

**Civil Society Report on Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment in South Africa**



**Submitted by the Centre for the Study of Violence and Reconciliation
(CSVr) to the Committee against Torture (CAT) for its consideration
during its deliberation of the report of the Government of the Republic
of South Africa in its 66th Session on 23 April – 17 May, 2019**

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ABBREVIATIONS

APT: Association for the Prevention of Torture

Art.: Article

CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

CSVR: The Centre for the Study of Violence and Reconciliation

DHA: Department of Home Affairs

DOH: Department of Health

DIRCO: Department of International Relations and Cooperation

DOJ&CS: Department of Justice and Correctional Services

IPID: Independent Police Investigative Directorate

IRCT: International Rehabilitation Council for Torture Victims

JICS: Judicial Inspectorate for Correctional Services

NGOs: Non-Governmental Organisations

NHRIs: National Human Rights Institutions

NPMs: National Preventative Mechanism(s)

OHCHR: Office of the High Commissioner for Human Rights

OPCAT: Optional Protocol to the Convention Against Torture

PCTPA: Prevention and Combating of Torture of Persons Act 13 of 2013

PTSD: Post-Traumatic Stress Disorder

RROs: Refugee Reception Offices

SAHRC: The South African Human Rights Commission

SGBV: Sexual and Gender-Based Violence

SAPS: South African Police Service

TRC: Truth and Reconciliation Commission

UN: United Nations

UNCAT: United Nations Convention Against Torture

VOTs: Victims of Torture

TABLE OF CONTENTS

1. INTRODUCTION	4
2. BRIEF OVERVIEW OF THE TORTURE SITUATION IN SOUTH AFRICA	4
3. CSVR RESPONSE TO UNCAT LIST OF ISSUES AND RECOMMENDATIONS	5
3.1 UNCAT ARTICLE 3: NON-REFOULEMENT	5
3.2 UNCAT ARTICLE 4: THE PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT 2013.....	7
3.3. UNCAT ARTICLE 11: OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE	8
3.4 UNCAT ARTICLE 12-13: LACK OF INVESTIGATION AND PROSECUTION OF TORTURE AND ILL-TREATMENT	9
3.5 UNCAT ARTICLE 14: VICTIMS' RIGHT TO REDRESS.....	12

1. INTRODUCTION

The Centre for the Study of Violence and Reconciliation (CSV) is an independent, non-governmental, organisation established in South Africa in 1989. We are a multi-disciplinary institute that seeks to understand and prevent violence, heal its effects and build sustainable peace at community, national and regional levels. We do this through collaborating with, and learning from, the lived and diverse experiences of communities affected by violence and conflict. Through our research, interventions and advocacy we seek to enhance state accountability, promote gender equality, and build social cohesion, integration and active citizenship. While primarily based in South Africa, we work across the African continent through collaborations with community, civil society, state and international partners.

2. BRIEF OVERVIEW OF THE TORTURE SITUATION IN SOUTH AFRICA

Torture is prevalent in South Africa and is committed by public officials in detention facilities including correctional services facilities, police stations, psychiatric institutions and immigration detention facilities. The impacts of torture are complex with long-term negative consequences that include physical, psychological and social dimensions, the impacts of torture are symptoms of post-traumatic stress disorder (PTSD), anxiety, depression and health problems preventing victims of torture (VOTs) their ability to fully function in society. Although torture is generally associated with apartheid in South Africa where victims comprised of liberation struggle heroes and apartheid era victims, it remains a major challenge in post-apartheid South Africa and its victims comprise of a diverse group of victims, including, refugees and asylum seekers, sex workers, LGBTIQ+ persons and innocent persons at the wrong place at the wrong time. South Africa ratified the United Convention against Torture (UNCAT) in 1998 and domesticated UNCAT through the Prevention and Combating of Torture of Persons Act 13 of 2013 (PCTPA).

