortium (SANTOC); and
- Amnesty International.

## 1. OPENING AND WELCOME

Mr. Francois Beukman, the Executive Director of the Independent Complaints Directorate (ICD) welcomed everyone attending on behalf of the ICD and the African Policing Civilian Oversight Forum (APCOF).

He indicated that there are a number of initiatives to strengthen the mandate of ICD and which would include the promulgation of specific ICD legislation and an expansion of its mandate.

In the debates within the ICD, Parliament and civil society on the strengthening of the ICD it was recognized;

- That the ICD should focus its resources to investigate those matters that will have a lasting impact on transforming the police;
- That the extended mandate of the ICD should focus on more serious and priority crimes committed by members of the SAPS;
- That the amendment to the ICD legislation should address current lacunas such as the need for the SAPS to respond to the ICD's recommendations;
- That the management structure of the ICD needed to be improved;
- That reporting and accountability practices in the ICD needed to be improved ; and
- That a formal liaison mechanism needed to be established between the ICD and the Secretariat of Police.

The focus of this particular workshop was on the expansion of the ICD mandate to include any complaint of torture which is referred to it by a station commissioner, magistrate, judge, legal representative or the complainant in the case where the complaint is unrepresented.

It was the second in series being hosted by the ICD and the APCOF. An earlier workshop in November 2009 had discussed the legislation specifically and a follow-up workshop in April 2010 was necessary to discuss the proposed new Rape mandate.

He then went on to discuss issues of torture specifically. Matters of definition, facilitators of torture and the prevalence of torture in South Africa were key areas the ICD and all stakeholders needed to consider in when making input into the draft legislation, the regulations to follow and the requirements training which the new mandate would place on the ICD.

The UN *Convention Against Torture* defines torture in *article 1(1)* as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party 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 on official capacity.”

The Report of the UN Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, released on 5 February 2010 identified the context within which torture was allowed to happen as including:

- A deficient legal framework;
- Lack of procedural safeguards;
- Lack of forensic examinations; and
- Impunity.

The police were also identified as among the main culprits when it came to committing acts of torture.

Recent South African research, for example, Dissel, Jensen and Roberts (2009) entitled “Torture in South Africa: Exploring torture and cruel, inhuman and degrading treatment or punishment through the media”, identified that:

- Torture occurs frequently in South Africa and usually within the framework of law enforcement responses;
- While torture previously was associated with political repression and discrimination, it now most often occurs in crime investigation processes and in the handling, treatment and punishment of suspected offenders;
- The public view towards torture is lenient in relation to the use of quite excessive violence on criminal suspects;
- The use and abuse of force has permeated the culture of the law and filters through to relationships with family members and friends;
- News reports often lack detail, and focus on sensational aspects of the case, rather than looking at the problem of torture or ill-treatment; and
- High profile cases are the ones usually reported.

While the draft ICD legislation was still awaiting Cabinet approval before being tabled in Parliament and opened to public scrutiny, the workshop nonetheless provided the ICD and its partners in government and civil society with the opportunity to debate key issues, including:

- The legal definition of torture;
- The Regulations that would accompany the Act ;
- Procedures in terms of processing of complaints;
- Capacity and expertise of the ICD;
- The role of civil society and the legal community;
- Cooperation with other institutions and departments; and
- Promotion of human rights culture and proper police conduct.

As respondent, David Bruce of the Centre for the Study of Violence and Reconciliation noted the strength of the ICD was ultimately depended on resources and capacity that were provided. By expanding the mandate to include torture and rape greater impact could be expected on addressing human rights violations in the police. However the new legislation did little to encourage the police to police themselves. Improving police internal accountability systems were essential in building police integrity.

## **2. DEFINING TORTURE IN SOUTH AFRICA**

### **2.1 Torture**

Ms. Amanda Dissel of the Association for the Prevention of Torture (APT) presented on the subject of defining torture.

She opened the presentation by mentioning the several instruments that defined torture. These included:

- Universal Declaration of Human Rights (1948);
- International Covenant on Civil and Political Rights (ICCPR) (1966) – ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’;
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- South African Constitution – right not to be tortured or treated or punished in a cruel, inhuman or degrading way; and
- The African Commission on Human and Peoples Rights, Guidelines against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The Robben Island Guidelines.

Reflecting on the United Nations’ definition of torture provided earlier, Dissel went on to discuss the four essential elements of the definition of torture. These are:

1. The act of inflicting severe pain or suffering which included:

- Omissions, for example, intentionally not providing food or medical treatment to detainees;
- Causing mental or physical pain or suffering;
- Causing severe pain or suffering, but does not need to result in serious physical injury; and



- That torture is reserved for the worst form of suffering (Nowak, 2010) and some interpretations distinguish torture from Cruel Inhumane and Degrading Treatment (CIDT) by severity of suffering (*Ireland v United Kingdom*, 1978).

## 2. The intent to torture. This meant that:

- Torture cannot be inflicted by negligence, such as forgetting to provide food to detainees; but that
- If a detainee is deprived of food intentionally in order to extract a confession, this would constitute torture.

## 3. A specific purpose

- The UNCAT refers to the importance of purposes for which torture is committed, such as: obtaining information, confession, punishment, intimidation or coercion, or discrimination. This is not an exhaustive list, and other purposes related to the list – could also be extortion, prison initiations, and suppression of political dissent.
- The *Greek Case* (1969) and more recent findings of the European Commission distinguish torture from other CIDT by its purpose (*Ihan v Turkey*, 2000).

