



UGANDA HUMAN RIGHTS COMMISSION

**INTERPRETIVE GUIDE TO THE  
PREVENTION AND PROHIBITION  
OF TORTURE ACT, 2012**



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## ACRONYMS

APT	Association for the Prevention of Torture
CAT	Committee against Torture
CIDT	Cruel, Inhuman, Degrading treatment
CPCA	Civil Procedure Code Act
DANIDA	Danish International Development Agency (Royal Danish Embassy)
DPP	Director of Public Prosecution
ICCPR	International Covenant on Civil and Political Rights
JLOS	Justice Law and Order Sector
PPTA	The Prevention and Prohibition of Torture Act
PCA	Penal Code Act
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UNCAT	United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
UNHRC	United Nations Human Rights Committee

## PREFACE

Under international law, States have the obligation to prevent torture and to criminalize it under their respective national legislation. Indeed, Article 4 of the United Nations Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (UNCAT) provides that “each State Party shall ensure that all acts of torture are offences under its criminal law” whereas Article 4 of the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa states that ‘States should ensure that acts, which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems’. This obligation derives from the absolute prohibition of torture and the duty to fight impunity by prosecuting and punishing authors of torture.

In 2012, Uganda made an important step forward with the adoption of the Prevention and Prohibition of Torture Act, 2012 (herein under referred to as the Act) which entered into force on 18 September 2012. The Act aims to reinforce respect for human dignity by giving effect to the provisions of the UNCAT, which was ratified by Uganda on 26 June 1987. The Act also gives effect to the Articles 24 and 44 (a) of the Constitution of Uganda, which reaffirm the right of all persons to enjoy the freedom from torture and cruel, inhuman or degrading treatment or punishment.

In this regard therefore, in order to give effect to the provisions of the Convention against torture and to contribute significantly to the eradication of torture, the Act needs to be promoted and implemented in practice. The implementation of the Act requires joint efforts, endeavours and commitment from all key partners under the Justice, Law and Order Sector (JLOS) as well as Civil society organisations and development partners. All relevant actors need to have substantive knowledge of the Act and to be more enlightened on the whole issue of torture prevention and prohibition for a better promotion and effective implementation of the Act. It is in this context that the Uganda Human Rights Commission (UHRC) with the support of the Royal Danish Embassy, Kampala (DANIDA), the German Foreign Office and the Association for the Prevention of Torture (APT), developed an interpretative guide to the Act.

This interpretative guide explains the provisions of the Act and is presented in simple and user friendly language. It is our sincere hope that this guide will go a long way in contributing to the clear understanding about the provisions of the Act and facilitate its implementation.

## ACKNOWLEDGMENT

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Med. S. K. Kaggwa

**Chairperson**

**UGANDA HUMAN RIGHTS COMMISSION**

# AN INTERPRETIVE GUIDE TO THE PREVENTION AND PROHIBITION OF TORTURE ACT, 2012

## Introduction

Uganda is a State Party to several regional and international human rights instruments/treaties which prohibit torture. These instruments include, among others, the Universal Declaration of Human Rights (UDHR) 1948, and the International Covenant on Civil and Political Rights (ICCPR). Specifically, Uganda ratified the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1986.<sup>1</sup> While the UNCAT is not the only international document dealing with torture and other forms of ill treatment, it is by far the primary international instrument on the prevention and prohibition of torture and cruel, inhuman and degrading treatment or punishment. The UNCAT provides a definition of torture and calls upon States Parties to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’ (Article 2(1)). Among these measures is the obligation to ensure that all acts of torture are criminal offences under the national criminal legislation (Article 4(1)).

In Africa, Article 5 of the African Charter on Human and Peoples’ Rights prohibits ‘all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment or punishment’.<sup>2</sup> In addition, the Resolution and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002 (also known as the Robben Island Guidelines)<sup>3</sup> calls upon member states to ensure that acts falling within the UNCAT definition of torture under Article 1 of UNCAT are offences within the national legal system.

These international and regional instruments establish a clear obligation that Uganda takes measures to prohibit and prevent torture and other forms of ill-treatment. However, the United Nations Committee against Torture (CAT), after considering Uganda’s official report on UNCAT in 2005, noted with concern that Uganda had not incorporated the UNCAT into its legislation nor introduced corresponding provisions to implement its Articles.<sup>4</sup> This was despite the fact that Uganda’s report to the Committee, and the Committee’s findings indicated that there were ‘continued allegations of widespread torture and ill-treatment by the State’s security forces and

agencies, together with apparent impunity enjoyed by its perpetrators,<sup>5</sup> as well as instances of customary torture.’<sup>6</sup>

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1 Adopted and opened for signature, ratification and accession by the General Assembly resolution 39/46 of 10 December 1984. Entry into force on 26 June 1987.

2 Adopted by the 18<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU on 27 June 1981 in Nairobi. It came into force on 21 October 1986.

3 Adopted by the African Commission on Human and Peoples’ Rights in the Gambia on 23 October 2002.

4 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10.

5 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 6(c).

6 Ibid, para 6(i).

The CAT therefore recommended that Uganda ‘takes all necessary legislative, administrative and judicial measures to prevent acts of torture and ill-treatment’. In particular, the Committee called on Uganda to adopt a definition of torture and amend the domestic penal law. It also called on the State to adopt legislation to implement the principle of non-refoulement; to ensure that acts of torture become subject to universal jurisdiction in Ugandan law; and to ensure compliance with other Articles of UNCAT.<sup>7</sup>

The Constitution of the Republic of Uganda was adopted in 1995, and took into consideration the UNCAT provisions. Article 24 provides for respect for human dignity and protection from inhuman treatment. In particular it stipulates that ‘[n]o one shall be subjected to any form of torture or cruel, inhuman and degrading treatment or punishment’.

Article 44 of the Constitution also provides that there shall be no derogation from the right to freedom from torture and cruel, inhuman and degrading treatment or punishment. This means that the prohibition against torture and ill-treatment is an absolute right, and is non-derogable.

Torture is also prohibited in some other national laws including Section 21(e) of the Anti-Terrorism Act, 2002, which makes it an offence for any ‘authorised officer’ to engage in acts of torture or ill-treatment.<sup>8</sup> Section 25(4) of the Police Act (CAP 303) requires that magistrates order an investigation into allegations of torture made by suspects against police officials and that perpetrators of torture must be charged.

Although the Constitution guarantees freedom from torture, cruel, inhuman and degrading treatment or punishment, there was no clear definition in the Constitution, legislation or common law as to what constitutes torture or cruel, inhuman and degrading treatment or punishment (cruel, inhuman or degrading treatment or punishment is also referred to in this text as CIDT or ill-treatment). There was also no specific crime of torture under the penal laws.

In terms of Uganda’s obligations under UNCAT to take legislative, administrative and judicial measures to prevent acts of torture in its jurisdiction, there was need to enact specific legislation to give effect to these obligations. This gap led to the enactment of the the Prevention and Prohibition of Torture Act, No. 3 of 2012. The Act was assented to by H.E the President on 27<sup>th</sup> July, 2012 and came into force on 18<sup>th</sup> September 2012.

The Prevention and Prohibition of Torture Act introduces a range of measures to prevent and prohibit torture. It provides a detailed definition of torture, makes torture a criminal offence and establishes penalties for the offence of torture taking into account the gravity of the offence.

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7 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10.

8 S 21(e) makes an offence for the officer who engages in torture, inhuman and degrading treatment, illegal detention or intentionally causes harm or loss to property, or commits and offence. A person convicted of this offence would be liable to imprisonment not exceeding five years or a fine not exceeding two hundred and fifty currency points, or both.

## ABOUT THE GUIDE

This interpretive guide aims to facilitate the understanding and the use of the Prevention and Prohibition of Torture Act by clarifying its provisions and some international law concepts. It is primarily intended to assist actors involved in the implementation of the Act including police officers, prosecutors, judges, magistrates and lawyers by serving as a reference tool, but it might be also useful for human rights defenders, non-governmental organisations, victims of torture and CIDT as well as any other interested persons.

The guide explains the meaning of the different sections of the Act with reference to how these matters have been debated and decided by international and regional bodies and in law. There has been very little jurisprudence in Uganda, and at the time of publication of this guide, there has been no criminal prosecution of torture. However, this guide does also refer to deliberations of the Uganda Human Rights Commission (UHRC).<sup>9</sup>

This easy-to-use guide follows the structure of the Act for easy reference and linkage between the guide and the Act. Focusing on the substantive part of the Act, from Section 2, it details what each provision stipulates, and provides commentary on the interpretation of each section. The full Act, and its schedules are attached as an appendix to the guide. The UNCAT is also included in the annexures.

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9 According to Article 52 of the Constitution of the Republic of Uganda, 1995, the Uganda Human Rights Commission has the mandate to 'investigate at its own initiative or on a complaint made by any person or a group of persons against the violation of any human right'. This mandate is fulfilled through investigations, mediation, counselling, giving advice, making referrals and through Tribunal hearings.

## PART II —PROHIBITION AND CRIMINALISATION OF TORTURE

### Section 2

#### **“2. Definition of torture.**

(1) *In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—*

*(a) obtaining information or a confession from the person or any other person;*

*(b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or*

*(c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.*

(2) *For purposes of this Act, “severe pain or suffering” means the prolonged harm caused by or resulting from—*

*(a) the intentional infliction or threatened infliction of physical pain or suffering;*

*(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;*

*(c) the threat of imminent death; or*

*(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.*

(3) *Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule.*

(4) *The definition of torture set out in subsection (1) does not include pain or suffering arising from, inherent in or incidental to a lawful sanction.”*

### COMMENTARY

This section is particularly significant because it defines torture and is an elaboration of Article 24 of the Constitution which prohibits torture.<sup>10</sup> Under this section, torture

<sup>10</sup> Article 24 of the Constitution provides that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment

is not just any other ‘right or freedom’ set out in the Constitution. According to Article 44(a) of the Constitution, torture is one of the only four absolute rights and freedoms from which there can be no derogation whatsoever.<sup>11</sup>

In summary, the Act’s definition of torture in Section 2 comprises four elements: An act or omission inflicting severe pain or suffering whether physical or mental on a person; intentional infliction; for particular purposes; and involvement of public official or private individual. It excludes pain or suffering from lawful sanctions.

The Act has substantially incorporated the definition of Article 1 of the UNCAT<sup>12</sup> into its definition of torture in keeping with the recommendations of the CAT to Uganda.<sup>13</sup> However, there are several differences. The Act provides for both ‘acts’ and ‘omissions’, whereas UNCAT refers only to ‘acts’. Secondly, the Act refers to acts committed by a ‘public official or any other person’ while the UNCAT refers only to public officials. Thirdly, the Act elaborates and provides a definition of ‘severe pain or suffering’ and also provides a schedule of acts that would constitute torture.

This is still in keeping with the UNCAT which provides under Article 1(2) that the definition of torture ‘is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.’ This gives States Parties the leeway to expand on the UNCAT definition. This can be seen in the definition of torture in Section 2 of the Act as well as in its Section 5 describing circumstances aggravating torture; and in the provisions of Section 7 creating an offence of cruel, inhuman or degrading treatment or punishment; as well as in Part III which outlines the other parties to an offence of torture.

The following is a discussion of each of these elements of the definition in relation to the Act.

## 1. Infliction of severe pain or suffering whether physical or mental

### *a. An act or omission*

The definition of torture under the Act requires an ‘act or omission’ that causes severe pain or suffering, whether physical or mental. This means that torture may be committed by means of a positive act or by simply failing to do something. The Second Schedule of the Act gives examples of acts that constitute torture which include systematic beatings, punching, kicking, striking with truncheons, rifle butts, etc. It is important to note that the acts listed in the Second Schedule are not exhaustive but are merely examples of acts of torture.

Although the UNCAT only refers to positive acts, there is also agreement by experts that it could include intentional omissions to act, where the other elements of the definition are met. For example, failure to feed prisoners or to provide them with

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11 The other non derogable rights and freedoms mentioned in article 44 are: freedom from slavery or servitude; the right to fair hearing; and the right to an order of habeas corpus.

12 See full text of UNCAT, Annex 2.

13 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10(a).

water for purposes such as punishment, or attempting to obtain information from them.<sup>14</sup> The CAT has found that there was a violation of Article 16 of UNCAT when police officials (public officials) in the Republic of Serbia failed to intervene to prevent the assault and cruel, inhuman and degrading treatment of a man of Roma ethnic origin, but stood by while other possibly public officials carried out the assault. The Committee said that the public officials had ‘acquiesced or consented’ to such treatment.<sup>15</sup> The Human Rights Committee has also held that the failure by the prison authorities to allow a South African prisoner to access HIV testing after he had been sexual assaulted with a baton and beaten by the authorities, consisted a violation of Article 7 of the ICCPR - the prohibition on torture or cruel, inhuman and degrading treatment or punishment.<sup>16</sup>

The Prevention and Prohibition of Torture Act clarifies this situation by providing in S 2(1) that torture may be any ‘act or omission’.

### ***b. Severe pain or suffering, whether physical or mental***

#### *‘Severe’ pain or suffering*

According to the Act, for an act to amount to torture the act must inflict severe pain or suffering whether physical or mental. Severity of pain or suffering is a subjective measure given the fact that each person experiences pain differently and one cannot quantify ‘pain or suffering’ in absolute terms. These experiences may depend on the person’s physical health, personal characteristics, cultural and religious beliefs, sex and age, and other factors.<sup>17</sup> It is possible that where a victim is particularly sensitive, acts which would otherwise not amount to torture may be considered so.<sup>18</sup> It is especially difficult to quantify the severity of pain where the acts complained of are of

a non-physical nature. It was, therefore, necessary to define ‘severe pain or suffering’ in the Act.

Section 2(2) defines ‘severe pain or suffering’ as ‘prolonged harm caused by or resulting from’ the actions that are set out in the section. The definition emphasizes the ‘prolonged’ harm, rather than the severity of the suffering. While it may be relatively easy to determine the prolonged harm resulting from physical harm, it becomes more subjective when assessing the mental or psychological harm or suffering.

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14 Rodley, N. and Pollard, M. (2006). *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, European Human Rights Law Review (2), p. 120.

15 Committee against Torture, *Osmani v. Serbia*, Comm. No. 261/2005, para10.5, UN Doc. CAT/C/42/D/261/2005 (25 May 2009)

16 UN Human Rights Committee, *Bradley McCallum v South Africa*, Communication No. 1818/2008, CCPR/C/100/D/1818/2008 (25 October 2010), para 6.6.

17 Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture*. Geneva: Association for the Prevention of Torture, p. 24.