During South Africa's 3rd UPR cycle in May 2017, CSV recommended, among other things that South Africa ratify the Optional Protocol to the Convention Against Torture (OPCAT) and further promulgate regulations to operationalise the Anti-Torture legislation. On 28 February 2019, the South African cabinet made a decision to refer OPCAT to parliament for its ratification in terms of section 231(2) of the Constitution of the Republic of South Africa of 1996. We commend South

Africa for honouring the recommendation made by the Human Rights Council and which the South African government accepted in 2017 with regards to the ratification of OPCAT. We hope South Africa will take steps to implement other recommendations of the Human Rights Council before the 4th UPR cycle.

3. CSVR RESPONSE TO UNCAT LIST OF ISSUES AND RECOMMENDATIONS

3.1 UNCAT ARTICLE 3: NON-REFOULEMENT

Despite fairly robust legal standards protecting against refoulement, there are serious gaps in the prompt and effective application of the non-refoulement principle by the South African authorities. High levels of corruption at the Refugee Reception Offices (RROs) that renders the most genuine asylum seekers with a valid claim for asylum do not obtain their asylum seeker permits¹, unless they pay an amount to the refugee status determination officers. This therefore leaves a large group of people who have fled from torture and persecution in their countries of origin in an insecure and highly vulnerable situation in South Africa, where they live in constant fear of deportation and experience various forms of harassment and abuse by the authorities. The Refugees Act 130 of 1998 regulates the filing and processing of asylum applications, additionally, the Prevention and Combating of Torture of Persons Act 2013 (PCTPA) provides victims with specific right to not be returned to countries where they would face torture. The legal entitlements are clear but the experiences of CSVR's clients highlight serious challenges in this regard. During the period 2015 to 2017, the proportion of asylum seekers accessing CSVR's trauma clinic increased from 25% to 45 % and the proportion of persons with refugee status decreased from 58% to 28%, which is a significant shift within a relatively short period. Their experiences, which are confirmed by legal partners working on refugee cases, indicate that asylum requests are difficult to file, processed with significant delays or not at all and often rejected without adequate consideration of the substance of the case. In the views of clients and our legal partners, the reasons for delays and rejection are growing corruption; inefficiency; ignorance; xenophobic sentiments and a lack of resources allocated to the Department of Home Affairs (DHA) and its refugee status determination

¹ Refugees Act 130 of 1998, sec. 22

and refugee appeals board processes. Specific concerns are raised in relation advocates and magistrates and judges (if the matter is taken to the High Court) who are reported to regularly dismiss claims without considering the evidence and who do not take into account how psychological trauma affects torture victim's behaviour and memory – effectively inhibiting their ability to present their cases in a coherent manner. This leaves all asylum seekers living in constant fear of deportation and therefore reluctant to seek help, including medical care from the authorities. For CSVV's clients, this situation is compounded by the fact that they are already living with severe physical and psychological trauma from the torture they have suffered in their country of origin.

RECOMMENDATIONS

The South African Government should:

1. Ensure that the Department of Home Affairs has adequate financial and human resources to conduct refugee status determination and refugee appeals board processes promptly and effectively and collect and publish data on processing times and outcomes.
2. Conduct trainings for all public officials involved in refugee status determination and refugee appeals board processes should receive training on the physical and psychological effects of torture, how it impacts behaviour, memory and how to ensure that traumatised victims can effectively participate in refugee status determination and refugee appeals board processes.
3. The South African Government ought to improve the conditions and treatment of and in the migrant/asylum facilities.
4. Implement a campaign to inform asylum seekers and refugees about their rights in connection with the asylum process and in relation to accessing government services and to combat xenophobic violence throughout South Africa.