## 4. The involvement of state officials, at least by acquiescence

- ‘By or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity’;
- Includes person acting under the cover of law;
- Includes acts which occur with State’s active or passive agreement, or even due to its lack of intervention; and
- May include inter-prisoner abuse, female genital mutilation, domestic violence, and human trafficking (Committee Against Torture, 2008; Nowak, 2010).

An issue particularly relevant to the understanding of torture was the powerlessness of the victim. People deprived of their liberty or in captivity are particularly vulnerable. According to Nowak, in his preparatory documents to the UNCAT, the powerlessness of a victim is a crucial distinction between torture and CIDT. In addition, the proportionality test cannot be applied when a person is under the legal or factual control of a member of the state, such as in police custody.

## 2.2 Cruel Inhumane and Degrading Treatment

As there is an indivisible and inter-related obligation to prevent Cruel, Inhuman or Degrading Treatment (CIDT) when committed by or with acquiescence of public official, there is a need to understand what is meant by CIDT.

- CIDT not defined by UNCAT which has said in practice the definitional threshold between torture & CIDT is unclear.
- CAT: Art 3 – 15 apply equally to CIDT.
- However, Human Rights Council does not necessarily distinguish between torture and CIDT. Both are prohibited.

According to the Nowak (2010), different legal consequences flow from torture and CIDT, namely:

- Moral judgement is greater for torture;
- Torture affects reputation, international standing; and
- UNCAT provides legal consequences flowing from torture, including prosecution, investigation, extradition, redress, non-refoulement and inadmissibility of evidence obtained by torture.

CIDT can also involve the infliction of severe pain or suffering. Furthermore, degrading treatment does not require element of 'severity', nor of purpose or intent. It can apply to a person in situation outside of de facto or legal control of state agent. The ICCPR and the South African Constitution do not specify that CIDT must be inflicted by public body.

Examples of CIDT include the following:

- Excessive use of police force on effecting arrests,
- Female genital mutilation,
- Human trafficking,
- Domestic violence – states' failure to take action,
- Corporal punishment,
- Conditions in detention - inhuman and degrading.

The distinction between Torture and CIDT was however less important when discussing prevention.

According to Article 16 of the UNCAT, the State shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment, 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

official capacity. Art 10, 11, 12, 13 refer equally to CIDT (training, interrogation rules, impartial investigation, right to complain).

## 2.3 Defining Torture in South Africa

Turning to domestic legislation, she said that South Africa's ratification of UNCAT in 1998 meant it is obliged to take legislative, administrative and judicial measures to prevent torture.

South Africa's Combating of Torture draft Bill of 2010 defines torture.

Section 3 notes:

For purposes of this Act, 'torture' means any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(a) in order to—

- (i) obtain information or a confession from him or her or a third person; or
- (ii) punish him or her for an act he or she or a third person has committed, or is suspected of having committed or of planning to commit; or
- (iii) intimidate or coerce him or her or a third person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind, but torture does not include pain or suffering arising from, inherent in or incidental to lawful actions.

Section 4 makes it an offence for a public official (defined in the draft Bill) to commit, or attempt to commit torture; or to incite, instigate, command or procure a person to commit torture. It is also unlawful for a person to commit or conspire with a public official to commit torture. No one is to be punished for disobeying order to torture.

## 2.4 Conclusion

In conclusion she noted that key issues for the ICD to consider in effecting its new mandate included:

1. Whether the ICD should remain close to the UNCAT definition of torture and to incorporate all elements, when defining torture;
2. The definition should be congruent with SA legislation and the criminal offence of torture;
3. Whether the ICD deals with other CIDT; and
4. Whether the ICD will also look at prevention of torture and CIDT.

## 3 THE PREVALANCE OF POLICE TORTURE IN SOUTH AFRICA

### 3.1 Prevalence of Torture in the SAPS

David Bruce of the Centre for the Study of Violence and Reconciliation discussed the prevalence of torture in the SAPS.

The South African Truth and Reconciliation Commission (TRC) Report of 1998 reported 33 713 gross human rights violations in the period 1960-1994 (34 years). Of these it noted 5002 instances of torture against over 2 900 people over the period. These violations are attributed overwhelmingly to the then South African Police (SAP). Most reports of torture occurred in the 1985-1989, a period which includes the State of Emergency.

Beatings were the most prevalent form of torture, followed by electric shock and 'posture' torture for the 1960-1984 period. While beatings and shocks remained the most common form of torture for the period 1985-1989, this was now followed by suffocation. The TRC report indicates that roughly 70 instances of electric shock torture were reported to it for the 1960-1973 period, roughly 160 in the 1974-1984 period, and roughly 500 in the 1985-1989 period. Instances of suffocation numbered roughly 50 and 110 in the first two respective periods, and 480 in the 1985-1989 period.

While the TRC was only concerned with 'political' gross human rights violations, it is likely that even during this period the main victims of torture were criminal suspects. Several reports on the torture of criminal suspects were produced during the mid 1990s

A seminal work by the Network of Independent Monitors, The Trauma Centre for Victims of Violence and Torture and Independent Board of Inquiry (1995) entitled *Breaking with the Past? Reports of alleged Human Rights violations by South African Police, 1990 - 1995* documents 380 cases of alleged torture, extra-judicial executions, and deaths in custody recorded by human rights organisations between 1990 and 1995. Over 250 of these cases involve torture or assault. Close to 100 allegations of torture are from the Vanderbijlpark area and many more than 50 cases from elsewhere in Gauteng, the Western Cape and KwaZulu-Natal are allegations of torture. The bulk of cases occurred from 1993 to 1994.