18 See *Dzemajl and Others v Yugoslavia*, CAT Communication No. 161/2000, 21 November, 2002

## *Interpretations of 'severe' at international law*

It is interesting to look at how international bodies have interpreted the 'severity component' in the definition of torture. A key case to consider in the European system is *The Greek Case*,<sup>19</sup> where the European Commission on Human Rights held that the severity of pain and suffering distinguishes torture and ill-treatment from other forms of treatment. But, what distinguishes torture *from* ill-treatment was not the *severity* of the act, but rather the *purpose* for which it was perpetrated. However, in subsequent decisions, notably *Ireland v UK*, the European Court of Human Rights preferred to look at the severity of suffering rather than at the purpose of the act. It drew a distinction between torture, inhuman treatment, and degrading treatment, as it saw it was necessary to distinguish these due to the 'special stigma' associated with torture. The Court held that an act must cause 'serious and cruel suffering' to constitute torture.<sup>20</sup> It took its formulation from the Declaration on the Protection of All Persons being subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which formed part of the early discussions around the drafting of the UNCAT. Article 1 of the Declaration considered torture as 'an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment.'<sup>21</sup> However, subsequent decisions of the European Commission and Court of Human Rights have placed more emphasis on the purposive element of torture.<sup>22</sup>

### *Mental or physical pain or suffering*

Both the Prevention and Prohibition of Torture Act and the UNCAT definitions recognise that acts of torture can result into mental or physical pain or suffering.

The European Commission on Human Rights has defined mental torture as 'the infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault'.<sup>23</sup> A person could thus suffer from the mental and physical anguish which results from physical torture. They could also suffer from non-physical actions, such as mock executions, threats to kill the person or person's family, or shaming the person.

This is further clarified in Section 2(2) of the Act where both mental and physical suffering are mentioned. A person may suffer the mental or psychological effects of physical forms of torture, such as those described in paragraph 1 of the Second Schedule to the Act. This may also include the threatened infliction of physical or mental forms of harm, as well as pharmacological forms of torture. It is clear that the list set out in the schedule is an illustrative list. Its purpose is to give users of the Act a sense of what kinds of acts constitute torture. That is, other forms of torture not

19 *The Greek Case*, No. 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Yearbook of the European Convention on Human Rights, No. 12, cited in APT and CEJIL. (2008). *Torture in International Law: A Guide to Jurisprudence*, Geneva and Connecticut, pp 56-60.

20 *Ireland v UK*, No. 5310/71, ECHR (Series A) No. 25, judgment of 18 January 1978.

21 Art 1(2) of GA Res 3452 (XXX) of 9 December 1975).

22 See *Selmouni v France* (1999) and *Iljan v Turkey*, No 22277/93. ECHR 2000-VIII judgment of 27 June 2000, both discussed in APT and CEJIL. (2008). *Torture in International Law: A Guide to Jurisprudence*, Geneva and Connecticut, p. 59.

23 *The Greek Case*, Nos 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Yearbook of the European Convention on Human Rights, No. 12, cited in Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture*. Geneva: Association for the Prevention of Torture, p. 25

mentioned in the list may also constitute torture as long as they conform with the other components of torture.

S 2(3) states that ‘without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule’.

In terms of Schedule 2(1), **physical harms** include:

- a) *systematic beating, head banging, punching, kicking, striking with truncheons, rifle butts, jumping on the stomach;*
- b) *food deprivation or forcible feeding with spoiled food, animal or human excreta*
- c) *electric shocks;*
- d) *cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices;*
- e) *the submersion of the victim’s head in water or water polluted with excrement, urine, vomit or blood;*
- f) *being tied or forced to assume a fixed and stressful body position;*
- g) *rape and sexual abuse, including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of the genitals;*
- h) *mutilation, such as amputation of the essential parts of the body such as the genitalia, ears, tongue;*
- i) *dental torture or the forced extraction of the teeth;*
- j) *harmful exposure to the elements such as sunlight and extreme cold; or*
- k) *the use of plastic bags and other materials placed over the victim’s head with the intention to asphyxiate.*

In terms of schedule 2(2), **mental or psychological** torture includes:

- a) *blindfolding;*
- b) *threatening the victim or his or her family with bodily harm, execution or other wrongful acts;*
- c) *confining a victim incommunicado, in a secret detention place or other form of detention;*
- d) *confining the victim in a solitary cell or in a cell put up in a public place;*

- e) *confining the victim in a solitary cell against his or her will or without prejudice to his or her security;*
- f) *prolonged interrogation of the victim so as to deny him or her normal length of sleep or rest;*
- g) *maltreating a member of the victim's family;*
- h) *witnessing the torture sessions by the victim's family or relatives;*
- i) *denial of sleep or rest;*
- j) *shame infliction such as stripping the victim naked, parading the victim in a public place, shaving the head of the victim, or putting a mark on the body of the victim against his or her will;*

Schedule 2(3) also refers to **pharmacological torture**, which includes:

- a) *administration of drugs to induce confession or reduce mental competence;*
- b) *the use of drugs to induce extreme pain or certain symptoms of diseases; and*
- c) *other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment.*

## 2. Intent

The UNCAT and the Act refer to the 'intentional' infliction of an act on a person causing severe pain or suffering. Intention can be direct and specific, or it can be indirect, in that the outcome of the perpetrator's actions are reasonably foreseeable. As a general principle of the criminal law, a person is only guilty of the offence where there is an intention to commit the offence. Section 8 of the Uganda Penal Code Act, in dealing with motive and intent, creates criminal responsibility where a person intentionally commits an act, or intentionally omits to act. In other words, the accused person must have the necessary *mens rea* when he or she does not act.

- (1) *Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident.*
- 2) *Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission is immaterial.*
- (3) *Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.*

The courts have held that where intention is not expressly stated, it may be deduced from the surrounding circumstances, such as the type and gravity of the injuries; the weapon used to inflict the injuries; where on the body the injuries were inflicted; and the conduct of the accused before and after making the injuries.<sup>24</sup> Although the motive for committing an act is immaterial according to Section 8(3) of the Penal Code Act, it can provide strong circumstantial evidence as to whether or not the accused did commit the act.<sup>25</sup>

### 3. Purpose of the act

The Act recognizes that a particular act constitutes torture if performed for certain purposes. These include obtaining information or a confession from the person or any other person punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or intimidating or coercing the person or any other person to do, or to refrain from doing, any act. However, this is a non-exhaustive list and may include other purposes. The phrasing ‘for such purposes as’ used in the Act indicates that there may be other reasons for the commission of the act of torture.

Both the UNCAT definition of torture and the Act set out purposes for which torture may be committed. However, the Act differs from the UNCAT in that Section 2(b) adds in punishing a person for an act which she or another person is ‘... planning to commit’. This serves to widen the scope to acts that are still in the planning stages. The Act does not indicate how far actors may have had to go in planning for the act that they were intending to commit. This is a matter that the courts may have to decide. The act referred to in this section is not limited to criminal acts, but may constitute any action, such as a planning to leave the country, to render assistance to a person or to give information to someone, etc.

This section further differs from UNCAT in that it unfortunately makes no reference in its discussion of potential purposes to the statement ‘for any reason based on discrimination of any kind’. However, because the list is not exhaustive, torture committed for the purpose of discrimination may still constitute torture for the purposes of the Act.

The Committee against Torture stressed the importance of the discrimination clause in its General Comment 2, where it said that the discriminatory nature of an act of physical or mental harm was an important factor in determining whether an act constituted torture.<sup>26</sup> The Committee drew the attention to the fact that States need to guard against the discrimination of minority groups. They also highlighted a concern with discrimination against women and children on the basis of their gender, and the multiple ways that gender-based discrimination and violence and abuse intersect. A further concern was that women, boys and men may be discriminated against as a result of their non-conformity with gender norms in society.<sup>27</sup>

<sup>24</sup> *Uganda v Omagor Steven and Another* (Criminal Case No. 68 of 2000); [2001] UGHC 101, at p. 4.

<sup>25</sup> *Uganda v Omagor Steven and Another* (Criminal Case No. 68 of 2000); [2001] UGHC 101, at p. 6.

<sup>26</sup> Committee against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2 (24 January 2008), para 20.

<sup>27</sup> Committee against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2 (24 January

Can an act causing severe pain amount to torture if there is no purpose to the act? It has been argued that the requirement of purpose is the most decisive factor distinguishing torture from cruel, inhuman and degrading treatment or punishment.<sup>28</sup> In terms of this view, an act of ill-treatment committed without any specific purpose, even if severe pain is inflicted would not amount to torture. Ill-treatment only amounts to torture if it has been committed for a purpose. The distinction between torture and ill-treatment will be discussed further later under Section 7. However, other forums have considered the severity of the pain and suffering as the fact that most distinguishes torture from other cruel, inhuman and degrading treatment or punishment.<sup>29</sup>

#### 4. Public official or private actor

The UNCAT definition provides that the act must be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ This includes not only public officials, but also private individuals who carry out acts of torture on their instruction, with their consent, or with their acquiescence. However, the definition of torture under the Act, refers to acts committed by a public official *or* other person acting in an official or *private* capacity. The definition of torture therefore applies to both public officials, as well as to private individuals who are acting either in an official capacity, or in a private capacity.

##### a. Public officials

The Prevention and Prohibition of Torture Act defines as public official as (Section 1):

*...a person, whether a public officer or not, employed by the government or local government at any Government agency or any other person paid out of public funds.*

This definition is fairly broad and could include government department officials, municipal workers, police and prison officials, school teachers, or even parliamentarians and government ministers – as they are all paid out of public funds.

It is clear that when a public official acting in his official capacity commits an act of torture the requirements of both UNCAT and the Act are met. Even where torture is not sanctioned by the State, but the fact that it may be routinely carried out by public officials, and is closely associated with the criminal justice system, it may fall within the scope of their activities as public officials. In addition, since it is likely that others know about torture, it falls within the scope of acquiescence (discussed below).<sup>30</sup> Because the definition in the Act applies to both officials and private actors, in the event that an official commits an act of torture in his or her private capacity, the courts do not need to concern themselves as to whether the act was committed in ‘an official capacity’, or a private one. The actor will attract liability regardless.

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2008), paras 21-22.

28 Nowak, M. (2006). ‘What practices constitute torture: US and UN Standards’. *Human Rights Quarterly* (28), 809-841 at p. 830.

29 See for example the European Court of Human Rights, *Ireland v. United Kingdom*, 18 January 1987, para. 167.

30 *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004).

The State involvement may also be remote and still satisfy the UNCAT definition, which includes acts inflicted at the ‘instigation of or with the consent or acquiescence of a public official’. In other words, a private individual committing an act of torture on behalf of an official could be held liable in terms of UNCAT.

Officials who instruct others to carry out acts of torture should be held criminally liable. Doctors who are involved in torture should also be held liable.<sup>31</sup> The working group which drew up the UNCAT agreed that ‘complicity or participation’ includes acts relating to cover ups or concealment of acts of torture.<sup>32</sup> The former UN Special Rapporteur on Torture, Nigel Rodley, interprets the state action requirement to be met when public officials are ‘unable or unwilling to provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-treatment by non-State actors.’<sup>33</sup> According to Rodley, public officials who turn a blind eye to acts committed by unofficial bodies, such as paramilitary groups and others tolerated by the government,<sup>34</sup> would fall within the definition of ‘acquiescence’ under Article 1 of the UNCAT. The CAT has found that warring factions operating in Somalia, which established quasi-governmental institutions and who operate with structures similar to those of legitimate governments can also fall within the understanding of ‘public official’ or other persons acting in an official capacity.<sup>35</sup>

In the matter of *Osmani v Serbia* the CAT found that public officials who failed to act to stop an assault of people of Roma origin by private actors had acquiesced to the ill-treatment.<sup>36</sup>

The Committee against Torture has said that State parties should adopt effective measures to prevent authorities or others acting in an official capacity or ‘under the colour of the law’ from consenting to or acquiescing in acts of torture. Officials working in a privately run detention centre are acting in an official capacity ‘on account of their responsibility for carrying out the State functions’.<sup>37</sup> The UNCAT definition talks specifically of a public official, or person acting with his or her acquiescence or other person acting in an ‘official capacity’. This includes not only public officials, but also private individuals who carry out acts of torture on their instruction, with their consent, or with their acquiescence.

The former Special Rapporteur on Torture, Prof Manfred Nowak, in his 2008 report to the Human Rights Council, indicated that extreme forms of violence by private actors, such as female genital mutilation and honour crimes fall under ‘the definition of torture and cruel, inhuman or degrading treatment by acquiescence, if the Government fails

31 Rodley and Pollard, M. (2006) Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *European Human Rights Law Review* (2), p 122-123.

32 Ibid.

33 UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 4 (Rev.1), Combating Torture*, May 2002, No. 4 (Rev.1), available at: <http://www.refworld.org/docid/4794774b0.html> [accessed 7 April 2015], p. 34.

34 N. Rodley. (1999). *The Treatment of Prisoners under International Law* (2<sup>nd</sup> ed, Oxford, pp 100-101, cited in N. Rodley and Pollard, M. (2006).

35 *Elmi v Australia*. Communication No 120/1998, CAT/C/22/D/120/1998, at para 65.

36 Committee against Torture, *Osmani v. Serbia*, Comm. No. 261/2005, para10.5, UN Doc. CAT/C/42/D/261/2005 (25 May 2009).

37 Committee against Torture, General Comment No. 2: Implementation of article 2 by State Parties. UN Doc. CAT/C/GC/2 (28 January 2008), para 17.

to take the necessary legislative and practical measures required by the principle of due diligence.<sup>38</sup> In his Global Study on Torture, the Special Rapporteur also talks about certain hazing or intimidation rituals which occur in some prisons where prisoners are beaten by other inmates with the guards consent.<sup>39</sup>

### ***b. Private officials or Non-state actors***

Uganda has elected to broaden the scope of application of the definition to include any ‘other person acting in an official or private capacity’ (S 2(1)). This means that it is not only public officials and those acting with their consent or acquiescence who may be held liable to acts of torture, but also private actors with no relationship to government, who may or may not be acting on their own incentive.

Article 44(a) of the Constitution makes freedom from torture, cruel, inhumane or degrading treatment or punishment an absolute right which is non-derogable. Read together with Article 24 of the Constitution, it is clear that nobody, whether in official or private capacity should violate these freedoms. This understanding is equally supported by Article 20(2) of the Constitution which provides that all ‘the rights and freedoms of the individual and groups enshrined in this chapter (Chapter 4) shall be respected, upheld and promoted by all organs and agencies of government and by all persons.’ It was therefore seen as important to extend the criminal liability for torture not only to state actors and public officials, but also to private individuals, private security forces and rebel groupings such as Kony.