3.2 UNCAT ARTICLE 4: THE PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT 13 of 2013

The Prevention and Combating of Torture of Persons Act (PCTPA) was signed by the then President Jacob Zuma and enacted on the 25th of July 2013. Among other things, the PCTPA criminalised torture and other human rights abuses and is testament to South Africa's commitment to fulfilling its obligations enshrined in the UNCAT. Additionally, the PCTPA promotes the universal respect for human rights and affirms freedom from torture as a non-derogable right even in state of emergency. More importantly, the PCTPA places a responsibility on South Africa to raise awareness about the prohibition of torture through education for the general public and public officials about torture and training of public officials and assisting those wishing to lodge complaints with information on torture². The Act also provides for the possibility of promulgation of regulations³. Although the Act has made advances towards the prevention of torture in South Africa, there are still significant gaps in the legal protection provided and in its implementation. Despite the fact that the PCTPA warrant imprisonment on acts of torture, it does not categorize torture as one of the serious crimes that attract a discretionary minimum sentence compared to other serious crimes like rape. By not stipulating a minimum sentence, the PCTPA creates the possibility that torturers are given a suspended sentence, which would not be commensurate with the gravity of the crime. The Act does not adequately address the responsibility of the South African State to provide and ensure redress for victims of torture⁴, save for prosecution of perpetrators of torture and the common law civil claims for damages available to victims of torture⁵. These are significant gaps in legal protection, which undermine the effective implementation of the Act. In the experience of CSVr, no public officials have been prosecuted under the new law. Access to justice is an essential feature of the right to redress and in order to effectively operationalise the Act, it needs to consider both the procedural and substantive part of redress as this will contribute to the restoration of victim's dignity and a sense of justice and empowerment.

² See PCTPA, sec 9.

³ See PCTPA, sec 10 and 11.

⁴ This includes the five forms of reparation namely; restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition as articulated in the General Comment No. 3 of the Committee Against Torture on Article 14 of UNCAT.

⁵ Section 4 of the Act lists offences constituting torture and their penalties while Section 7 indirectly provides for the victim's common law claim for damages for any physical and/or psychological suffering suffered from torture through a civil lawsuit.

RECOMMENDATIONS

The South African Government should:

1. Amend the PCTPA to provide for the criminalization of cruel, inhuman or degrading treatment or punishment; extension of the *ratione personae* to include persons employed by private institutions or organisations that are contracted to carry out work on behalf of the state; mandatory minimum sentences; the obligation to document, investigate and prosecute; and to provide full reparation to victims.
2. Urgently promulgate regulations to operationalise the PCTPA with a specific focus on giving guidance on procedures and processes for documenting and investigating torture; what are the aggravating factors; and how to provide rehabilitation in accordance with the needs of victims and survivors of torture.
3. Amend the Criminal Procedure Act and the Prevention of Organised Crime Act to include the crime of torture in their schedules of crimes.
4. Prioritise and adequately fund training of public officials on the PCTPA and in particular the prohibition and definition of torture, the obligation to investigate and prosecute and how to ensure that victims receive justice and reparation.

3.3. UNCAT ARTICLE 11: OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Torture and ill-treatment continue to be carried out in places of detention including immigration detention, psychiatric and other public facilities in South Africa. Despite the fact that South Africa has existing oversight bodies, such as the Judicial Inspectorate for Correctional Services (JICS) and the Independent Police Investigative Directorate (IPID), the independence of these bodies has long been debated coupled with allegations of corruption. The IPID and JICS have proved to be ineffective in ensuring accountability in their current form and capacity. Access to and periodic monitoring of detention facilities is imperative in ensuring that victims' (including refugees and asylum seekers) have access to their fundamental rights. In February 2019, civil society and the South African Human Rights Commission (SAHRC) welcomed the Cabinet decision to refer the

OPCAT to parliament for ratification in terms of section 231 (2) of the Constitution of the Republic of South Africa, 1996. OPCAT is particularly innovative as it's based on the complementarity of preventive visits by an internal organ and by one or several National Preventive Mechanisms (NPMs) – the SAHRC would be an ideal institution to operate as a co-ordinating function for the abovementioned bodies as well as other involved institutions, so as to improve conditions of detention and to avert the risks of arbitrary or unlawful detention, torture and other forms of ill-treatment, and indeed refoulement.