Munnik, (1995) reported 145 allegations of torture and a further 68 allegations of assault in the period from February 1993 to June 1995. These partly overlapped with cases from the Vanderbijlpark area reported in *Breaking with the Past?* In addition, some reported cases of deaths at the hands of the police also involved allegations of torture.

Looking at the current situation, Bruce said that the ICD statistics revealed that

- In the 11 years to 2008/2009 (from 1996/1997 excluding 2004/2005):

- Torture cases amounted to 332 in 10 years;
  - Assault GBH and attempted murder amounted to 6385 (roughly 70/75% are assault GBH; 30/25% attempted murder);
  - Common assault cases were about 1832; and
  - Rape amounted to 162 cases over a 9 year period.
- Deaths as a result of police action cases were about 5242 of which 90% (4737) are shootings in 12 years.
  - An unofficial estimate put the number of people wounded in shootings involving the police at between 10 and 15 000 over the 12 year period.

There seemed to be a trend of torture among certain units in the SAPS. Particularly, units which were linked to allegations of torture in the past are often still linked to such allegations currently. For example:

- In the ICD's 2001 report, the Vaal Rand Murder and Robbery Unit, the successor to the Vanderbijlpark Murder and Robbery Unit, was a major source of the torture allegations documented in *Breaking with the Past*;
- The ICD reports also mention the Belleville Murder and Robbery Unit earlier mentioned by Fernandez (1990) and in *Breaking with the Past*;
- The Brixton Murder and Robbery Unit is mentioned in *Breaking with the Past*, in the ICD 2001 report and in other cases reported in the press;
- The Protea Police Station is linked to allegations in *Breaking with the Past* and in the 2004 Landless People's Movement (LPM) case; and
- Some of the recently reported allegations relate to Serious and Violent Crime Units, the heirs to the mantle of the former murder and robbery units.

There was some sense that 'specialised' units, such as Organised Crime (and previous Serious and Violent Crime) units are most likely to be associated with torture. The units which practice torture seem to be those with a history of torture. Recent reports such as that by the Forced Migration Studies (FMS) at the University of Witwatersrand suggest torture may be far more prolific. In particular, they document torture where large groups of police including student constables are involved. The FMS report 'Good Cop Bad Cop' (Matshediso, 2009) notes:

- Treatment of hijacking suspect by a group of police (including student constables) at a police station in Gauteng:
  - Smacked and punched him so that he was dripping blood;
  - Filled plastic bag with pepper spray and wrapped it around suspect's head.
- Another reference is to 'three suspects that were kicked, punched and electrocuted by about 20 police officers'.

### 3.2 The Impact of definitions of torture on understanding the prevalence thereof

Bruce then discussed the factors influencing the statistics on torture. These included

- Factors shaping the reporting of police violence, such as:
  - Incidence;
  - Victim's awareness of and access to facilities for reporting;
  - Fear and intimidation;
  - Severity; and
  - False reporting.
- The approach to classifying reported cases shapes whether they are classified as torture cases or not.

In relation to the last point and referring to the previous speaker Bruce confirmed the issues of definition were paramount to a successful strategy to combat and prevent torture.

The SAPS defined torture in their Prevention of Torture Policy (PTP). The PTP's definition of torture closely resembles that provided in the CAT. It begins by noting 'torture may include, but is not limited to, any cruel, inhuman or degrading treatment or punishment, as referred to in section 12(1)(e) of the Constitution'. The explanatory notes explain further that: 'practical examples of torture' include 'the use of insulting or abusive language' and 'any unnecessary application of physical force in escorting or dealing with a *person in custody*' (emphasis in original).

However, the effect of such broad definition was to inflate the extent of reported torture and consequently undermine its severity. The UN Rapporteur on Torture has noted that the term 'torture:

- Should not be used in inflationary manner.
- Is reserved for one of the worst possible human rights violations and abuses human beings can inflict.

The ICD's classification of torture, based on an analysis conducted in 2001 of cases which are classified by the ICD as cases of torture, tend to be cases which :

- "involve certain established techniques, such as electric shocks or suffocation techniques which are known as torture techniques in South Africa, or
- otherwise involve severe and sustained (prolonged or repeated) infliction of pain (or other suffering – one of the torture cases includes several physical assaults as well as the person being left in a cell for days without a blanket) linked to an attempt to interrogate the person".

The fact that pain is inflicted on a person repeatedly will not necessarily lead the ICD to classify these as cases of torture. This may be influenced by the fact that:-

- The infliction of physical pain may not necessarily be linked to an attempt to extract information from a person, or
- The techniques used may not be the techniques such as electric shocks and tubing which are widely recognised as torture techniques in South Africa, or
- The assaults are carried out relatively spontaneously (such as while transporting a person in a police vehicle) rather than at a locality to which the person is taken for purposes of being tortured, or
- Relative to some assaults which are inflicted, the assaults (being alleged as having been committed through torture) appear less severe.

In conclusion Bruce noted that in developing a definition of torture for the ICD, key questions included the need to:-

- Clarify issues of 'severity' of pain or suffering;
- Consider whether the ICD has not been too narrow in how it engaged with questions of 'purpose' of pain and suffering; and
- Whether it should have classified more of the cases which it receives as cases of torture.

While available evidence cannot support contention that 'torture is widespread', there was evidence of a consistent ongoing problem of torture. Exactly how widespread it is remains open and questions of the definition of torture have major implications for how prevalence is understood. Finally, issues of definition were also influenced by changing the face of torture and that 'classic apartheid era techniques' (electric shocks, wet-bag, suspension) are used less in favour of new technologies (pepper spray, tasers) in torture and abuses.