In addition, the Uganda Human Rights Commission has previously held that private actors can be held liable for acts of torture committed. The case of *Fred Tumuramyé v. Gerald Bwete and others*<sup>40</sup> concerned a complaint lodged with the Commission Tribunal by Fred Tumuramyé against the violation of his right to liberty and the right to freedom from torture, cruel, inhuman or degrading treatment or punishment. The complainant alleged that he was taken by force by the Gerald Bwete and others, who were all private citizens, and confined in a hut for four days. He claimed that he was tortured in order to obtain information about certain lost cattle which the alleged torturers believed he had stolen and hidden. In resolving the complainant the Commission Tribunal assessed the nature of the definition of torture in the Convention and made the following observation:

*A definition that conveys the meaning that torture or cruelty in law can only be committed by government or its agent would be very restrictive and ignores the fact that acts of torture, inhumane and degrading treatment or punishment are always practiced by individuals, groups or organisations that have nothing to do with government. ‘Mob justice’ can be torturous, cruel and inhuman. Certain types of family violence are acts that can inflict severe pain and suffering as a form of punishment or a way of obtaining information.*

38 Statement by Manfred Nowak, Special Rapporteur on Torture to the 13th session of the Human Rights Council, 8 March 2010, Geneva - See more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9918&LangID=E#sthash.a7Qu7qst.dpuf>, accessed 26 February 2015.

39 Special Rapporteur, Manfred Nowak, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, (5 February 2010), p.20

40 *Fred Tumuramyé v Gerald Bwete and others*, Complaint 264/1999 (1 October 2001).

For the above reasons, the Convention conceptualisation of torture was expanded in the Act. Expanding the liability from public officials to public AND private actors is not in contradiction with international law, particularly the Convention against Torture, but it is rather recent development of the international law in this regard. As indicated above, Article 1(2) of the Convention provides that Article 1(1) 'is without prejudice to any national legislation which does or may contain provisions of wider application.' Furthermore, the United Nations Human Rights Committee (UNHRC) has interpreted the State's obligations under Article 7 of the International Covenant on Civil and Political Rights<sup>41</sup> to include the need to take measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on those within their power.<sup>42</sup>

The Jurisprudence of the International Criminal Tribunal for Ex-Yugoslavia took the same line that an act doesn't require the involvement of a public official to be qualified as torture.<sup>43</sup> The Committee against Torture has also agreed with this in its General Comment No. 2 where it said that the Convention does not limit the international responsibility 'that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties'.<sup>44</sup>

## 5. Exclusion of pain or suffering from lawful sanctions

The Act provides that the definition of torture does not include pain or suffering arising from, inherent in or incidental to a lawful sanction. Sanctions, in law and legal definition, are penalties or other means of enforcement used to provide incentives for obedience with the law, or with rules and regulations. Sanctions therefore include judicially-imposed penalties or punishments and other enforcement actions authorized by Ugandan laws or by judicial interpretation.

The UNCAT provides a rider to the definition of torture in Article 1 to the effect that the definition does 'not include pain or suffering arising from, inherent in or incidental to lawful sanctions'. S 2(4) of the Act contains the same exclusion. The UNCAT does not specify whether the 'lawful' actions must be in compliance only with national law, or whether it should comply with international norms and standards, including the prohibition on cruel, inhuman and degrading treatment or punishment.

### *The issue of corporal punishment*

According to Sir Nigel Rodley 'lawful sanctions' refers to practices that the international community widely accepts as permissible sanctions, such as imprisonment.<sup>45</sup> Despite this position of international human rights experts and the fact that several States

41 Article 7 prohibits torture and other cruel, inhuman and degrading treatment or punishment.

42 See HRC, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.13 (26<sup>th</sup> May 2004), para 8.

43 ICTY, Furundzija case, Judgment of 10 December 1998, from paragraph 151

44 Committee against Torture, General Comment No. 2: Implementation of article 2 by State Parties. UN Doc. CAT/C/GC/2 (28 January 2008), para 15.

45 Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission On Human Rights Resolution 1995/37 B, Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1997/7, ¶ 8 (1997) [hereinafter Report of the Special Rapporteur].

indicated that 'lawful' meant lawful under international law, some Islamic States have interpreted this clause to mean 'lawful at national law' and thus allowing for such sanction as corporal punishment prescribed by Islamic law. However, the UN Commission on Human Rights has adopted a resolution confirming that corporal punishment can amount to ill-treatment, or even to torture, and the Committee against Torture has adopted a similar position.<sup>46</sup> The Special Rapporteur on Torture also argues that corporal punishment amounts to at least cruel, inhuman or degrading treatment or punishment, and sometimes torture. It is therefore not a lawful sanction and is thus a violation of UNCAT.<sup>47</sup> The Uganda courts have held that corporal punishment is unconstitutional, and the Penal Code was amended to abolish this as a form of punishment.<sup>48</sup>

### *Death penalty and torture*

The most common sanction cited as constituting torture is the death penalty. In international law, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that the death penalty is the one exception to the inviolable right to life. There is a growing trend towards the abolition of the death penalty, but many States continue to practice it. However, international law is clear the imposition of the death penalty must not constitute cruel, inhuman or degrading treatment or punishment. National and international courts and human rights bodies have considered the death penalty on many instances and in some cases held that it constitutes cruel, inhuman and degrading treatment or punishment.<sup>49</sup> In particular, it is a common understanding that the conditions of custody in the period leading up to an execution may constitute ill-treatment, including length of detention, the conditions of detention, long periods of solitary confinement, failure to inform the person of the date and other factors may constitute ill-treatment.<sup>50</sup> In the same vein, the Human Rights Committee stated that when a trial resulting in death penalty is unfair, it constitutes a violation of Article 7 of the ICCPR, which prohibits torture and other cruel, inhuman or degrading treatment or punishment.<sup>51</sup>

In Uganda, the matter has been considered by the courts. In 2009, the Supreme Court of Uganda said that the death penalty imposed in accordance with the law is not

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46 Rodley, N. and Pollard, M. (2006). *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, European Human Rights Law Review (2), pp. 120-122.

47 *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* submitted in accordance with General Assembly resolution, UN Doc 66/150 A/67/279 (9 August 2012), para 28.

48 Section 1 of the Penal Code (Amendment) Act, 2007.

49 For example, see *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Supreme Criminal Tribunal, 8 February 2007); *Al-Saadoon & Mufdhi v. United Kingdom*, Case No. CA/2008/3083 (citation No. 2009 EWCA Civ 7), where the European Court held that the extinction of life involved some pain and suffering; *Republic v. Mbushuu alias Dominic Mnyaroro and Kalai Sangula*, High Court of the United Republic of Tanzania, 22 June 1994, where the High Court found that execution by hanging was a violation of the right to dignity; and the case of *S v Makwanyane* (CCT3/94)[1995] ZACC 3 in South Africa which held that the death penalty constituted a violation of the right to life and of human dignity, and also constituted cruel, inhuman and degrading treatment or punishment and was thus unconstitutional. It is interesting to note that in the *Susan Kigula* case, the court did consider the Makwanyane case, but distinguished it from the Ugandan law because the right to life in the South African Constitution is an absolute and non-derogable right, whereas it contains limitations in the Uganda Constitution.

50 See the discussion of the Special Rapporteur on the 'death row phenomenon' in *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* submitted in accordance with General Assembly resolution, UN Doc 66/150 A/67/279 (9 August 2012), at paras 42-52.

51 Human Rights Committee, *Larranaga v. Philippines*, Communication No. 1421/2005

torture.<sup>52</sup> The Court did find that it was unconstitutional for the death penalty to be mandatory for certain offences in terms of Articles 20, 21, 22 24, 28 and 44(a) of the Constitution.<sup>53</sup> It also called on the legislature to re-open the discussion on the desirability of the death penalty in the Constitution particularly in light of the fact that no death sentences have been executed in recent years, and many people continue to be incarcerated on death row without knowing whether they will be pardoned, their sentences remitted or whether they are to be executed.<sup>54</sup>

In conclusion, the notion of ‘lawful sanctions’ should be fairly narrowly interpreted. Rodley and Pollard argue that ‘its role may be solely to clarify that ‘torture’ does not include mental anguish resulting from the very fact of incarceration’.<sup>55</sup>

### Section 3

#### “3. Prohibition of torture.

- (1) *Notwithstanding anything in this Act, there shall, be no derogation from the enjoyment of the right to freedom from torture.*
- (2) *The following shall not be a defence to a charge of torture—*
  - (a) *a state of war or a threat of war;*
  - (b) *internal political instability;*
  - (c) *public emergency; or*
  - (d) *an order from a superior officer or a public authority”.*

### COMMENTARY

#### ***Absolute prohibition of torture***

Section 3 of the Act reaffirms the constitutional guarantee under Article 44 of the Constitution that the enjoyment of the right of the freedom from torture is absolute.<sup>56</sup> The right to freedom from torture is one of four absolute rights under the Constitution which may not be derogated from even in a state of emergency as provided under Articles 46, 47, 48 and 49 of the Constitution.<sup>57</sup> This means that under no exceptional circumstances should torture be condoned – not even in a state of war, political instability public emergency, upon superior orders, public order, or in public interest. Although the Act refers specifically to these four instances, because

52 See *Attorney General v Susan Kigula*, Supreme Court Constitutional Appeal No. 3 of 2006.

53 *Attorney General v Susan Kigula* and 416 others, Supreme Court Constitutional Appeal No. 3 of 2006.

54 *Attorney General v Susan Kigula* and 416 others, Supreme Court Constitutional Appeal No. 3 of 2006, p. 63.

55 Rodley, N. and Pollard, M. (2006). *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *European Human Rights Law Review* (2), p. 121.

56 See article 44(a) provides that notwithstanding anything in the Constitution, there shall be no derogation from the enjoyment of the freedom from torture and cruel, inhuman or degrading treatment or punishment.

57 The other rights which may not be derogated from under article 44 of the Constitution are freedom from slavery or servitude; the right to fair hearing; the right to an order of habeas corpus.

torture is absolutely non-derogable, it is prohibited under *all* circumstances. Section 3(2) should not be considered as a restricted list.

This section confirms the non-derogable nature of torture at international law: that there is no justification for torture under any circumstances, and that the prohibition of torture or ill-treatment cannot be limited in any way. Under customary international law, the prohibition of torture is *jus cogens*, a peremptory norm that is non-derogable under any circumstances. It is binding on all nations. In the *Furundzija* case, the International Criminal Tribunal for Yugoslavia explained the reason for the special status of the absolute prohibition of torture as follows-

*Because of the importance of the values it [the prohibition against torture] protects, this principle has evolved into a peremptory norm or jus cogens that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules.*<sup>58</sup>

This principle was affirmed in the case of *Gafgen v Germany*, where the security forces threatened the complainant who was suspected of child abduction with intolerable pain in order to make him confess the whereabouts of the child. The European Court of Human Rights stressed that:

*The prohibition on the ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation...*<sup>59</sup>

In its 2005 Conclusions and Recommendations to Uganda, the CAT noted its concern with the 'lack of an absolute prohibition of torture in accordance with Article 2 of the Convention.'<sup>60</sup> Section 3 of the Prevention and Prohibition of Torture Act now incorporates this provision into national legislation.

### Order from superior official or authority not a defence

Section 3(2)(a) provides that an order from a superior officer or public authority shall not be considered a defence to a charge of torture. This makes it clear that a person cannot rely on the defence that there were obliged to follow the orders of a superior officer in conducting an act of torture. The 1950 Principles of the Nuremberg Tribunal<sup>61</sup> establish this principle which subsequently became codified in the UNCAT. However, the International Law Commission reporting to the General Assembly recommended

58 International Criminal Tribunal for Ex-Yugoslavia, *The Prosecutor v. Furundzija*, Trial Chamber, 10 December 1998, para 153

59 See Judgment of 1 June 2010, Par. 107. See also *See Agiza v. Sweden* (2005)

60 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 5(b).

61 Principle 4 of the Principles of the Nuremberg Tribunal, 1950 state that: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.'

that the fact that a person was acting on superior orders may be considered in mitigation of sentence.<sup>62</sup> But, even if this is the case, the reduction in penalty cannot be so substantial so as to undermine the essential purpose of the provision, which is to ensure that there is no justification for torture.

## Section 4

### “4. Criminalisation of torture.

*(1) A person who performs any act of torture as defined in section 3 commits an offence and is liable on conviction to imprisonment for fifteen years or to a fine of three hundred and sixty currency points or both.*

*(2) A person shall not be punished for disobeying an order to undertake actions amounting to torture, cruel or inhuman treatment”*

## COMMENTARY

This section clearly makes torture an offence under the criminal law and sets out the punishment for the offence of torture. This provision fulfills Uganda’s obligation to criminalize torture under Article 4 of the UNCAT, which requires State Parties to ensure that all acts of torture are offences under their criminal laws. Article 4 of the UNCAT also obliges States to make attempts to commit torture, and complicity or participation in torture a criminal offence. This section of the Act clearly stipulates that torture is an offence under the criminal law. However, it does not make it an offence to ‘attempt’ an act of torture, though in terms of the definition in Section 2 acquiescence (akin to complicity) and participation in an act of torture can be assumed as part of the definition of torture.

Also in keeping with Article 4(2) UNCAT which obliges States to make torture ‘punishable by appropriate penalties which take into account their grave nature’, Section 4(1) of the Act establishes that punishment for the offence of torture, is fifteen years imprisonment or three hundred and sixty (360) currency points which is the equivalent to seven million, two hundred thousand shillings. (7,200,000/-),<sup>63</sup> or to both a fine and imprisonment.

In this case, where a person is convicted of the offence of torture, the person may be sentenced to serve a prison term of fifteen years imprisonment, or may pay a fine, or may be ordered to pay both fine and serve a sentence of imprisonment. This means that courts have the discretion to determine whether a perpetrator is sentenced, fined or subjected to both penalties, but it does not have the discretion to impose a lesser sentence. This is also the maximum sentence which can be imposed under the Act.

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<sup>62</sup> Rodley and Pollard (2006), at p. 127.

<sup>63</sup> Schedule 1 states that a currency point is equivalent to Ug. Shs. 20,000

Under section 4(2) of the Act, a person who refuses to carry out any act of torture ordered by a superior officer shall not be punished.<sup>64</sup> Section 4(2) of the Act seeks to protect junior officers from punishment, administrative or otherwise, for refusing to obey orders to carry out acts of torture. On the other hand, section 3(2)(d), which provides that an order from a superior official or authority is no defence to torture, makes it clear that any junior official who does carry out torture on the orders of a senior person may be held liable for torture.

## Section 5

### “5. Circumstances aggravating torture

*Notwithstanding section 4, where it is proved that at the time of, or immediately before, or immediately after the commission of torture the—*

- (a) offender uses or threatens to use or used a deadly weapon;*
- (b) offender uses or used sex as a means of torture;*
- (c) victim was a person with a disability;*
- (d) victim was pregnant or becomes pregnant;*
- (e) offender causes death;*
- (f) the victim was subjected to medical experiments;*
- (g) victim acquires HIV/AIDS;*
- (h) victim was under the age of 18 years;*
- (i) the victim is incapacitated;*
- (j) the act of torture is recurring;*
- (k) offender commits any act which court considers aggravating;*

*the offender and any other person jointly connected with the commission of an act of torture is liable, on conviction to life imprisonment.*

## COMMENTARY

Section 5 outlines aggravating circumstances of an act of torture which attract an even higher penalty on conviction. The penalty for torture occurring under any of these

<sup>64</sup> Superior officer means a person in a higher position of authority than the officer alleged to have committed torture (S 1).

aggravated circumstances is life imprisonment. The legislature may have considered that certain forms of torture were particularly heinous and that they warranted a much more severe penalty. This is a mandatory sentence.