RECOMMENDATIONS

The South African government should:

1. Urgently ratify OPCAT and establish a multi-stakeholder NPM that will enable monitoring visits to be consistent, effective, independent and evidence-based as well as improving conditions of detention and to avert the risk of arbitrary or unlawful detention, torture and other forms of ill-treatment, and indeed refoulement.
2. Allocate sufficient resources for the NPM to conduct analyses in a systematic manner before, during and after monitoring visits (as well as follow-up visits).
3. Take all measures to prevent and combat torture and ill-treatment of non-citizens detained in repatriation centres and provide people with information about their rights and legal remedies available.

3.4 UNCAT ARTICLE 12-13: LACK OF INVESTIGATION AND PROSECUTION OF TORTURE AND ILL-TREATMENT

3.4 INTRODUCTION

Investigation and prosecution of torture allegations is a major problem in South Africa. In CSV's experience, it is very difficult for victims of torture to file complaints; there are serious problems with accessing a competent and independent medical examination to document allegations of torture; there are no adequate safeguards in place to protect complainants from reprisals; when complaints are made, investigations are not carried out effectively and there are no examples of complaints leading to prosecutions.

LAW & POLICY

The PCTPA does not address investigations, which means that this is (often) covered sporadically in other regulations without a comprehensive and torture specific approach. The IPID was created in 2011 and became operational in 2012. IPID has the legal mandate to receive, log and investigate complaints against assault or torture by police before making recommendations for prosecution to the National Prosecuting Authority (NPA) or disciplinary steps to the South African Police Service (SAPS). The IPID's reinforced powers are now similar to those of a police official and include powers of search and seizure and arrest⁶. Police officers must notify the IPID if they become aware of an alleged offence falling under the IPID's mandate and are obliged to cooperate with its investigations. Failure to do so is a criminal offence⁷. At the end of its investigation, the IPID must refer all criminal cases to the NPA for assessment, and may recommend disciplinary action to the Police Service⁸. Since the JICS is not primarily an investigative but a complaints and inspections body, prisoners who have suffered torture (and/or ill-treatment) must file a criminal charge with the Police Service.

No systematic medical oversight of police detention and interrogation

Medical oversight of police detention is not mandatory. The Police Service Standing Orders entitle detainees to consult a medical practitioner of their choice, but at their own cost. Police Service officials have the discretion to decide whether detainees should receive urgent medical treatment (if they do not consult a doctor themselves). The Standing Orders state that a medical examination must be carried out in private. If a detainee complains of torture, the medical practitioner must examine the allegation and prepare a report, and the police station commander must ask the medical practitioner to send the report to IPID⁹. This implies that medical officers must automatically inform the station commander of torture allegations. The Correctional Services Act states that every prisoner must undergo a 'health status examination' as soon as possible on admission¹⁰.

⁶ IPID Act, sec 24.

⁷ The offence is punishable by a fine or a maximum sentence of two years' imprisonment. See IPID Act, sec 29(1), (2), and 33(3).

⁸ IPID Act, sec 7(4), (6), and (9).

⁹ SAPS Standing Order (General), order 349.

¹⁰ Correctional Services Act, sec 6(5).

PRACTICE AND IMPLEMENTATION

Although IPID has the duty to investigate allegations of torture by police and members of the metro police, IPID has currently not investigated nor reported a single torture case. Article 9 of the PCTPA only provides for education and training for public officials involved in custody, interrogation or treatment of arrested, imprisoned or detained persons. There is a gap when it comes to training and capacity building for officers in the criminal and civil justice system on the same. The criminalization of torture calls for the officials in the criminal justice system, specifically the police officers, prosecutors, legal practitioners, magistrates and judges to be trained on the PCTPA, which training will guarantee effective application, interpretation and enforcement of its provisions. Anecdotal evidence suggest that the Police Service often refuses complaints by prisoners and it has been alleged that when it does open investigations, Police Service investigators sometimes collude with officials from the DCS. Neither the JICS nor the IPID appear to cooperate regularly with forensic medical practitioners when they investigate allegations of torture. Overall, generally good legal frameworks seem not to have enabled effective and independent oversight that prevents and eradicate torture and other ill-treatment. Many detainees are not informed of their right to legal representation and fail to request it at their first court appearance. Similar concerns were raised, including the inadequacy of police and prison oversight, poor conditions of detention, police brutality, prison assaults, and the legacy of the Truth and Reconciliation Commission (TRC).