## **4 CRIMINALISING TORTURE**

### **4.1 Introduction**

Lucas Muntingh of the Civil Society Prison Reform Initiative discussed the criminalisation of torture. He began by noting that the duty to criminalise torture is placed on states which are parties to UNCAT by virtue of Art. 4.

South Africa has not yet complied with this requirement 12 years after ratifying the Convention. UNCAT places duties on states parties to take measures, and these measures focus on prevention of torture and CIDT, prohibition of torture and providing redress to victims.

## 4.2 Recent history

Right To Be Free From Torture is included in the 1948 UDHR (Article 5) but does not include a definition of torture.

Following the overthrow of the Allende government by Pinochet in Chile, the *UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was passed in 1975. Even though the Declaration clarified the position in respect of international law, it still fell short of providing a mechanism of enforcement. In South Africa, the death of Steve Biko in 1977 under torture at the hands of the apartheid police moved the General Assembly to start work on what would result in UNCAT and adopted by the General Assembly in 1984 and came into force in 1987. The majority of UN members have signed and ratified the declaration. South Africa ratified in 1998 and must submit periodic reports to the Committee Against Torture (CAT) every four years after initial report was due in 1999. South Africa submitted its initial report in 2005 and this was considered in November 2006. The first periodic report was due in December 2009 but it is not yet submitted.

## 4.3 The prohibition of torture

The international ban on the use of torture has the enhanced status of a peremptory norm of general international law (*jus cogens*). This means that it “enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

It signals to all states and to the people under their authority that “the prohibition of torture is an absolute value from which nobody must deviate.” At the national level it de-legitimizes any law, administrative or judicial act authorising torture.

Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Because the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they are in a state of war, siege, emergency, or whatever.

The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become “like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”, and torture itself as an act of barbarity



which “no civilized society condones,” “one of the most evil practices known to man” and “an unqualified evil”.

Following from the status of the prohibition of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as “they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution”. The UNCAT therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT places the obligation on states to **either prosecute or extradite** any person suspected of committing a single act of torture. Doing nothing is not an option.

#### 4.4 Why criminalise the act of torture in domestic law?

Article 4 of UNCAT states: *1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*

Although South Africa does not have the crime of torture defined on the statutes, common law crimes such as assault and attempted murder have been used to prosecute officials. This is, however, not satisfactory and the use of common law is, according to the Committee Against Torture, inadequate to prosecute perpetrators of torture:

*By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that State parties will directly advance the Convention’s overarching aim of preventing torture and ill treatment. Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.*

Article 5 requires that the state establishes jurisdiction over the crime of torture. CAT 2006 Concluding Remarks in respect of SA noted:

*The State party should enact legislation with a specific offence of torture under its criminal law, with a definition fully consistent with article 1 of the Convention, which should include appropriate penalties that take into account the grave nature of the*

*offence, in order to fulfill its obligations under the Convention to prevent and eliminate torture and combat impunity.*

Therefore SA has a duty to criminalise torture as required under Article 4 and was sternly reminded of this duty in 2006 by CAT.

## 4.5 Defining Torture

With regard to the definition of torture, the advice from the CAT and the Special Rapporteur is to use the definition of torture in Art. 1 in the domestic legal definition of torture. One attempt to reinterpret "torture" was the memorandum by the United States Head of Office of Legal Council in which it was concluded that: *"Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed".* **The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.** *If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind."*

## 4.6 Components of the crime of torture

### Acts related to torture

Not only is the act of torture prohibited, but also the attempt, instigation, incitement, superior order and instruction, consent and acquiescence, concealment, and other forms of complicity and participation must be criminalised. An order of a superior or public authority can never be invoked as a justification of torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The CAT considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the

investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.

### **Principle of *non-refoulement***

Article 3 states that no State Party shall expel, return ('refouler') or extradite a person to another state where that person may be at risk of being subjected to torture. *Mohamed v President of South Africa and six Others* sets a precedent in this regard, where it was held that:

- The applicant only has the burden of showing a risk of torture, while the burden of proof is carried by the State throughout the procedure (SRT para 239);
- The state must assess the risk of torture before making any decision to transfer detainee to another state.
- Diplomatic assurances: not advised without a thorough risk assessment; often sought from states with a proven track record of torture; diplomatic assurances are not legally binding (SRT para 2); and
- Extraordinary renditions must be condemned (SRT para 245).

### **Evidence obtained under torture**

In *Mthembu v S* (SCA, 2008) it was noted that *"To admit Ramseroop's testimony regarding the Hilux [vehicle] and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial."*

### **Inter-prisoner violence**

The failure to act to prevent victimisation amounts to acquiescence:- *B v Minister of Safety and Security* – (Gansbaai case).

## **4.7 Additional legal measures**

The manufacture and trade in equipment to inflict torture and ill treatment must be criminalised.

## 4.8 The duty to investigate

According to Article 13, each state party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 5 compels states to establish jurisdiction over acts of torture and suspected perpetrators of torture. Article 6 obliges a state to arrest (or take other legal measures against) a person suspected of having committed torture once it is satisfied that it is necessary to do so, based on the available information. Article 7 compels states to exercise this jurisdiction by submitting for prosecution or extradition the alleged perpetrator of torture. Pursuant to the objective that there shall be no safe haven for the perpetrator of torture, the obligation is simple: **submit for prosecution or extradite; doing nothing is not an option.**

Whenever there are ‘**reasonable grounds**’ to believe that torture and/or CIDT have taken place, the state has a duty to ensure that this is promptly investigated by competent authorities in an impartial manner. The threshold of ‘reasonable grounds’ for initiating an investigation is important, as it does not require a complaint to be lodged by the victim. Victims often do not report victimisation for fear of reprisal, or they are not able to complain. For the purposes of initiating an investigation, it really does not matter where the suspicion comes from.