Section 5 lists some of the aggravating circumstances but the list is not exhaustive as the court may still consider whether the offender commits ‘any act’ which it considers aggravating (S 5(k)). One of the aggravating factors under the Act is the threat of or the use of a ‘deadly weapon’ at the time of, or immediately before, or immediately after the commission of torture (S 5(a)). The Act defines a ‘deadly weapon’ as including (S 1):

- (a) *(i) an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;*  
*(ii) any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and*
- (b) *any substance intended to render the victim of the offence unconscious.*

There are many possible weapons that can be considered ‘deadly’ within this definition. This definition is very similar to that contained in S 286(3) of the Penal Code Act which defines ‘deadly weapon’ for the purpose of a conviction of aggravated robbery.<sup>65</sup> While dealing with cases of aggravated robbery, courts have held on several occasions that a gun;<sup>66</sup> panga, knives and iron bars;<sup>67</sup> machete, spear, metal bar<sup>68</sup>; and a baton-like-sticks<sup>69</sup> are all deadly weapons. If the courts apply the reasoning in robbery cases, it is possible that such weapons will be considered deadly weapons for purposes of the Act.

## Section 6

### **“6. Compensation, rehabilitation or restitution to be made by court in certain cases.**

- (1) *The court may, in addition to any other penalty under this Act, order for reparations, which may include—*
  - (a) *restitution of the victim, his or her family or dependents to the greatest extent possible and such restitution may include—*

<sup>65</sup> In terms of the Penal Code Act (Cap 120) S 286(3) a ‘deadly weapon’ includes any instrument made or adapted for shooting, stabbing or cutting, and any instrument which when used for offensive purposes is likely to cause death.

<sup>66</sup> In the matter of *Uganda v Maweje & Another* (Criminal Session Case No. 0087 of 2010 [2010] UGHC 182, the court overturned the prevailing decision of *Wasajja v Uganda* (1975) E. A. 181 (which was upheld in *Shaban Birumba v Uganda* (cr. Appeal No. 32 of 1989) that it must be shown that the weapon was in fact deadly and capable of causing death. Toy guns and broken guns incapable of discharging bullets, or those without ammunition or imitation guns cannot be considered dangerous. In the *Maweji* matter, the court held that the definition of ‘deadly weapon’ should be read together with the provisions of the Firearm Act, 1970 (Cap 299) which refers to both firearms and imitation firearms.

<sup>67</sup> *Baguma Stephen & Another v Uganda* (Criminal Appeal No. 42 of 2001) [2003] UGCA 40.

<sup>68</sup> *Nanyonjo Harriet and another versus Uganda* (Supreme Court Civil Appeal No. 24 of 2012).

<sup>69</sup> *Absolom Omolo Owiny v Uganda* (Criminal Appeal No. 321 of 2003)[2008] UGCA 2.

- (i) *the return of any property confiscated;*
  - (ii) *payment for harm or loss suffered;*
  - (iii) *payment for the provision of services and restoration of rights; or*
  - (iv) *reimbursement of expenses incurred as a result of victimisation.*
- (b) *compensation for any economically assessable damage resulting from torture such as—*
- (i) *physical or mental harm, including pain, suffering and emotional distress;*
  - (ii) *lost opportunities, including employment, education and social benefits;*
  - (iii) *material damage and loss of earnings, including loss of potential earnings;*
  - (iv) *costs required for legal or expert assistance, medicines, medical services, and psychological and social services; and*
- (c) *rehabilitation including—*
- (i) *medical and psychological care; or*
  - (ii) *legal and psycho-social services to the victim in case of trauma.*
- (2) *Restitution, compensation, rehabilitation or any payment ordered by the court under subsection (1) may be satisfied by the property of the person convicted of torture”.*

## COMMENTARY

Section 6 provides for reparations for victims of torture and ill-treatment as well as additional penalties for persons convicted of torture. The additional penalties may take the form of an order of reparations which may include restitution, compensation or rehabilitation. Article 14(1) of UNCAT provides that:

*Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of torture, his dependents shall be entitled to compensation.*

It further provides that this right does not detract from any right the victim or other person may already have under the national law (S 14(2)). The Committee against Torture considers this provision as applying to both victims of torture and to victims

of cruel, inhuman and degrading treatment or punishment,<sup>70</sup> and therefore would apply to acts falling under section 4 and 7 of the Act. Section 6 seeks to provide for the reparation of victims of crimes under the Act.

Article 14 of the UNCAT therefore provides for redress, rehabilitation and compensation to victims on an individual or collective basis. It also includes the families of victims, dependents, and anyone else who may have suffered harm in intervening to assist victims. The victim should be eligible for these remedies regardless of whether the perpetrator has been identified, prosecuted or convicted.<sup>71</sup> Section 6(1) of the Act, on the other hand, only empowers courts, 'in addition to any other penalty' to make an order for reparations. This presumes that the court may only invoke this section once a perpetrator has been convicted and a suitable criminal penalty has been imposed. However, under Ugandan law, a victim may have the right to claim these remedies from the alleged perpetrator under civil law.

In 2006 the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines) to give effect to the right of reparations at international law.<sup>72</sup> Redress includes five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Section 6 of the Act aims to deal with the first three listed here, while other aspects of the Act aim to address elements of satisfaction and non-repetition.<sup>73</sup>

**Restitution** aims to re-establish the victim to the situation before the violation occurred, while also taking care that the restitution does not put the victim back in the situation where they are at risk. The CAT has recommended that in order to be effective, the State should attempt to address structural causes of the violation.<sup>74</sup> Restitution includes restoration of liberty, enjoyment of human rights, identity, family life, and citizenship, return to one's place of residence, restoration of employment, and the return of property.<sup>75</sup>

Because the Act deals with an individual perpetrator's responsibility to make reparation *after* conviction, the provision for restitution is more limited. The Act refers to measures including the return of confiscated property; the payment for harm or loss suffered; payment for provision or services and restoration of rights; and reimbursement of expenses incurred as a result of the victimization (S6(1)(a)).

**Compensation** deals with the monetary payment for economically accessible damage resulting from the physical or mental harm. The Committee against Torture emphasizes that the State's obligation to compensate is not restricted to monetary

70 Committee against Torture, *General Comment 3 (2012): Implementation of article 14 by States parties*. CAT.C/GC/3 (13 December 2012), para 1.

71 CAT.C/GC/3, para 3.

72 General Assembly Resolution, A/RES/60/147 (21 March 2006).

73 See articles 22 and 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (21 March 2006), for a detailed discussion of these rights.

74 CAT.C/GC/3, para 8.

75 Basic Principles and Guidelines, Article 19.

payment alone.<sup>76</sup> The definition provided in the Basic Principles and Guidelines<sup>77</sup> is substantially similar to the definition outlined in S6(1)(b) of the Act. This includes the right to compensation for mental or physical harm, including pain, suffering and emotional distress; lost opportunities, including employment, education and social benefits; material damage and loss of earnings, including loss of potential earnings; and costs required for legal or expert assistance, medicines, medical services, and psychological and social services. The Basic Principles and Guidelines also refer to compensation for 'moral damage' - a concept not included in the Act but that courts can still refer to in a dynamic interpretation and implementation of the Act.

**Rehabilitation** includes medical and psychological care, as well as legal and psychosocial services to a victim in case of trauma (S 6(1)(c)). The CAT has indicated that rehabilitation should provide for as full and holistic a range of services to the victim so as to restore self-sufficient functioning and to enable the acquisition of new skills that may be required in the aftermath of torture or ill-treatment. As far as possible, rehabilitation should restore the victim's independence, physical, mental, social and vocational ability, and full inclusion and participation in society.<sup>78</sup>

In order for the State to provide as full as rehabilitation service as possible, the CAT has recommended that States 'adopt a long-term, integrated approach to ensure that specialist services for victims of torture or ill-treatment are available, appropriate and accessible.'<sup>79</sup> This includes inter-disciplinary measures to deal with the multiple needs of a victim, including: medical, physical and psychological rehabilitative services, re-integrative, social services, vocational training and educational training. This should be provided in a context of confidence and trust.<sup>80</sup> The right to rehabilitation includes care and treatment in the immediate aftermath of the torture and ill-treatment, as well as what is required in the medium and longer term.

The reparations referred to in Section 6 of the Act are not an automatic right, but are something which may be awarded at the discretion of the court. The victim, or his or her legal representative, may have to provide argument and justification for the need to award reparation, and of the extent of the award.

S 6(2) provides that court may order that the restitution, compensation, rehabilitation or any payment ordered by the court may be satisfied against the property of the person convicted of torture. This calls for the attachment of the perpetrator's property in order to provide victims with an effective remedy. It also stems from the fact that in some instances perpetrators may not have the funds to pay for their penalties and courts have to resort to attachment of personal properties.

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76 CAT.C/GC/3, para 9.

77 Basic Principles and Guidelines, Article 20.

78 CAT.C/GC/3, para 11.

79 CAT.C/GC/3, para 13

80 CAT.C/GC/3, para 12-14.

## Section 7

### **“7. Cruel, inhuman or degrading treatment or punishment**

- (1) *Cruel, inhuman or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official or private capacity, which does not amount to torture as defined in section 2, is a criminal offence and shall be liable on conviction to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.*
- (2) *For the purposes of determining what amounts to cruel, inhuman or degrading treatment or punishment, the court or any other body considering the matter shall have regard to the definition of torture as set out in section 2 and the circumstances of the case.*
- (3) *In a trial of a person for the offence of torture the court may, in its discretion, convict the person for cruel, inhuman or degrading treatment or punishment, where the court is of the opinion that the act complained of does not amount to torture”.*

### **COMMENTARY**

Section 7 criminalises cruel, inhuman or degrading treatment or punishment (CIDT). It establishes a punishment for the offence of cruel, inhuman or degrading treatment or punishment, which is lesser than that of torture. A person convicted under section 7 is liable to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points (three million two hundred thousand shillings) or both.

However, the Act provides no definition of CIDT and unlike the offence of torture, section 7 does not specify the acts that amount to cruel, inhuman or degrading treatment or punishment, except to say that it is an act which doesn't amount to torture (S7(2)). It leaves it to the discretion of the court or other body considering the matter to determine what amounts to torture or ill-treatment having regard to the definition of torture and the circumstances of the case. This means that each case will have to be considered on its merits. The Act provides also that a conviction for a crime of CIDT may be a competent verdict where the prosecution is not able to prove all the elements of torture exist. The question would be then to know how to distinguish torture and cruel, inhuman or degrading treatment or punishment.

### ***Distinction between the offence of torture and the one of cruel, inhuman or degrading treatment or punishment***

On the whole, the offence under section 7 shares a number of elements of the offence of torture. Indeed, Article 16 of the UNCAT obliges States Parties to *prevent* other acts of cruel, inhuman and degrading treatment or punishment which do not amount to torture, when they are committed by or at the instigation of or with the consent

or acquiescence of a public official or person acting in an official capacity. States Parties are not obliged to make ill-treatment a criminal offence under the UNCAT. However, Article 1(2) of UNCAT creates the scope for States to widen the definition and application of torture because it says that the definition is ‘without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.’

Section 7 of the Act criminalizes cruel, inhuman or degrading treatment or punishment using much the same wording as Article 16 of the UNCAT, with the exception of its inclusion of ‘any other person’. Like the definition of torture in the Act, cruel, inhuman or degrading treatment or punishment becomes an offence when ‘committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official or private capacity’. In other words, both public officials and private actors may be held criminally liable for acts of cruel, inhuman and degrading treatment or punishment.

### *Elements of distinction*

Under the Act, the offence of cruel, inhuman or degrading treatment or punishment (ill-treatment) is a lesser<sup>81</sup> offence of torture which means that any act that falls short of the definition of torture because it lacks one or more of the criteria may be defined as ill-treatment. In practical terms, however, the distinction between torture and cruel, inhuman or degrading treatment or punishment is not easy to draw. As the Committee against Torture has noted, ‘[i]n practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear.’<sup>82</sup>

However, the CAT stated, that ‘[i]n comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes.’<sup>83</sup> Similarly, the former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observes that ‘*a thorough analysis of the travaux préparatoires of Articles 1 and 16 of the Convention as well as a systematic Commentary of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.*’<sup>84</sup> He argues that acts falling short of the definition of torture, especially acts without the element of intent, or acts carried out without the particular purposes outlined in the UNCAT Article 1 definition, may comprise cruel or inhuman treatment.

Furthermore, in the UN Special Rapporteur’s 2010 Global Study on torture, he stated that ‘cruel and inhuman treatment means the infliction of severe pain or suffering

81 A cognate offence refers to a lesser offence of a greater offence.

82 CAT, General Comment No. 2, “Implementation of article 2 by State Parties”, UN Doc CAT/c/GC/2/CRP.1/Rev.4 (23 November 2007)

83 CAT, General Comment No. 2, “Implementation of article 2 by State Parties”, UN Doc CAT/C/GC/2 (24 January 2008), para 10.

84 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December, 2005) p.9

without purpose or intention and outside a situation where a person is under the de facto control of another'.<sup>85</sup>

Acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.<sup>86</sup>

### *Examples of what constitutes cruel, inhuman or degrading treatment or punishment*

Neither the Act nor the Convention provide examples of what may constitute cruel, inhuman or degrading treatment or punishment. This is so that there is no limitation on the forms of CIDT or the nature of CIDT. However, we discuss some of the situations as some examples of where ill-treatment may occur.

**(a) Manner of carrying out the death penalty:** From international jurisprudence, while the death penalty is permissible at law in some countries, the manner of carrying out the death penalty may make it cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee has stated that where the death penalty is carried out, it must be done 'in such a way as to cause the least possible physical and mental suffering.'<sup>87</sup> On that basis, the Constitutional Court has ruled that keeping persons sentenced to death waiting for a considerable period of time in poor conditions (in what is called the 'death row' phenomenon) can constitute cruel, inhuman and degrading treatment or punishment.<sup>88</sup> In the matter of *Susan Kigula and 416 others*, one petitioner had been held on death row for 20 years, while the average number of years that the petitioners had been on death row was between 5 and 6 years. The court said that a 3 year delay in execution after a decision from the highest court in the land would be inordinate and constitute ill-treatment.<sup>89</sup> When this matter was heard on appeal by the Supreme Court, this decision was upheld.<sup>90</sup>

The Constitutional Court has found that the execution by hanging would not in itself constitute cruel, inhuman and degrading treatment or punishment. Okello, JA said that, 'Articles 24 and 44(a) [of the Constitution] do not apply to it [the death penalty, which is permitted by virtue of Article 22(1) of the Constitution]. Punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective'.<sup>91</sup> The Supreme Court of Appeal agreed with this decision.<sup>92</sup> However, the dissenting judge, Egonda Ntende, J. S. C., found that there was powerful evidence of cruel, inhuman or degrading treatment or punishment in the execution by hanging, including 'subjecting those who do not die instantly to bludgeoning or the plucking off of heads', and that this constituted ill-treatment.<sup>93</sup>

85 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*. A/HRC/13/39/Add.5 (5 February 2010), para 188.