RECOMMENDATIONS

The South African Government should:

1. Ensure that future regulations to operationalise the PCTPA establish effective complaints procedures and a process for prompt, effective and impartial documentation and investigation of torture in accordance with the standards in the Istanbul Protocol;
2. Ensure the independence of institutions responsible for documentation and investigation, including complaints and investigative mechanisms, forensic services, the judiciary, NHRIs as well as traditional mechanisms.
3. Ensure training on documentation and investigation of torture in accordance with the Istanbul Protocol for all relevant actors, including law enforcement officials, judicial officers, medical and forensic staff and investigators.

4. Ensure effective external oversight to monitor and evaluate the work of bodies established to investigate torture and ill-treatment.

3.5 UNCAT ARTICLE 14: VICTIMS' RIGHT TO REDRESS

3.5 INTRODUCTION

Despite clear legal entitlements in international and regional human rights law, torture victims currently do not have access to reparation or appropriate rehabilitation services being provided or otherwise supported by the South African state. Instead, the majority are left to handle the physical, psychological and social consequences of torture on their own. A very small group can access rehabilitation services provided by CSVR and other non-governmental organisations. However, these services far from cover the needs of all victims. This has far reaching implications for victims and their families who are often unable to live fulfilling lives provide for their own livelihood and participate in their communities. CSVR is currently leading a process to develop indicators on torture victims' right to rehabilitation as a tool for the state and civil society to have an objective discussion on how to address this situation. The indicators are based on the best practice developed by the Office of the High Commissioner for Human Rights (OHCHR) and thus contain structure, process and outcome indicators. The follow analysis will be loosely based on the indicator, which can be found here: https://irct.org/uploads/media/National-Indicator_south_africa1.pdf.

LAW & POLICY

The UNCAT and its General Comment No. 3 provides clear legal obligations on State Parties to ensure that torture victims access reparation and rehabilitation. This obligation is reiterated and given regional specificity in General Comment No. 4 on the African Charter on Human and People's Rights: The Right to Redress for VOT's and other Cruel, Inhuman or Degrading Punishment or Treatment (Art.5). Unfortunately, the PCTPA does not address reparation for victims, which means that there is no domestic legal framework for victims of present-day torture to seek reparation including rehabilitation. The PCTPA envisages the promulgation of regulations, which could provide for the establishment of a reparation and rehabilitation programme but six years into the law's existence, the regulations have not been developed. Currently, victims of torture

(VOT's) in South Africa are only able to pursue their reparation through common law civil claim of damages, a court process which tend to be time-consuming, bureaucratic, expensive and cumbersome. Such a procedure can be an additional barrier to redress often leading to victims' re-traumatisation. Moreover, national human rights institutions (NHRIs) and quasi-judicial mechanisms in South Africa are often under-resourced or lack the technical competencies to determine and award effective reparation to VOT's and/or to enforce their decisions and recommendations.

PRACTICE AND IMPLEMENTATION

Since 2007, the Department of Health (DOH) has repeatedly affirmed the rights of asylum seekers and refugees to access the same public health care to which citizens have access. Unfortunately, the public health care system is currently not able to provide services that enable torture victims to go through a process of rehabilitation for a number of reasons.

Appropriateness

There are currently no government institutions providing specialised psycho-social supporting including trauma counselling and rehabilitation to VOT's. The Department of Social Development Victim Empowerment Programme has not yet been equipped or strengthened to provide support to the specific needs of VOT's. Staff do not speak the language of refugees and asylum seekers and have not been trained on the cultural background on refugees and asylum seekers from Africa who may access their services. Experience in providing health and psychosocial support services to VoT's is very rare in South Africa and few people have been trained to understand the impacts of torture and address them accordingly.