Research by the Redress Trust suggests that a state will have violated a victim’s rights by failing to investigate despite the existence of an ‘arguable claim’ – the merits of which are determined on a case-by-case-basis. An allegation is ‘arguable’ when it is supported ‘by at least some other evidence, be this witness testimonies or medical evidence or through the demonstrated persistence of the complainant.’ European courts have also come up with the notion that an investigation should be triggered by a ‘reasonable suspicion’.

Undertaking investigations **promptly** is equally important. There are, however, no international guidelines as to what ‘prompt’ means. Perhaps the most concrete meaning was given by the European Court of Human Rights (ECtHR) in its decision in *Assenov and Others v Bulgaria*, suggesting that ‘prompt’ means ‘in the immediate aftermath of the incident, when memories are fresh.’ The CAT has, however, found individual breaches of Article 12 due to excessive delay before the commencement of an investigation, in one case 15 months and in another 18 months.

A high premium is placed on the **impartiality** of the investigation, as this is central to its credibility remaining intact. The term ‘impartiality’ means free from undue bias and is conceptually different from ‘independence’, which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The two notions are, however, closely interlinked, as a lack of independence is commonly seen as an indicator of partiality. The ECtHR has stated that ‘independence’ not only means a lack of hierarchical or institutional connection, but also practical independence. The ECtHR has also stressed the need for the investigation to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as in theory, to maintain public confidence in the adherence to the rule of law by authorities, and to prevent any appearance of collusion in or tolerance of unlawful acts.

Article 13 gives everyone who claims to have been tortured or subjected to CIDT the right to complain and to have the case examined promptly and impartially by the competent authorities. Supported by Article 12, these are the essential requirements of a complaints and investigative regime envisaged by CAT.

A further duty imposed by Article 13 is that such a complaints mechanism must be accessible in any territory and thus at all facilities under its jurisdiction. There are therefore no territories or facilities under the state’s jurisdiction that are excluded. Violations of Article 12 (a duty to investigate) and Article 13 (a duty to ensure redress) do, however, not require that there must be a finding that torture and/or CIDT have in fact been committed; the duty to investigate stands independent of the duty not to torture.

*Istanbul Protocol for the Effective Investigation of Torture and CIDT* should be followed. This will require training and forensic capacity.

## 4.9 Common challenges in investigations

Common challenges in the investigation of torture include:

- Even when survivors of torture know about the existence of complaints procedures, they seldom know how to go about lodging their complaints.
- Survivors who do know how to lodge a complaint tend to refrain from doing so because of the number of hurdles, both physical and otherwise, that they are likely to encounter. Once victims lodge their complaints, they are often forced to endure deliberately manufactured situations, the combined purpose of which is to undermine, if not to sabotage, a complaint.
- Perpetrators often pressurise the victim to withdraw the complaint, even to the point of offering them bribes.

- Very often, victims do not pursue their complaints out of fear of suffering physical harm, including threats to their lives, as well as the lives of their families, witnesses and human rights lawyers.
- Where complaints are lodged in good time, cases tend to drag on endlessly, resulting in proceedings being discontinued.
- In many countries that lack such legislation dealing specifically with torture, the laws of prescription apply.
- In countries without clear-cut rules governing the reporting and recording of complaints, the authorities who are entitled to receive complaints tend to enjoy wide discretionary power in dealing with complaints. In such countries, complaints may be dismissed at the reporting stage simply because the complainant, for want of evidence, is unable to name the alleged torturer. Such complaints are then considered incomplete.
- It also is not unusual in the case of an unregulated procedure for the complaints officer to take down the complaint, only to deny afterwards that it was ever lodged. And because the complainant is not given a copy of the complaint, the matter simply peters out.
- Even where complaints procedures exist, officials in some countries are known not only to refuse to receive complaints, but also to suppress or destroy whatever evidence there is that implicates alleged perpetrators.

#### 4.10 Redress for victims of torture

*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) provide guidelines and principles on redress.

- Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: Physical or mental harm; Lost opportunities, including employment, education and social benefits; Material damages and loss of earnings, including loss of earning potential; Moral

- damage; Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- Rehabilitation should include medical and psychological care as well as legal and social services.
  - Satisfaction should include, where applicable, any or all of the following:
    - Effective measures aimed at the cessation of continuing violations;
    - Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
    - The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
    - An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
    - Public apology, including acknowledgement of the facts and acceptance of responsibility;
    - Judicial and administrative sanctions against persons liable for the violations;
    - Commemorations and tributes to the victims;
    - Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.
  - Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
    - Ensuring effective civilian control of military and security forces;
    - Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
    - Strengthening the independence of the judiciary; protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
    - Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and

training for law enforcement officials as well as military and security forces;

- Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and
- Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

#### **4.11 Punishment for the crime of torture**

UNCAT does not prescribe the sentence that must be imposed, but states that “Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.” A survey of members of the CAT found that they recommended a custodial sentence of between 6 and 20 years. Non-custodial sentences, postponed sentences, employment conditions adjustment (demotion, loss of salary and fines) do not reflect the grave nature of the crime of torture.