86 Chapter IV, UN Doc.E/CN.4/2006/6 at para 35.

87 CCPR, General Comment No. 20, 1992.

88 *Susan Kigula and 416 Others v Attorney General*, Constitutional Court Petition 6 of 2003, 33..

89 *Susan Kigula and 416 Others v Attorney General*, Constitutional Court Petition 6 of 2003, p. 46.

90 *Attorney General v Susan Kigula and 416 others*, Supreme Court, No 3 of 2006.

91 *Susan Kigula and 416 Others v Attorney General*, Constitutional Court Petition 6 of 2003,

92 *Attorney General v Susan Kigula and 416 others*, Supreme Court, No 3 of 2006.

93 Cited in *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*

- (b) Corporal punishment:** in the matter of *Simon Kyamanywa v Uganda*, the petitioner was sentenced to imprisonment and corporal punishment on a conviction of robbery. The court found that corporal punishment would constitute cruel, inhuman or degrading treatment or punishment.<sup>94</sup> As a consequence, the Penal Code was amended to abolish corporal punishment.<sup>95</sup> Corporal punishment is also prohibited in terms of the Children’s Act.<sup>96</sup>
- (c) Solitary confinement:** Solitary confinement per se is not considered cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee has noted, however, that ‘solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is...cruel, inhuman or degrading treatment or punishment’.<sup>97</sup>
- (d) Solitary confinement for children:** The Committee against Torture, Committee on the Rights of the Child and the Special Rapporteur on Torture consider solitary confinement of children of any duration to constitute cruel, inhuman or degrading treatment or punishment, or even torture.<sup>98</sup> The Special Rapporteur has recently highlighted the concern that children are especially vulnerable to abuse and ill-treatment in places of detention, including in police and prison cells, administrative detention centres, and even in institutions for education and care of children. Particularly concerning are the use of long sentences. Life imprisonment and the death penalty for children are prohibited at international law.<sup>99</sup> In keeping with the Convention on the Rights of the Child, detention of children should be used as the last resort and for the shortest possible time.<sup>100</sup> In determining the seriousness of the acts and whether they constitute torture or ill-treatment, consideration should be given to the physical and mental capacity and age of the victim. The Special Rapporteur stated that ‘higher standards must be applied to classify treatment and punishment as cruel, inhuman or degrading’ when considering cases applicable to children.<sup>101</sup>

Some other forms of cruel, inhuman and degrading treatment or punishment include overcrowded or poor conditions in detention where detainees are held in conditions which don’t meet minimum standards of human rights; excessive use of force by law enforcement officials; domestic violence, sexual violence, female genital mutilation and human trafficking.<sup>102</sup>

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submitted in accordance with General Assembly resolution, UN Doc 66/150 A/67/279 (9 August 2012), para 36.

94 See *Simon Kyamanywa v. Uganda*, Constitutional Reference No. 10 of 2000.

95 Section 1 of the Penal Code (Amendment) Act, 2007.

96 S 94(9) of the Children Act, Cap 59 (1997).

97 CCPR , Concluding Observations on Denmark, UN Doc. CCPR/CO/70/DNK, 2000 p. 12

98 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68, para 44.

99 Article 37(a), Convention on the Rights of the Child.

100 Article 37(b), Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

101 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68 (5 March 2015), at para 70.

102 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68.

## PART III—OTHER PARTIES TO THE OFFENCE OF TORTURE

### Section 8

#### **“8. Other parties to offence of torture.**

*A person who, whether directly or indirectly:—*

*(a) procures; (b) aids or abets; (c) finances; (d) solicits; (e) incites; (f) recommends; (g) encourages; (h) harbours; (i) orders; or (j) renders support to;*

*any person, knowing or having reason to believe that the support will be applied or used for or in connection with the preparation or commission or instigation of torture commits an offence and is liable on conviction, to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.*

### COMMENTARY

This section ensures that no person connected with the commission of torture goes scot-free or escapes the long arm of the law. The section targets persons who in some way or another facilitate torture other than the actual offenders. As such, other than the torturer, any person who helps, finances, incites or orders torture to be committed may be found guilty of the offence of torture. However, a person can only be held liable under this section, if he or she *knew or had reason to believe* that his or her support will be used to commit the offence of torture. This section opens the net of liability to people such as doctors who turn a blind eye to torture or assist in the process. It may also include people who provide equipment (such as electric shock equipment) which may be used in the act of torture.

Article 4 of UNCAT provides that each State Party must ensure that an attempt to commit torture and any act by a person which constitutes complicity or participation in torture is also an offence punishable by appropriate penalties. Section 8 of the Act complies with this obligation.

The penalty for aiding and abetting torture is as high as the possible sentence for a person convicted of cruel, inhuman and degrading treatment or punishment.

### Section 9

#### **“9. Accessory after the fact to the offence of torture.**

*(1) A person who receives or assists another who is, to his or her knowledge, guilty of an offence under this Act, in order to enable him or her to escape punishment, becomes an accessory after the fact to the offence of torture.*

*(2) A person who is or becomes an accessory after the fact to the offence of torture commits an offence and is liable on conviction, to imprisonment not exceeding*

seven years or a fine not exceeding one hundred and sixty eight currency points or both.

- (3) *A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment by receiving or assisting in her husband's presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part in order to enable that other person to escape punishment, nor does the husband become an "accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment".*

## COMMENTARY

Section 9(2) seeks to punish any person who gives assistance or comfort to a person who is guilty of torture under this Act or a person who is wanted in connection with the commission of the offence of torture. Section 9 of the Act creates an accessory after the fact to an offence under the Act, and is drafted in very similar terms to S 393 of the Penal Code, which states:<sup>103</sup>

*A person who receives or assists another who is, to his or her knowledge, guilty of an offence, in order to enable him or her to escape punishment, becomes an accessory after the fact to the offence.*

*A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting, in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become an accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.*

Section 9(1) seeks to make it an offence for any person to receive or give assistance to a person who is guilty of an offence under the Act in order to assist the person to escape punishment. The Act uses the term 'guilty' rather than 'convicted' in reference to the offence under the Act, which means that one should have been found guilty by a court of law.

There are thus three elements to this offence:

- the torturer must be **guilty** of an offence under the Act
- the first person must **know** that the torturer is guilty of an offence under the Act
- the assistance must be for the **purpose** of helping the torturer evade punishment.

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<sup>103</sup> Cap 120, 1950.

The offence thus requires that the person must have the necessary *mens rea* when assisting the alleged perpetrator. The matter of *Nasolo v Uganda*<sup>104</sup> decided the question of accomplices:

*In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial.*

*However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another.*

The punishment for an offence under section 9(2) of the Act is a maximum sentence of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both. This is comparable with the sentence of someone convicted of being an accessory after the fact for murder.<sup>105</sup>

Like the Penal Code, a wife cannot be an accessory after the fact to an offence committed by her husband (and vis versa) under the Act. This section also protects a wife from becoming an accessory if she assists a perpetrator on the instruction of her husband. Although the Act defines ‘spouse’ as a husband or wife by lawful marriage, it does not use the word ‘spouse’ in Section 9(3), but one could argue on an interpretation of the intention of the law, that the provision was meant to protect both wives and husbands from acts committed by their spouses.

## Section 10

### “10. Responsibility of a superior over actions of a subordinate.

*A superior officer is liable for any act of torture committed by a subordinate under his or her authority and control where—*

- (a) the superior knew, or consciously disregarded information which clearly indicated, that the subordinate was committing or about to commit an act of torture;*
- (b) the acts committed by the subordinate concerned activities that were within the responsibility and control of the superior; and*
- (c) the superior failed to promptly investigate, diligently pursue administrative and disciplinary measures to prevent re-occurrence, and cooperate with judicial authorities to prosecute the offence”*

104 [2003] 1 EA 181 (SCU).

105 Such a person is liable to imprisonment for seven years. S 206, Penal Code.

## COMMENTARY

Section 10 is designed to create liability for a superior officer for acts carried out by a junior officer where he or she knew or should have known those acts amounted to torture or other cruel, inhuman and degrading treatment or punishment. Under this section, superior officers are held accountable for the actions and conduct of subordinates under their control and direction. Any order to torture is unlawful and must be rejected. In addition, if a superior knows that a subordinate is committing torture or is about to commit torture and the superior does nothing about it, the superior is also liable for the acts of torture of the subordinate. Related to the above, if a superior disregards information which clearly shows that the subordinate is committing torture or is about to torture and the superior does not act, the superior is liable for the torture of the subordinate. The law also prohibits any punishment for disobeying an order of torture.

This section is an amplification of the State's obligation under the UNCAT to take effective legislative, administrative, judicial and other measures to prevent acts of torture (Article 2(1)), and to ensure that all acts of torture are offences under national law (Article 4(1)).

Article 2(3) of the UNCAT provides that an order from a superior officer or a public authority may not be invoked as a justification of torture. The Act defines the link between superior order or instruction and the action of a junior staff member. Section 3(2)(d) provides that an order from a superior officer or a public authority is not a defence to torture, while S 4(2) says that a person who disobeys an instruction to undertake actions amounting to torture or CIDT shall not be punished for disobeying an order from whoever was instructing to commit prohibited acts of torture or ill-treatment.

This is clearly in compliance with the UNCAT and international law. The CAT has said that States parties must adopt measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating in or being complicit in acts of torture.<sup>106</sup>

The CAT has further stated that those exercising superior authority, including public officials, cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by their subordinates where they knew, or should have known that such impermissible conduct was occurring and they failed to take necessary preventive measures. The CAT said that the responsibility of any superior officials should 'be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.'<sup>107</sup> On the other hand, '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.'<sup>108</sup>

<sup>106</sup> CAT, General Comment No. 2, "Implementation of article 2 by State Parties", UN Doc CAT/C/GC/2 (24 January 2008), para 17.

<sup>107</sup> CAT, General Comment No. 2, "Implementation of article 2 by State Parties", UN Doc CAT/C/GC/2 (24 January 2008), para 26.

<sup>108</sup> CAT, General Comment No. 2, "Implementation of article 2 by State Parties", UN Doc CAT/C/GC/2 (24 January 2008), para 26.

Section 10 is a restatement of the concept of ‘command responsibility’. The concept of responsible command is often applied to security and armed forces including the army and Police. The ‘purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organizational structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.’<sup>109</sup>

The principle of superior responsibility extends also to civilian leaders. In the International Criminal Tribunal for Rwanda Judgment: *Kayishema and Ruzindana* the tribunal observed that:

*...the principle of superior responsibility applies not only to military commanders, but also encompasses political leaders and other civilian superiors in positions of authority. The crucial question is not the civilian status of the accused, but the degree of authority he or she exercised over his or her subordinates.*<sup>110</sup>

Section 10 is drafted in such a way that the superior officer becomes liable if: a) he knew or should have known and disregarded information that the subordinate was committing or was about to commit torture; b) the acts committed were in the sphere of responsibility and control of the superior officer; or where c) the superior failed to investigate, pursue administrative and disciplinary measures to prevent reoccurrence, and cooperate with judicial authorities to prosecute the offence.

Section 10 refers to ‘superior officer’ which is defined in the Act as a person in higher position of authority than the officer alleged to commit and act of torture. This therefore refers to public officials in higher positions as well as any other person in some official position higher than the perpetrator.

## Section 11

### “11. Right to complain.

- (1) *A person alleging that an offence under this Act has been committed, whether the person is the victim of the offence or not, has a right to complain to the Police, Commission or any other relevant institution or body having jurisdiction over the offence.*
- (2) *Where a complaint is made, a prompt investigation into the complaint shall be conducted, and where there are substantial grounds to support the complaint, the police shall arrest and detain the person and accordingly charge the person with the offence he or she is alleged to have committed.*
- (3) *Any person arrested and detained under subsection (2), shall be assisted in communicating as soon as legally possible with the nearest appropriate*

109 ICTY Judgment, *Hadzihasanovic* (IT-01-47-PT) Trial Chamber, 15 March 2006, par.66

110 ICTR-95-1-T, Trial Chamber, 21 May 1999; par. 213-6

*representative of the state of which he or she is a national or if the person is a stateless person, with the representative of the state where the person ordinarily resides”.*

## COMMENTARY

This section provides that persons have the right to complain about torture and other offences under the Act, and indicates who they may report to. Under this section, any person may report acts of torture. This need not be the victim. However, any person who suspects or has reasonable grounds to suspect that torture is being or has been committed has a duty to report. A person who alleges that an offence has been or is about to be committed may complain to the Police or to the Uganda Human Rights Commission or to any other institution or body having jurisdiction over the offence.

Section 11 is derived from Article 12 of UNCAT which requires States Parties to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is grounds to believe that an act of torture has been committed in their territory, together with Article 13. Article 13 of UNCAT obliges State Parties to ensure that any individual who alleges he has been subject to torture has the right to complain to and have his case promptly and impartially investigated by a competent authority. These rights pertain also to cruel, inhuman and degrading treatment or punishment.<sup>111</sup>

S 11(1) provides for the victim, as well as any other person, to complain that an offence has been committed under the Act. This is particularly useful when or if the victim of torture is deceased or otherwise incapacitated and unable to make a complaint of torture him or herself. A victim may for example be in detention where it is difficult to make a complaint of torture directly to the authorities. Despite any difficulties in making a complaint, the Act is clear that this is the victim, or other person's *right*, and that the relevant authorities may not refuse to allow the complainant to lodge a complaint.

The victim, or other person, may complain to the police, the Ugandan Human Rights Commission or to any other relevant body or institution which has jurisdiction over the offence.

The Committee against Torture has held that it is not a requirement even for the complainant to make a formal complaint to prompt an investigation, but that it is sufficient that torture or ill-treatment has been alleged and brought to the authorities' attention.<sup>112</sup> The CAT also does not require the complaint to be lodged in any particular format.

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111 By virtue of Article 16.

112 See *Blanco Abad v Spain*, CAT Communication No. 59/1996, 14 May 1998, para 8.6, and *Ltaief v Tunisia*, CAT Communication No. 189/2001, 14 November 2003 para 10.6; also *Abdelli v Tunisia*, CAT Communication No. 188/2001 (20 November 2002). (UN Doc CAT/C/31/D/188/2001), para 10.6. The Human Rights Committee has taken the same position: HRC General Comment No. 20, para 15.