Access

Due to an overburdened South African health care system, it is very difficult for VoT's to access adequate health care. Furthermore, other non-government centers that used to focus on rehabilitation for VoT's have had to close down due to funding constraints, leaving CSVV as the main NGO in South Africa that specializes in both clinical and community based mental health services for torture victims and refugees. Torture victims who are seeking refuge in South Africa

encounter additional barriers to accessing rehabilitation services¹¹. CSVR's clients regularly report being denied access to health care. Even when seeking emergency care after xenophobic attacks or rapes, migrants are often turned away by medical personnel who may discharge them prematurely, harass them, charge them excessive user fees, and call the police to deport them.

Safety of services

Many of CSVR's clients report having experienced violence, threats and verbal abuse by health workers when trying to access public health services. They are refused treatment, told to go back to their country of origin, that they are a burden on the South African society and depriving South Africans of their opportunities. CSVR has engaged with healthcare professionals working for the state who reported being under resourced; overburdened; experiencing burn out; having their salaries delayed or not paid at all; experiencing abuse from senior staff and other contextual challenges. Some also expressed xenophobic attitudes towards foreigners.

Coherence and context

In addition to the lack of access to appropriate and safe services, torture victims seeking refuge in South Africa live in a context that makes it very difficult for them to rebuild their lives and often exacerbate their torture trauma. An increasing number of CSVR clients experience long delays in the processing of their refugee status claims and thereby leave them in a situation of insecurity and constant risk of deportation. Most refugee and asylum seeker victims of torture have experienced xenophobic violence, which often result in displacement, homelessness and unsafe living conditions. Finally, an increasing number of CSVR clients are unemployed (56% of our new intake of clients were unemployed in 2017, as opposed to 24% in 2015) resulting in a very difficult socio-economic situation. This combination of constant uncertainty and insecurity, re-experiencing violence and a life in extreme poverty makes it impossible for torture victims to heal and often compound their trauma. This situation is caused by the Government's failure to implement its legal obligations to conduct effective refugee status determination, to protection person on its territory from violence and to deliver appropriate social services. Considering the impact it has on

¹¹ Higson-Smith, C. Mulder B. and Masitha, S. (2006). "Human dignity has no nationality": a situational analysis of the health needs of exiled torture survivors living in Johannesburg, South Africa, unpublished research report, Johannesburg: Centre for the Study of Violence and Reconciliation.

the physical and mental health of CSVR clients, it constitutes at the very least a failure to implement their right to rehabilitation and may constitute ill-treatment on its own.

RECOMMENDATIONS

The South African Government should:

1. Amend the PCTPA to include an explicit right to reparation including restitution, rehabilitation (both medical and psycho-social), compensation, satisfaction and guarantees of non-repetition of torture.
2. Urgently promulgate regulations to operationalise the PCTPA and include a specific procedure for victim to seek reparations, the establishment of a specialised rehabilitation programme in accordance with the standards in the Committee's General Comment No. 3 and General Comment No. 4 on the African Charter on Human and People's Rights, and a system to monitor and evaluate the implementation of the rehabilitation programme on the basis of objective indicators developed in accordance with international best practice.
3. Develop and implement a holistic rehabilitation strategy, in which government institutions and civil society organisations collaborate on providing treatment to torture survivors. The rehabilitation programme should include medical and psychosocial care, social, legal, educational and other measures, as well as family support. To be effective, rehabilitation must be victim-centred and be provided at the earliest possible point in time after the torture occurred.
4. Ensure effective access to judicial remedies including through assistance and support to complainants and removal of barriers to access to justice; and ensure that decisions of judicial bodies on reparations for torture victims are executed without unreasonable delay.
5. Establish an administrative reparations programme for victims of torture to provide an out-of-court process for victims to be recognised and obtain reparation and recognise existing quasi-judicial or traditional processes as alternatives to the formal judicial process.