#### **4.12 Discussion**

In the discussion to follow it was noted that police officers receive little training on managing detained people. In order to overcome these problems, measures had to be put in place by reviewing policies and procedures on managing detained people. UNCAT requires regular review of policies and procedures.

Further, in considering the expansion of the ICD mandate to include investigation of torture it should also consider whether, as provided for in CAT, it would recognise:

- The failure to act to prevent victimisation; and
- The instigation, incitement, superior order and instruction, consent and acquiescence, concealment, and other forms of complicity and participation as torture.

Furthermore, the ICD should consider the threshold of ‘reasonable grounds’ for initiating an investigation which does not require a complaint to be lodged by the victim. Finally, there was an onus on the ICD to undertake investigations promptly.



## 5 SUPPORTING VICTIMS OF TORTURE

### 5.1 Introduction

Ms. Marivic Garcia-Mall of the Centre for the Study of Violence and Reconciliation and a member of the South African No Torture Consortium presented on supporting victims of torture. She introduced SANToC as a community of organisations that serves as a critical resource for strengthening national initiatives for the prohibition and prevention of torture and the rehabilitation of torture survivors.

In her presentation she addressed the following:

- The effects of torture;
- Psychosocial rehabilitation interventions;
- When healing occurs;
- Challenges to healing; and
- Implications for the ICD and police work.

According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, most victims of torture are not political prisoners or suspected of having committed political crimes, but ordinary persons suspected of having committed criminal offences. They usually belong to disadvantaged, discriminated and vulnerable groups, in particular those suffering from poverty.

The most frequent purpose of torture is to extract a confession. Since confessions in many contexts are still regarded as the crown of evidence, considerable pressure is exerted by politicians, the media, prosecutors and judges on law enforcement bodies to “solve criminal cases” by means of extracting confessions that are later used in courts to convict the suspects.

### 5.2 Types of Torture

Types of torture include:-

- Physical
- Psychological/Mental
  - Shame And Humiliation
  - Threat
  - Mock Executions And Threats
  - Over- And Under-Sensory Stimulation
  - Witnessing The Torture Of Others
  - Mind Games
  - Sleep Deprivation

- Pharmacological Torture (Truth Serum).

### 5.3 Effects of Torture

The effects of torture are felt in the following ways:

- Physically
- Mentally
- Emotionally
- Behaviorally
- Socially
- On the Sense Of Self and
- Spiritually.

Other effects of torture include disempowerment and helplessness (complete control by torturers, even of bodily functions, both physical and mental control) and fragmentation (loss of memory of traumatic events, effort to avoid stimuli (including thoughts) associated with traumatic events, cutting off one's painful feelings, inability to contain feelings of hopelessness, not feeling whole).

Psychiatric problems are also associated with the effects of torture, and they include:

- Post Traumatic Stress Disorder (PTSD);
- Major Depressive Disorders;
- Substance abuse; and
- Sexual Dysfunctions.

### 5.4 Interventions

Interventions to address the effects of torture include:

- Interventions that target the individual's, a family's and/or a community's skills to cope better with the consequences of torture by mitigating symptoms in order to regain self help capacities to master the situation;
- Psychosocial interventions;
- Community interventions; and
- Advocacy and Awareness campaigns.

Psychosocial Rehabilitation

- Helps restore the victim to his/her full capacities and roles;

- Can be done in a clinical setting, with professionals;
- Community rituals, practices can also have healing effects;
- Informing the victim of his/her rights and instruments of recourse; and
- Empowerment as a fundamental principle in recovery.

Victims of torture are not primarily interested in monetary compensation, but in having their dignity restored. **Public acknowledgment** of the harm and humiliation caused and the establishment of the truth together with a **public apology** are critically important.

Justice is only perceived as such when criminal prosecution has led to an appropriate punishment of the perpetrators. There is the need of long-term medical and psychological rehabilitation and activities that foster community/group support whether through traditional rituals or healing practices.

Compensation Includes:

- Any economically assessable damage, such as the costs of long-term rehabilitation measures; and
- Compensation for lost opportunities, including employment, education and social benefits.

The following are some of the challenges in the healing process:

- There is very little possibility of getting justice;
- Without any means of justice done, healing can only be 60-70%;
- Unless there is a possibility of reparation, rehabilitation is compromised;
- In the reparation process it is necessary to make the space safe enough for the victim who needs to be supported, believed, and respected;
- There is little acknowledgement of injury; and
- Re-integration into society is difficult, especially in alleged criminal cases.

## 5.5 Impact of Torture

The impact of torture on police work includes the following:

- The experience is passed to the family, community, social groups;
- This impacts on feelings (usually negative, full of hatred) towards the police;
- It creates a feeling within the Department that officers are working against negative energy and feelings leveled against them all the time;
- The Department spends millions on public relations campaigns, which is quite easily negated by one victim in the community with an axe to grind;

- All the good work the Department and the ICD are doing is undone in the community;
- The effect of working with torture victims on the staff of the ICD and the Police (there is vicarious traumatising when one is affected by the stories they hear, and experience similar symptoms that victims have);
- Not only victims need support, different role players also need support and an acknowledgement of the effects of investigating torture, where staff and self-care strategies are put in place; and
- The challenge to include the management of work-related stress and vicarious traumatising in capacity development.