Section 11(2) requires that a *prompt* investigation be undertaken. Although the Committee has not indicated a specific period from the time that the complaint has been made to the time of commencing or completing the investigation, it has stressed that promptness is essential to ensuring that the victim does not continue to be exposed to acts of torture or ill-treatment, but also to ensure that the physical evidence of torture does not disappear through a passage of time.<sup>113</sup>

The investigation that is carried out must be effective and be carried out by appropriately qualified individuals. It should aim to determine the nature and circumstances of the alleged acts and establish the identity of any person who may have been involved,<sup>114</sup> and to facilitate the victim's right of redress.<sup>115</sup>

The investigation should be conducted regardless of whether the suspect is known or present.<sup>116</sup>

Though the Act refers to a 'prompt' investigation, Article 13 of the UNCAT also requires that the investigation be 'impartial'. The Istanbul Protocol goes further and states that 'the fundamental principles of any viable investigation into incidents of torture are competence, impartiality, independence, promptness and thoroughness'.<sup>117</sup> The principles of impartiality and independence are important, because in many instances of torture involving public officials, the perpetrators of torture may be members of the police, military or prison service, or senior officers of State, and it may be difficult for members of the police or prosecution to investigate themselves or other officials. In such cases, an investigation by the Uganda Human Rights Commission, or other commission of inquiry may be a more effective manner of upholding the principles of impartiality and independence.

Under Article 13 of UNCAT, the State also has an obligation to ensure that complainants and witnesses are protected against all ill-treatment or intimidation which may arise as a consequence of the complaint or evidence given. The CAT called on Uganda to put such measures in place,<sup>118</sup> and these are now provided for in Section 21 of PPTA.

Section 11(2) provides that where there are substantial grounds to support the complaint, the police must arrest and detain the person and charge him or her with the offence which has been alleged to have been committed. This section derives from Article 6(1) of UNCAT which provides that a person against whom there is an allegation of an offence must be taken into custody to ensure his presence. It goes further to say that these measures must only be as are provided for in law, and may only be continued for as long as it is necessary for criminal or extradition proceedings to be instituted.

113 See *Blanco Abad v Spain*, CAT Communication No. 59/1996, 14 May 1998, para 8.2.

114 APT and CEJIL. (2008). *Torture in International Law: A Guide to Jurisprudence*, Geneva and Connecticut, p. 16.

115 United Nations. (9 August 1999). *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, para 76.

116 Ingelse, C. (2001). *The UN Committee against Torture: An Assessment*, Kluwer Law International. Note 20, p. 335, cited in Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture*. Geneva: Association for the Prevention of Torture, p. 52.

117 United Nations. (9 August 1999). *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, para 73.

118 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10(1).

Section 11(3) outlines the protection to be offered to persons detained on an allegation of having committed an offence under the Act. If the person is a non-resident, they should be assisted to communicate with the nearest appropriate representative of the state of which he or she is a national. In the event that the person is a stateless person, then they may communicate with the representative of the state where the person normally resides.

## Section 12

### “12. Institution of criminal proceedings

- (1) *Criminal proceedings under this Act, may be instituted in one of the following ways—*
  - (a) *by a police officer bringing a person arrested with or without a warrant before a magistrate upon a charge;*
  - (b) *by a public prosecutor or a police officer laying a charge against a person before a magistrate and requesting the issue of a warrant or a summons; or*
  - (c) *by any person, other than a public prosecutor or a police officer, making a complaint.*
- (2) *The validity of any proceedings instituted or purported to be instituted under subsection (1) shall not be affected by any defect in the charge or complaint or by the fact that a summons or warrant was issued without any complaint or charge or, in the case of a warrant, without a complaint on oath.*
- (3) *Any person, other than a public prosecutor or a police officer, who has reasonable and probable cause to believe that an offence has been committed by any person under this Act, may make a complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be.*
- (4) *A complaint made under subsection (3) may be made orally or in writing signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant.*
- (5) *Upon receiving a complaint under subsection (3), the magistrate shall consult the local authority of the area in which the complaint arose and put on record the gist of that consultation; but where the complaint is supported by a letter from the local authority, the magistrate may dispense with the consultation and thereafter put that letter on record.*
- (6) *After satisfying himself or herself that prima facie the commission of an offence has been disclosed and that the complaint is not frivolous or vexatious, the magistrate shall draw up and shall sign a formal charge containing a statement of the offence or offences alleged to have been committed by the accused.*
- (7) *Where a charge has been—*
  - (a) *laid under the provisions of subsection (1)(b); or*

- (b) drawn up under the provisions of subsection (9), the magistrate shall issue either a summons or a warrant, as he or she shall deem fit, to compel the attendance of the accused person before the court over which he or she presides, or if the offence alleged appears to be one which the magistrate is not empowered to try or inquire into, before a competent court having jurisdiction; except that a warrant shall not be issued in the first instance unless the charge is supported by evidence on oath, either oral or by affidavit.
- (8) Notwithstanding subsection (7), a magistrate receiving any charge or complaint may, if he or she thinks fit for reasons to be recorded in writing, postpone the issuing of a summons or warrant and may direct an investigation, or further investigation, to be made by the police into that charge or complaint; and a police officer receiving such a direction shall investigate or further investigate the charge or complaint and report to the court issuing the direction.
- (9) Without prejudice, nothing in subsection (7) shall authorise a police officer to make an arrest without a warrant for an offence other than a cognisable offence.
- (10) A summons or warrant may be issued on a Sunday.
- (11) Nothing in this section shall be so construed as to affect the powers conferred upon justices of the peace by the Justices of the Peace Act.

## COMMENTARY

One of the CAT recommendations in its 2005 concluding observations to Uganda was that Uganda take ‘vigorous steps to eliminate impunity for alleged perpetrators of acts of torture and ill-treatment’ by conducting prompt impartial and exhaustive investigations, trying and convicting perpetrators of torture and ill-treatment, and compensating victims.<sup>119</sup> This Section, together with Section 11, sets out the procedure for bringing perpetrators to book. It is essential that the State enforces these sections and does indeed prosecute perpetrators.

This section was imported from the Criminal Procedure Code Act<sup>120</sup> which deals with the manner of institution of criminal proceedings. It is clear that the manner of institution of proceedings under this Act does not differ from the usual manner of instituting proceedings for any other criminal offence. Accordingly, criminal proceedings may be brought by a police officer by bringing a person arrested with or without a warrant before a magistrate upon a charge, or by a public prosecutor or a police officer laying a charge against a person before a magistrate and requesting the issue of a warrant or a summons. A complaint may also be brought by any person, other than a public prosecutor or a police officer, making a complaint (S 12(1)).

A complaint of the commission of torture or any other offence may be made orally or in writing signed by the complainant. Where the complaint is made orally, the complaint must be reduced into writing by the magistrate and then signed by the complainant (Section 12(4)).

119 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10(g).

120 Sections 2, S 10, S 15, and S 16 of the Penal Code Procedure Act (CAP 116).

The drafters of the Act were mindful that in some instances the police may be reluctant to investigate allegations of torture, or may refuse to do so. It therefore provided for another mechanism to ensure that criminal matters could be brought before the courts. Section 12(3) provides for any person who is not a public prosecutor or a police officer but who has reasonable and probable cause to believe that an offence has been committed by any person to make a complaint of an alleged offence to a magistrate (Section 12(3)). The Act envisages that the magistrate or complainant must consult with the local authority before the complaint can be dealt with. Because the local authorities are elected by the community, they are seen to be legitimate representatives who can assist complainants and assess the 'bona fides' of a complaint. The Act requires that when a magistrate receives a complaint made by 'any person' other than a police official or prosecutor, he or she must consult the local authority of the area in which the complaint arose and record the details of the consultation (Section 12(5)). The magistrate does not need to consult the local authority if the complaint is supported by a letter from the local authority. Where the magistrate is satisfied on the basis of the complaint that *prima facie* an offence may have been committed and that the complaint is not frivolous or vexatious, the magistrate must draw up a formal charge containing a statement of the offence or offences alleged to have been committed by the accused.

It is however important to ensure that this procedure, which is designed to protect and assist complainants, does not in itself become a means of restricting people from instituting complaints of torture. This provision may potentially conflict with the spirit and purpose of Article 13 of the UNCAT which provides that a victim has the right to complain and have their case promptly investigated. The requirement that where the complainant is a person who is not a prosecutor or police official, the magistrate should consult with the local authority or that the complaint should be submitted by the local authority, detracts from the informal nature of the complaint envisaged by Article 13 of the UNCAT.

The magistrate in his or her discretion has to decide whether to issue either summons or a warrant to ensure the attendance of the accused in court. If it appears that the magistrate does not have jurisdiction to hear the matter, then the warrant should indicate that the accused appear before the relevant court (Section 12(7)).

A magistrate may also postpone the issuance of summons or a warrant until more investigations are carried out on the complaint, and may instruct a police officer to carry out further investigation on the matter (Section 12(8)).

This section does not affect the complainant's right to complain to the UHRC or other relevant body or institution having jurisdiction to over the offence (Section 11 (1)).

## Section 13

### "13. Control over private prosecutions.

(1) *Where criminal proceedings under this Act have been instituted, the Director of Public Prosecutions may—*

*(a) take over and continue the conduct of those proceedings at any stage before the conclusion of the proceedings;*

*(b) discontinue the prosecution of the proceedings at any stage; and*

*(c) require the victim or the person reporting the offence—*

*(i) to give him or her all reasonable information and assistance; and*

*(ii) to furnish him or her with any documents or other matters.*

*(2) For the avoidance of doubt, any person other than a public prosecutor or a police officer, may institute criminal proceedings for any offence committed under this Act.*

*(3) This section shall not prejudice the mandate of the Uganda Human Rights Commission to entertain matters under this Act as cases of human rights abuse, and in such cases, the Commission shall deal with the cases as it ordinarily deals with human rights cases”*

## COMMENTARY

Section 13 recognises the power of the Director of Public Prosecutions (DPP) under Article 120 of the Constitution to institute criminal proceedings and to take over and manage public prosecutions instituted by any other person or authority. If a person commences a prosecution, the DPP may take over and continue or discontinue the prosecution. Although it is not provided for in the Constitution, Section 13(1c) provides that in the case where the DPP takes over or discontinues a prosecution, the DPP may require the victim or person reporting the offence to give him or her all reasonable information and assistance, and furnish him or her with any documents or other matters.

Section 13(2) reiterates that any person, besides a police officer or public prosecutor, may institute criminal proceedings under the Act (Section 12(1c)). It also does not detract from the mandate of the Uganda Human Rights Commission to entertain a matter as a human rights abuse, following its usual procedure (S 13(3)). Article 52 (1a) of the 1995 Constitution of Uganda, mandates the UHRC to ‘investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right’. Article 53(1) gives the UHRC powers of a court to issue summons or other orders requiring the attendance of any person before the UHRC and the production of any document or record relevant to any investigation by the UHRC; to question any person in respect of any subject matter under investigation before the UHRC; to require any person to disclose any information within his or her knowledge relevant to any investigation by the UHRC; and to commit persons for contempt of its orders. The Constitution also gives UHRC powers to order the release a detained or restricted person; payment of compensation; and any other legal remedy or redress. Since torture is a human rights issue, the Act retains the constitutional mandate, which means that a civil action on torture can be lodged before the UHRC.

## PART IV—USE OF INFORMATION OBTAINED BY TORTURE

### Section 14

#### **“14. Inadmissibility of evidence obtained by torture.**

- (1) Any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceeding.*
- (2) Notwithstanding subsection (1), such information, confession or admission may be admitted against a person accused of torture as evidence that the information, confession or admission was obtained by torture”*

### COMMENTARY

Torture is often committed for a reason such as obtaining information or a confession from a person, which is used to convict a person or to find information relating to an offence. In many criminal justice systems, there is an over reliance on using confessions, often obtained through torture or duress, to obtain the information necessary for a conviction, rather than to do the necessary investigation to find sufficient evidence for a conviction.

To effectively prevent torture and other forms of ill treatment, there is need to exclude from admissibility any confession or admission obtained by torture.<sup>121</sup> Section 14 therefore prohibits the admissibility of any information, confession or admission obtained by torture. The statements may not be used against the victim or a third party. However, such information, obtained by torture is admissible in evidence against the perpetrator of the torture.

Section 14 takes Section 24 of the Evidence Act CAP. 6 further. Section 24 stipulates that ‘a confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made’. In terms of Section 14 of the Act, there is no requirement that the information, admission or confession be ‘untrue’, and even if the statement or information is ‘true’ it is not admissible in evidence against that person as far as it was obtained by torture.

This section is derived from Article 15 of UNCAT which says that ‘any statement which is established to have been made as a result of torture, shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.’ This prohibition is an essential component to the prohibition on torture, and it aims to ensure that the value of any statement obtained from torture is nullified.<sup>122</sup> Section 14 is an affirmation of this position and an indication of the

<sup>121</sup> Article 15 of the Convention requires State Parties to ensure that all statements obtained by torture are not invoked as evidence in proceedings except against the person accused of torture as evidence that the statement was made.

<sup>122</sup> *PE V France*, CAT Communication, CAT/C/29/D/193/2001 (19 December 2002), para 3.2.

absolute prohibition on torture. The prohibition against the use of evidence obtained in torture must be observed in all circumstances.<sup>123</sup>

Although section 14 only refers to torture, the Committee against Torture has said that the prohibition on the use of confessions obtained through torture applies equally to confessions obtained through cruel, inhuman and degrading treatment or punishment.<sup>124</sup>

Article 15 refers to any 'statement' obtained as a result of torture. However, Section 14(1) is broader than this and refers to any 'information, confession, or admission', which could include any physical evidence discovered as a result of torture, as well as a statement or confession. The CAT has indicated that the prohibition applies to *any* evidence obtained as a result of a statement obtained by torture.<sup>125</sup>

In *PE V France*, the CAT considered that a statement by the victim of torture and used against another person cannot be used in evidence against that person.<sup>126</sup> This has also been affirmed in the South African case of *S v Mthembu*, where the court held that evidence that was pointed out by a victim of torture could not be used as evidence in the trial of his accomplice, even where the victim testifies years after the torture.<sup>127</sup>

The prohibition on the use of information obtained as a result of torture applies to *any proceedings*, including court, and non-court proceedings, such as penal or administrative hearings, and extradition hearings.<sup>128</sup>

Section 14(2) restates the position of Article 15 of the UNCAT that information, statement or confession obtained through torture may be used as evidence against a person accused of torture to prove that the allegation was made as a result of torture. This means that such information may be used by the victim as evidence to prove that he or she was tortured to obtain information.

The ban on the use of evidence obtained as a result of torture means that law enforcement officials and investigators are required to obtain their evidence through a thorough investigation of the facts and evidence. They can no longer rely only on confessions obtained under duress or torture.

If a person alleges during proceedings that the evidence was obtained as a result of torture, the presiding officer is obliged to hold an immediate inquiry into whether the allegations are correct. In a criminal trial, such proceedings are known as a 'trial within a trial'. If it is established that the evidence was obtained through torture, then

123 On 22 November 2001, the Committee adopted a statement in connection with the events of 11 September which was sent to each State party to the Convention (A/57/44, paras. 17-18), and reaffirmed in CAT General Comment No. 2, para 6.

124 CAT General Comment No. 2, para 6.

125 See CAT, Concluding Observations on the UK, UN Doc. A/54/44, 1999 ss 76(d); CAT, Concluding Observations on Zambia, UN Doc. A/57/44, 2002, ss3(b)(iii).

126 *PE V France*, CAT Communication, CAT/C/29/D/193/2001 (19 December 2002).

127 *S v Mthembu* (379/07) [2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA) (10 April 2008).

128 *PE V France*, CAT Communication, CAT/C/29/D/193/2001 (19 December 2002), para 3.3.

that evidence must be discarded and cannot be used in the trial. If the court finds that the evidence was not obtained as a result of torture, then that evidence may be used in the proceedings.

Once a person alleges torture or ill-treatment, then the provisions of Article 12 and 13 of the UNCAT, and sections 11 and 12 of the Act come into effect. The allegations of torture must in itself be investigated for the purpose of establishing the facts relating to the alleged incidents of torture, with a view to identifying those responsible for torture and for facilitating their prosecution, as well as for allowing for redress towards the victim.<sup>129</sup> It should also be investigated for the purpose of protecting the victim against further incidents of torture, or from reprisals as a result of having made a complaint of torture.

## Section 15

### **“15. Prohibition of use of information obtained by torture.**

*A person who uses information which he or she knows or ought to have reasonably known to have been obtained by means of torture in the prosecution of the person tortured, commits an offence and is liable on conviction to imprisonment not exceeding two years or a fine not exceeding forty eight currency points or both”.*

## COMMENTARY

This section reinforces Section 14. It creates criminal liability for any person who uses tainted information in the prosecution of the tortured person. This is intended to strengthen the prohibition on the use of evidence obtained through torture. The penalty of up to two years imprisonment illustrates that this crime is considered a serious one.

The person should know or should have reasonably known that the information is tainted by torture. A person may know or ‘reasonably’ be considered to know that information was obtained by torture if after the victim alleged that he or she had been tortured, that person has made inquiries into the veracity of the claims of torture. This requires a ‘reasonable’ inquiry rather than an inquiry which results in information ‘beyond reasonable doubt’. This section also brings into effect the obligations under Articles 12 and 13 of the UNCAT to institute an investigation where there are reasonable grounds to believe that an act of torture was committed. The section punishes a person who both fails to ensure that the matter is investigated, and who also continues to use the evidence in a trial against the person.

This section places an obligation on persons who use information to exercise due diligence to determine the source of the information and to ensure that the information was not obtained through torture. For instance, if a person had to make a statement that they were tortured to a magistrate during the course of a court

129 United Nations (9 August 1999) Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

appearance or during a trial, the magistrate should order an investigation into the allegations. Similarly, a prosecutor who suspects that the information was obtained under torture, can order an investigation into the allegations under S 11(2).

The section penalizes the use of evidence in the 'prosecution' of a person who has been tortured. As discussed above (under the discussion of Section 14), the prohibition on the use of torture at international law goes wider, and refers to the use of evidence obtained through torture in proceedings against any other person. It also prohibits the use of torture in *any* proceedings, and not only in a *criminal prosecution* of the victim of torture.

## PART V—TRANSFER OF DETAINEES

### “16. No transfer of persons where likelihood of torture exists.

(1) *A person shall not where there are reasonable grounds to believe that a prisoner or detainee is likely to be tortured—*

- *release, transfer or order the release or transfer of a prisoner or detainee into the custody or control of another person or group of persons or government entity;*
- *transfer, detain or order the transfer or detention of a prisoner or detainee to a non-gazetted place of detention; or*
- *intentionally or recklessly abandon a prisoner or detainee, in any place where there are reasonable grounds to believe that the prisoner or detainee is likely to be tortured.*

(2) *Subsection (1) applies to any prisoner or detainee in the custody of any public official irrespective of the—*

*(a) citizenship of the prisoner or the detainee;*

*(b) location in which the prisoner or detainee is being held in custody or control; or*

*(c) location in which or to which the transfer or release is to take place or has taken place”.*

### COMMENTARY

Section 16 creates a deterrent measure to prohibit the transfer of persons to places where there is a likelihood of torture occurring. This section is based on the CAT’s General Comment 2, when talking about a State’s responsibility to prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, such as in prisons, hospitals, schools, institutions that engage in the care of children, the aged, mentally ill or disabled, in military institutions, and well as other contexts ‘where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.’<sup>130</sup> The obligation to take steps to prevent torture in any *territory* under the control of the State includes situations where the State exercises de facto or de jure control over persons in detention.<sup>131</sup>

The Committee against Torture is clear that where State authorities or others acting in an official capacity or under the colour of the law, know or have reasonable grounds to believe that torture or ill-treatment will be committed, by State actors, non-State

<sup>130</sup> CAT, General Comment 2, Implementation of Article 2 by States Parties, CAT/C/GC/C(24 January 2008) para 15.

<sup>131</sup> CAT, General Comment No. 2, para 17.

officials or private actors, and they fail to investigate, prosecute and punish the actors, the State bears responsibility, and the officials who did not take measures to prevent the acts of torture should be held responsible for consenting or acquiescing to such impermissible acts.<sup>132</sup> The Committee cites the specific example of where a person is to be transferred or sent to the custody of an individual or institution known to have engaged in torture or ill-treatment, or which has not implemented adequate safeguards. The officials should be ‘subject to punishment for ordering, permitting or participating in this transfer contrary to the State’s obligations to take effective measures to prevent torture.’<sup>133</sup>

This section is also partially drawn from Article 3 of the UNCAT which deals with *non refoulement* (as explained below in the discussion of Section 22), which prohibits the return, expulsion or extradition of a person to another State where they are at risk of being tortured or subject to ill-treatment.

Detainees and prisoners are particularly vulnerable to torture and to cruel, inhuman and degrading treatment or punishment, and conditions in prison and police cells are often deplorable.<sup>134</sup> Pre-trial detainees and detainees who are children are often especially vulnerable,<sup>135</sup> as are detainees with disabilities, certain diseases, drug addicts, the elderly, or persons suspected of specific crimes,<sup>136</sup> foreigners, women, gays, lesbians and transgender persons.<sup>137</sup> Section 16 thus seeks to protect detainees and prisoners by creating personal responsibility for the person who deals with them, if they fail to take measures to protect them. The section prohibits a person from ordering or carrying out the transfer or release of a prisoner or detainee into the custody or control of another person, group of persons or government entity (Section 16(1)) where there are reasonable grounds to believe that person is likely to be tortured. This applies to prisoners or detainees who are released or transferred from state to state facility, as well as those released to any privately run facility.

The section also prohibits the transfer or detention of persons in non-gazetted places of detention (such as safe houses), where there are reasonable grounds to believe that the person may be tortured (Section 16(1b)). It is interesting to note that the CAT in its concluding observations to Uganda called on the State to abolish the use of ‘ungazetted’ or unauthorized places of detention or ‘safe houses’ and to provide information about all places of detention.<sup>138</sup>

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132 CAT, General Comment No. 2, “Implementation of article 2 by State Parties”, UN Doc CAT/C/GC/2 (24 January 2008), para 18.

133 CAT, General Comment No. 2, “Implementation of article 2 by State Parties”, UN Doc CAT/C/GC/2 (24 January 2008), para 19.

134 See for instance, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. A/HRC/13/39/Add.5 (5 February 2010), Section E

135 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. A/HRC/13/39/Add.5 (5 February 2010), Section E.

136 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. A/HRC/13/39/Add.5 (5 February 2010), para 237.

137 A/HRC/13/39/Add.5 Para 257.

138 United Nations, Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Uganda, CAT/C/CR/34/UGA (21 June 2005), para 10(i).

In addition, a person is prohibited from intentionally or recklessly abandoning a prisoner or detainee in any place where there are reasonable grounds to believe they may be tortured (S 16(1)).

Though the Act refers specifically to the risk of 'torture', an analysis of the CAT's views in General Comment No. 2 indicate that these provisions should apply to the risk of ill-treatment as well.

The Act makes plain that Section 16(1) applies to instances where a prisoner or detainee is in the custody of a public official. The section applies to prisoners or detainees irrespective of their citizenship; the location where they are being held; or the location to which they are taken for transfer or release. The Act does not define prisoner or detainee, though the interpretation should be considered as broadly as possible in keeping with the Committee's observations in General Comment No. 2.

This section does not create criminal liability or make it an offence to order or facilitate the transfer or release of a detainee in such circumstances. However, a person may become liable for prosecution of an offence if their actions fall under the ambit of Sections 4, 7, or 9 of the Act or of any other criminal legislation.

## PART VI—JURISDICTION OVER THE OFFENCE OF TORTURE

### Section 17

#### “17. Jurisdiction of Uganda courts in relation to the offence of torture.

(1) *The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed—*

(a) *in Uganda;*

(b) *outside Uganda—*

(i) *in any territory under the control or jurisdiction of Uganda;*

(ii) *on board a vessel flying the Uganda flag or an aircraft which is registered under the laws of Uganda at the time the offence is committed;*

(iii) *on board an aircraft, which is operated by the Government of Uganda, or by a body in which the government of Uganda holds a controlling interest, or which is owned by a company incorporated in Uganda;*

(c) *by a citizen of Uganda or by a person ordinarily resident in Uganda;*

(d) *against a citizen of Uganda;*

(e) *by a stateless person who has his or her habitual residence in Uganda; or*

(f) *by any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda”*

### COMMENTARY

This section aims to give the courts jurisdiction to try an offence of torture which occurs within the country, as well as to establish jurisdiction for offences occurring outside of the country under certain conditions (*universal jurisdiction*). This means that the Ugandan courts have jurisdiction to try offences of torture committed outside Uganda, provided the offence was committed within Uganda’s territory or jurisdiction, or where the offender is a victim, a stateless person, a resident in Uganda or any person with in Uganda’s territory. The section also gives courts the power to try foreigners present in Uganda’s jurisdiction who may have committed acts of torture outside Uganda.

Article 5(1) of the UNCAT obliges States parties to establish under its national laws jurisdiction for offences under Article 4 (torture). This applies in the case of where the offence is committed in any territory under the jurisdiction of the State, or on board

a ship or aircraft registered to that State. It also applies where an alleged offender is a national of the State and where the victim is a national of that State. Article 5(2) of the UNCAT also obliges States to take measures to establish jurisdiction over offences under Article 4 where the alleged offender is present in any territory under its jurisdiction, and where it does not extradite him or her in terms of Article 8.

Section 17(1)(a)-(f) essentially incorporates these provisions into the law in respect of offences committed in terms of the Act and grants the Chief Magistrates' court the jurisdiction to deal with them.

Some of these provisions are slightly broader or more specific than the requirements of UNCAT. For example, S 17(1)(b)(iii) grants jurisdiction 'on board an aircraft, which is operated by the Government of Uganda, or by a body in which the government of Uganda holds a controlling interest, or which is owned by a company incorporated in Uganda'. To some extent, this provision ensures that torture which is committed on board a privately owned aircraft may still fall within the jurisdiction if it is owned by a company incorporated in Uganda. The Act also includes jurisdiction over a stateless person who has his or her habitual residence in Uganda (Section 17(1e)).

The principle of establishing jurisdiction over offences which take place outside the jurisdiction of a State is known as *universal jurisdiction*. This is the ability of the State to prosecute person present in the territory of the State for crimes committed outside the State's territories, which are not linked to that State by the nationality of the suspect or of the victim, or by harm to the State's own interests.<sup>139</sup> The rationale behind universal jurisdiction that torture is considered as an infringement of fundamental human rights and legal values shared by the international community. It is the potential threat that these crimes pose to both international and national interests if the perpetrators of these acts were found without steps being taken to investigate these actions and to prosecute them.<sup>140</sup> Under the Convention, the provision of universal jurisdiction ensures that a torturer does not escape the consequences of his or her actions and find a safe haven in another country.<sup>141</sup> Section 17(1)(f) establishes this universal jurisdiction over an alleged perpetrator on the sole basis that the perpetrator is present in any territory under the control and jurisdiction of Uganda, even though the perpetrator may have committed the offence in another country or jurisdiction.

Article 5(2) of the UNCAT obliges States to establish jurisdiction over an alleged offender who is present in its territory where it does not extradite him or her in terms of Article 8 to any State having jurisdiction in terms of Article 5(1). This provision in particular ensures that if the State in whose territory the alleged perpetrator is present does not prosecute him or her, then the State must extradite him or her to a State that will prosecute him or her. Section 22(1) and Section 22(5) make provision for the extradition of a person under such circumstances.

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139 Wendland, L. (2002). A Handbook on State Obligations under the UN Convention against Torture. Geneva: Association for the Prevention of Torture, p. 63.

140 Wendland, L. (2002). A Handbook on State Obligations under the UN Convention against Torture. Geneva: Association for the Prevention of Torture, p. 63.

141 Wendland, L. (2002). A Handbook on State Obligations under the UN Convention against Torture. Geneva: Association for the Prevention of Torture, p. 63.

In practice, if there are reasonable grounds to suspect that a person present in a State's territory has committed an act or torture, the State is obliged to take that person into custody, or otherwise ensure their presence and conduct a preliminary inquiry. If there are no requests for extradition to the State in which the crime was allegedly committed, or in the State where the suspect or victim belongs, then the State must prosecute the suspect.<sup>142</sup>

Developments in international law suggest that this universal jurisdiction and obligation to prosecute alleged torturers extends even to the highest officials and heads of States.<sup>143</sup>

## Section 18

### **“18. Torture bailable by the Chief Magistrates Court.**

*Bail in respect of the offence of torture may be granted by a Chief Magistrate”*

## COMMENTARY

The Chief Magistrates' Court may grant bail in respect of the offence of torture. Bail is a constitutional right and this provision was inserted to clarify that despite the gravity of the offence of torture, a person charged with this offence may still be granted bail pending trial.

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142 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention.* A/HRC/13/39/Add.5 (5 February 2010), para 153.

143 Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture.* Geneva: Association for the Prevention of Torture, p. 40. The International Criminal Court; the Statutes of the International Tribunal for the Former Yugoslavia, and the Statute for the International Tribunal for Rwanda extend jurisdiction to the highest officials and heads of States.

## PART VII—GENERAL

### Section 19

#### **“19. Consent of DPP required for prosecution of non citizen.**

*A person who is not a citizen of Uganda shall not be prosecuted for an offence under this Act except with the consent of the Director of Public Prosecutions”*

#### **COMMENTARY**

A non-citizen cannot be prosecuted for an offence under the Act unless the DPP has consented.