## 6. CHALLENGES IN INVESTIGATING TORTURE – AN ICD PERSPECTIVE

### 6.1 Introduction

Mr. Tommy Tshabalala, Head of Investigations for the ICD discussed the challenges in investigating torture from the perspective of the ICD. In his presentation he addressed issues related to:-

- Powers and Functions
- Example of torture cases reported to the ICD
- The ICD's approach
- Challenges
  - General application
  - Torture investigation

Tshabalala began by noting that from a practical point of view, torture is a difficult concept to deal with because it is not a specific crime in our law. It is covered by the crimes of Common Assault and Assault with intent to cause Grievous Bodily Harm, and perhaps to a lesser extent by the crime of intimidation. It is probably correct to regard it as a form of assault. In practice the ICD sometimes finds it difficult to distinguish between torture and other forms of assault and it is possible that some cases of torture may have been classified as assault (ICD, 2001).

The powers of the Independent Complaints Directorate (ICD) to combat torture are contained in Chapter 10 of the South African Police Service Act of 1995, which provides in terms of Section 53(2) that the Independent Complaints Directorate:

- May *mero motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigation to the Commissioner concerned;

- Shall *mero motu* or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
- May investigate any matter referred to the Directorate by the Minister or member of the Executive Council.

The ICD has the same powers and functions in respect of the Municipal Police Service under sections 64 (O) of the SAPS Act.

## 6.2 Case Studies

Tshabalala then went on to provide examples of the types of torture cases investigated by the ICD to illustrate the challenges faced.

“After the arrests, they (the suspects) were handed over to the Murder and Robbery Unit in Nelspruit for interrogation. During the course of the interrogations, they were allegedly tortured and assaulted. They were throttled and suffocated with plastic bags, which were tied around their necks. When these methods failed to elicit the kind of information the police were looking for, the members concerned resorted to more brutal methods. They then used the notorious ‘helicopter’ method and the victims were allegedly suspended and left ‘hanging’ for a considerable period of time, as a consequence of which they all became incontinent, urinated and defecated upon themselves. One of the ladies was also assaulted indecently. The barrel of a rifle was pushed into her vagina. They were then incarcerated at Nelspruit police station for a week before being transferred to a local prison. Upon arrival at the prison, they requested and received medical treatment. Although they immediately laid criminal charges against the members involved, at the time they approached the ICD, they had not received any progress report from the police.”

In a second example

“The complainant in this matter was allegedly arrested by 10 members of the Murder and Robbery Unit in Garankuwa Police Station, who accused him of having murdered his wife. The complainant was allegedly assaulted and tortured by these members on a number of occasions. He was slapped, booted and hit with fists several times. He was also forced to stand on one leg. He was kicked whilst in this posture and at the same time a statement was being obtained from him. Furthermore he was handcuffed, stripped naked and his head was covered with a canvas bag, which was tied tightly around his neck, and thereafter his head was immersed in water. The complainant laid a charge of assault with intent to do grievous bodily harm, vide CR 201/12/98. The ICD investigated the matter and eventually the Director of Public Prosecutions declined to prosecute the members concerned, due to lack of evidence. The ICD has decided not to pursue the matter any further.

In a third case

“The complainants in this matter were arrested on 24 December 1997 for attempted armed robbery at Klerksdorp. They were allegedly subjected to a series of electric shocks. They were ultimately admitted to a hospital where they were treated for their injuries. They subsequently laid charges against the members involved. Their case was initially investigated by the police and referred to the Director of Public Prosecutions (DPP) in Pretoria, who declined to prosecute. However, subsequent to this, some information that was received by the Wits University Law Clinic at the time the complainants brought an interdict against the police, was brought to the attention of the ICD. The ICD then investigated the case, but could not find enough evidence to substantiate the allegation. The case has been closed as unsubstantiated.”

A fourth case

“On 16 February 1999 at about 07h00 the complainant was arrested at Jane Furse Meat Plaza by six members of the Vaal-Rand Murder and Robbery Unit. He was arrested for questioning in connection with a robbery that led to the death of five people in the Vereeniging area. In particular, the police wanted to establish from him the whereabouts of another suspect involved in the crime. After the arrest he was taken to Jane Furse police station for questioning. Later he was taken to a river bank. He was blindfolded and assaulted by being kicked on his stomach and back.

The members drove around with him. During the course of this, he was allegedly assaulted and electrically shocked. Later a helicopter arrived and the complainant was taken on board the helicopter. At some point during the flight, his arrestors threatened to push him out of the aircraft. Eventually he was suspended outside the aircraft and left dangling outside for a few minutes.

After the aircraft had landed, he was put into a vehicle which headed in the direction of Nebo and Mosterlus. At some point between Nebo and Mosterlus, he was pushed out of the vehicle and left by the roadside. Some members later returned to fetch him. He was taken directly to St Ritas Hospital, where he received medical treatment and was hospitalised for a considerable period. The members who took him to the hospital were allegedly untruthful to the hospital authorities as to the circumstances surrounding his injuries. They said that they had found him drunk along the road.”

The 332 complaints of torture over the period of 11 years illustrate the difficulties faced by the ICD in dealing with torture but also the acknowledgement that not any violent/brutal act by the police constituted torture. The ICD’s approach to allegations of torture has always been influenced by the provisions of the Convention Against Torture (CAT) signed by South Africa in 1998. Within the few cases illustrated and those that the ICD continues to deal with today, there is a realisation that they contain the four main elements contained in CAT. The approach is thus not one where a complaint is labeled as torture because the complainant alleges that to be the case. The classification is informed by the facts of each case. However, until such time that national legislation is adopted there will be cases that fall through the cracks

## 6.3 Challenges

The following challenges are general to complaints investigated by the ICD. They include:

- Legislative lacuna;
- Lack of strong internal mechanisms which impact negatively on external oversight bodies;
- Code of silence and Culture of cover-up;
- Late or no notifications of deaths by the SAPS;
- Long distances to be travelled to crime scenes;
- Vast distances to visit witnesses and collect evidence;
- Waiting period to obtain forensic reports too long;
- Budgetary constraints which affects the ability to effectively execute on the ICD's mandate – *the general dealer approach*; and
- Recommendations to SAPS have no legal force.

Challenges that apply specifically to the investigation of torture include the following:

### **Non Reporting**

The police are only obliged to report incidents of deaths in custody or as a result of police action to the ICD:-

- Section 53(8) provides that the National or Provincial Commissioner shall notify the directorate of all cases of death in police custody or as a result of police action;
- No similar provision exists in respect of any other class of complaints.

Some of the torture investigations were purely coincidental as they led to fatal consequences: -

- Interrogation gone bad and the police had no option but to report the incident;
- In some cases police reported matters on their own accord – an incident in the Northern Cape serves as a good example.

### **Mixed messages by the SAPS management**

The SAPS Management is not sending clear messages that it does not condone torture. In particular its approach was:

- No evidence of implementation of own internal policy on prevention of torture ;
- ICD recommendations to suspend members in the face of strong evidence supporting allegations of torture have been ignored; and
- Little or no protection is given to whistleblowers.

### **Limited sanction**

There is a lack of penal provisions in the current legislation.

## **Lack of Co operation**

Section 50(4) provides that all organs of state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the directorate in the exercise and performance of its powers and functions;

- The DPP has in some cases not assisted the ICD. This includes incidents where the decision on prosecution was not made for prolonged period of time which affects the credibility of the ICD, and impacts negatively on witnesses.
- Relationship between the DPP's office and some Specialised Units impacts on the partiality of some prosecutors.

Section 53(6) (d) provides that the Executive Director may request and obtain the co-operation of any member as may be necessary to achieve the object of the Directorate;

- Identification parades have been problematic areas which negatively affected our ability to investigate some of our cases.
- Non suspect members have been reluctant to stand in the parade.
- One matter took well over 6 months before several ID parades, emanating from a single incident which could be finalised.

## **Lack of Forensic support**

Lack of in-house forensic capacity means reliance on private practitioners who may not be readily available to conduct critical examination of a victim of alleged torture. Often vital evidence is lost. This is exacerbated by a lack of trained personnel in state hospitals to conduct critical examination

In conclusion Tshabalala noted clear legislative guidelines on what constitute torture would greatly assist the ICD. The ICD should clearly define all areas of intervention in light of the distinction made between torture and CIDT and punitive measures to be built into regulations. Memorandum of understanding (MOU) must be signed with the Directorate of Public Prosecutions (DPP) to bring in neutral DPP's to deal with matters in case where partiality is detected.

## **7 CHALLENGES IN INVESTIGATING TORTURE - CHALLENGES FROM A CIVIL SOCIETY AND FORENSIC PERSPECTIVE**

Dr Reggie Perumal presented on the forensics challenges in investigating torture.

According to him, a significant challenge was the limited number of medical practitioners with the skill and experience to diagnose torture. There was little or no training at undergraduate level. The Health Professions Council of South Africa (HPCSA) has not prescribed training for



undergraduate training. The Continuous Profession Development (CPD) requirement of 30 points only provided for 1 point for ethics, which may include torture. The lack of expertise in forensic investigation of torture means district surgeons, even with the best intentions, are often unable to detect torture. Documentation included in transcripts photographs are in many cases poor. Special investigations, such as blood and urine tests and X-rays are often not done and this translates into poor evidence in court.

This lack of independent forensic practitioners was exacerbated by the fact that:-

- Private practitioners are often not interested in contracting to the state. Proper clinical evaluation of torture survivors is costly and time consuming.
- Survivors often do not provide full history or cooperation.
- The obstructionist behaviour by the SAPS, making access to survivors difficult. The SAPS are known to remove survivors from one police station to the other and only allow District Surgeons and not private practitioners' access to survivors. In addition, they also delay access until injuries have healed.
- The facilities for examining torture survivors in police cells are poor. Often survivors are examined in cells and under poor lighting, with limited equipment and with no privacy.
- Methods of torture often leave little or no evidence, increasing the challenge of clinical examination. A Cigarette burn was given as an example. To prove that the person was burnt with cigarettes requires removal of tissues from the burnt area.

Professor Peter Jordi of Wits Law Clinic discussed civil society experiences and lessons learnt with regard to defending survivors of torture. Best practices included taking detailed statements. It was also important to engage with survivors early. The first ten days are critical to diagnosing torture.

According to Jordi, torture in South Africa is not hidden and, survivors come to court with bruises and marks but these are often ignored by the courts.

Police were motivated to torture for the following reasons:

- To get information;
- To steal;
- Torture was also particularly likely in incidents where it is alleged that the suspect killed a SAPS member.

In the discussion that follows it was noted that:-

- The ICD has the power to move survivors to places of examinations.
- Magistrates must be trained on how to assess documents of torture cases.
- The ICD needs to market itself. It is important that communities know about the existence of the ICD.

- The ICD should work with other organisations, particularly the Provincial Health structures on how to work with cases of torture and torture documents.

## **8 CLOSURE**

The Executive Director of the ICD thanked everyone for attending the workshop. He mentioned that the ICD has much to do to if the new legislation was passed, not least of which is defining what constitutes torture. He encouraged the attendees to be part of the drafting process and engage the Parliament on the issue of torture.

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