This Section has to be read together with Section 17, which establishes the court’s jurisdiction over offences under the Act. This includes the universal jurisdiction (discussed above) pertaining to ‘any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda’ (Section 17(1f)). This is an obligation at international customary law, and enshrined in Article 5(2) of the UNCAT. The principle of universal jurisdiction is important to ensure that perpetrators of torture do not seek a safe haven from prosecution.

In terms of Section 19, a non-citizen cannot be prosecuted for an offence under the Act unless the DPP has consented. Section 19 has wider implications, as it means that not only a ‘person who is for the time being present in Uganda’, but also a stateless person who has their habitual residence in Uganda, as well as in respect of any person who has committed an offence under the Act in Uganda or in territory under the control or jurisdiction of Uganda.

One could wonder why special consent of the Director of Public Prosecutions is required before the prosecution may take place. Section 19 reflects the sensitivity of diplomatic relations as well as the international nature of the offence when foreigners are involved. In this regard therefore, the DPP’s office is best placed to handle investigation that may be within or outside the country if necessary. However, it is important that this provision is not used to create an obstacle to the prosecution of alleged perpetrators of torture, or to create any unreasonable delays in prosecution, as thus might undermine the purpose of the Act and the principle of universal jurisdiction.

### Section 20

#### **“20. Duty to report torture**

*A person who suspects or has reasonable grounds to suspect that torture is being committed by a public official, person acting in official capacity or private capacity, has a duty to report to the police, the commission, of his or her suspicion of torture”*

## COMMENTARY

Section 20 places an obligation on all persons to report torture or suspicions of torture to the police or the Uganda Human Rights Commission. This complements Section 11(1) which outlines the right of a victim or any other person to complain to the police, UHRC or any other body having jurisdiction over the offence.

The authorities have an obligation to process an investigation wherever there are reasonable grounds to believe that an act of torture has been committed, and whatever the origin of the suspicion.<sup>144</sup> This provision is in conformity with Article 12 of the UNCAT. It shifts the responsibility of commencing with an investigation to the State authorities in order to ‘counterbalance the vulnerability of the victim and the de facto inaccessibility of the complaints mechanisms, particularly in the context of detention.’<sup>145</sup> Victims, particularly those in detention, are often afraid to report an incident of torture for fear of reprisals, or they may not have the means to do so.

### Section 21

#### **“21. Protection of victim, witnesses and persons reporting torture.**

*It shall be the responsibility of the State to ensure that any person including the—*

*(a) complainant;*

*(b) witnesses; or*

*(c) person making a complaint, whether the victim or not;*

*is protected against all manner of ill-treatment or intimidation as a consequence of his or her complaint or any evidence given.”*

## COMMENTARY

Section 21 obliges the State to offer protection to any person who is a complainant, witness or any person who makes a complaint of torture.

Under Article 13 of UNCAT, the State has an obligation to ensure that complainants and witnesses are protected against all ill-treatment or intimidation which may arise as a consequence of the complaint or evidence given. The CAT called on Uganda to put such measures in place.<sup>146</sup> Article 49 of the Measures and Guidelines for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)<sup>147</sup> goes further and calls on States to ensure that victims of torture and ill-treatment, as well as witnesses, those conducting the investigation, other human rights defenders and families are

<sup>144</sup> *Blanco Abad v. Spain*, CAT Communication No. 59/1996, para. 8.2.

<sup>145</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*. A/HRC/13/39/Add.5 (5 February 2010), para 135.

<sup>146</sup> United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10(l).

<sup>147</sup> Adopted by the African Commission on Human and Peoples’ Rights, during the 32<sup>nd</sup> ordinary session, held in Banjul, The Gambia, from 17 to 23 October 2002.

protected from violence, threats of violence or any other form of intimidation that arises following a report or investigation.

Following the recommendations of CAT to Uganda, Section 21 of the Act obliges the State to ensure that any person, including a complainant, witness or victim is protected against ‘all manner of ill-treatment or intimidation as a consequence of his or her complaint or any evidence given’.

Provisions of Section 21 should to be read together with Whistleblowers Protection Act 2010, which deals with the procedures for protection of a person who discloses: a criminal act or other unlawful act that has been committed; that a miscarriage of justice has occurred or is likely to occur; that a person has failed to comply with any legal obligations; or that any such matters have been deliberately concealed (Section 2). Disclosures of impropriety may be made to several bodies including the police, the Uganda Human Rights Commission and the Directorate of Public Prosecutions (Section 4(3)). If a whistleblower who makes a disclosure has reasonable cause to believe that his or her life or property, or that of a family member is endangered, then the whistleblower may request State protection and the State must provide the protection considered adequate (Section 11(1)). The Act does not specify what that protection should be.

It is not necessary that protection be offered to victims and complainants outlined in Section 21 be provided in terms of the Whistleblowers Protection Act.

Protection from victimization may take many forms. The victim should be in a safe place where they are not at further risk of harm. Because there is a clear duty on the State to provide protection, it must also ensure that it has the means to do it, or must enable to victim or other person the means to protect themselves. This may involve relocation of housing, changing the schools which the children attend, and looking for new employment, as well as other security measures. These measures should persist as long as the threat of harm exists.

Detainees are particularly vulnerable to reprisals and the threat or reprisals, and the reprisals may take many forms. The Special Rapporteur on Torture documented many of these, including verbal threats against the victim’s family members outside of detention. However, physical abuse was most often reported, both as a threat to the complainant, as well as actual assaults. These assaults were also conducted in full view of other detainees as a lesson not to complain to the authorities.<sup>148</sup> The Special Rapporteur drew attention to the particular need for *effective* complaints mechanisms and oversight bodies, so that they could respond to any complaints of ill-treatment.

If the person requiring protection is a detainee, then he or she may need to be moved to another place of detention where it is not known that they have made an allegation of torture. Other measures could involve the moving implicated personnel to a different facility or the suspension of the alleged perpetrator from duty.<sup>149</sup>

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<sup>148</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention.* A/HRC/13/39/Add.5 (5 February 2010), para 120

<sup>149</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention.* A/HRC/13/39/Add.5 (5 February 2010), para 112.

The right to protection from reprisals is fundamental to the right to complain. A failure to protect a person who makes a complaint jeopardizes the credibility of the system and the functioning of the complaints mechanism. 'States therefore have to inquire into all reported cases of intimidation and set up a program that protects complainants, witnesses and those who might be further endangered.'<sup>150</sup>

## Section 22

### **"22. Restriction on extradition or deportation where person is likely to be tortured**

- (1) *Torture is an extraditable offence.*
- (2) *Notwithstanding subsection (1) and the provisions of the Extradition Act, a person shall not be extradited or deported from Uganda to another state if there are substantial grounds to believe that that person is likely to be in danger of being subjected to torture.*
- (3) *For the purposes of subsection (2), it shall be the responsibility of the person alleging the likelihood of being tortured to prove to the court the justification of that belief.*
- (4) *In determining whether there are substantial grounds for believing that a person is likely to be tortured or in danger of being subjected to torture under subsection (2), the court shall take into account all factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state seeking extradition or deportation of the person.*
- (5) *Where a person is not extradited or deported as a consequence of the provisions of this section, that person shall be tried in Uganda.*

## COMMENTARY

This section prohibits the deportation or extradition of a person to a place or country where there is a likelihood of such person being tortured. It should however be noted that where a person is accused of torture, that person may be extradited to stand trial but that person must not be extradited where there are substantial grounds to believe that the person is likely to be tortured. The provision applies to refugees, asylum seekers, stateless persons, and those who are to be extradited: the transfer of an individual from one country to another where he or she is wanted on suspicion of having committed a crime.

This section is drawn from Articles 3 and 8(1) of the UNCAT. Article 3 provides:

1. *No State Party shall expel, return ('Refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

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<sup>150</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention.* A/HRC/13/39/Add.5 (5 February 2010), para 112.

2. *For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of consistent pattern of gross, flagrant or mass violations of human rights.*

The principle of non-refoulement appears in many international treaties and principles.<sup>151</sup> In interpreting the provision, the UN Human Rights Committee summarised non-refoulement as:

*States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*<sup>152</sup>

Article 3 of the UNCAT overrides any extradition treaty that may exist between countries, and also applies where no extradition treaty exists. It is a principle founded in international customary law, and thus does not only apply to State Parties to the Convention.<sup>153</sup> The CAT considers that Article 3 applies both to the threat of torture, and to the threat of cruel, inhuman and degrading treatment or punishment.<sup>154</sup>

Article 3 is an important provision in the UNCAT, and the majority of the cases heard by the CAT deal with appeals against the decision of a country to refouler a person. In its General Comment 1, giving guidelines on the application of Article 3, the Committee has stated that the burden of proof lies with the applicant to present an arguable case, or a factual basis for the applicant's position sufficient to require a response from the State Party.<sup>155</sup> The risk of torture must be assessed on 'grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.'<sup>156</sup> The person must establish that he or she would be in danger of being tortured, and the grounds for believing this are substantial. The danger must be personal and present. All information may be introduced by either party in this matter.<sup>157</sup>

In deciding on whether there are 'substantial grounds' for believing that the person will be in danger of being subjected to torture, the CAT stated that it must take into account the factors mentioned in Article 3(2). The aim of the investigation is to establish whether the person would personally be at risk. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not in itself

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151 See for instance: Article 33 of the 1951 Convention Relating to the Status of Refugees, No. 2545, 189 UNTS 150; Article 3 of 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967, A/RES/2132 (XXII) of 14 Dec. 1967; Article II(3) of the 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45; Article 3 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

152 Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), at para. 9.

153 Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture*. Geneva: Association for the Prevention of Torture, p 33.

154 CAT, General Comment No. 2, "Implementation of article 2 by State Parties", UN Doc CAT/C/GC/2 (24 January 2008), para 6.

155 Committee against Torture, General Comment No. 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003), para 5.

156 CAT, General Comment No. 1, para 6.

157 CAT, General Comment No. 1, para 7.

constitute sufficient ground for determining whether the person would be at risk. Additional grounds must exist which indicate that the individual concerned would be personally at risk. Similarly, the absence of a pattern of gross, flagrant pattern of violations of human rights does not mean that a person cannot be considered in danger of being subjected to torture.<sup>158</sup>

The Committee has further stated that though there may be some doubt in the veracity of the facts adduced by the person resisting return, it is important that his or her security is not endangered. In order to do this, it is not necessary that all the alleged circumstances be proved, but the Committee considers it sufficient that they be substantial and reliable.<sup>159</sup>

The Committee has elaborated on a list of non-exhaustive factors that may be considered in deciding whether a person is at 'substantial risk' of being tortured in the country which they will be returned to:

- Evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the country;
- Whether the applicant has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity in the past.
- Whether there is there medical or other independent evidence to support the applicant's claim that he or she has been tortured in the past. Has the torture any aftereffects?
- Whether the applicant has engaged in political or other activity within or outside the State concerned to make him or her particularly in danger.
- Evidence of the credibility of the applicant.
- Factual inconsistencies in the claim, and whether they are relevant.<sup>160</sup>

Section 22(2), (3) and (4) are substantially based on Article 3 of the UNCAT, and thus the same considerations would apply to a Uganda court deciding whether substantial grounds exist for believing a person would be subject to torture or ill-treatment.

Article 8(1) of the UNCAT states that a person may be extradited to another country for the offence of torture. The Act is clear that any extradition, for any offence, including torture, would be subject to the provisions of S 22.

Section 22(5) provides that where a person is not extradited or deported, as a consequence of these provisions, the person must be tried in Uganda. Section 17(1) deals with the jurisdiction of the Chief Magistrates' court to try an offence committed under the Act. Though Section 22(5) does not specify that the crime for which a person must be tried, it applies to offences committed under the Act.

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158 See *Balabou Mutombo v Switzerland*, Communication No. 13/1993 at para 9.3.

159 *Balabou Mutombo v Switzerland*, Communication No. 13/1993 at para 9.2.

160 CAT, General Comment 1, para 8.

## Section 23

### “23. No amnesty for offence of torture

*Notwithstanding the provisions of the Amnesty Act, a person accused of torture shall not be granted amnesty”*

#### COMMENTARY

Considering the absolute prohibition of the torture as well as the seriousness of the offence of torture, a person accused of torture cannot be granted amnesty. Under the Amnesty Act, 2000, an amnesty was declared for any Ugandan who since 26 January 1986 has or is engaged in any war or armed rebellion against the Republic of Uganda though participation in combat, collaborating with perpetrators of war or armed rebellion, committing any other crime in furtherance of the war or rebellion, or assisting or aiding the conduct or prosecution of the war or armed rebellion (Section 3(1)). The Amnesty Act protects the person involved from any form of punishment (Section 3(2)).

In terms of Section 23 of the Prevention and Prohibition of Torture Act, a person cannot be granted amnesty under the Amnesty Act, or any other legislation, if the person considered for amnesty is accused of torture. In other words, torture is an offence for which no amnesty may be granted. Indeed, Section 23 of the Act provides that no one accused of torture shall be granted amnesty, notwithstanding the provisions of the Amnesty Act. Since the Act refers to people ‘accused’ of torture, it is not necessary for them to have been convicted of torture to disqualify them from amnesty.

The CAT has been critical of amnesties and impunities as a result of national laws, and has stressed that in such cases, the Convention should override such provisions. It should therefore be considered that the duty to investigate extends to instances where alleged perpetrators have been granted amnesty elsewhere.<sup>161</sup> This is part of the general and absolute prohibition of torture.

It is likely that any person seeking amnesty under the Amnesty Act might do so for acts constituting torture or cruel, inhuman or degrading treatment or punishment. Any amnesty granted for such acts would be in clear violation of the principle of impunity, and of the absolute prohibition of torture. Though CAT did not address the issue of amenities in its Concluding observations to Uganda in 2005 it did call on the State to take ‘vigorous steps to eliminate impunity for alleged perpetrators of acts of torture and ill-treatment, carry out prompt, impartial and exhaustive investigations, try and, where appropriate, convict the perpetrators of torture and ill-treatment, impose appropriate sentences on them and properly compensate the victims.’<sup>162</sup> This recommendation must also have applied to perpetrators involved in ‘war like’ activities against the Republic of Uganda where the perpetrators were involved in torture or ill-treatment.

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161 Wendland, L. (2002). *A Handbook on State Obligations under the UN Convention against Torture*. Geneva: Association for the Prevention of Torture, p. 45.

162 United Nations, Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Uganda*, CAT/C/CR/34/UGA (21 June 2005), para 10(g).

## PART VIII—MISCELLANEOUS

### Section 24

#### “24. Regulations

- (1) *The Minister may, by statutory instrument, make regulations for better carrying into effect the provisions of this Act.*
- (2) *The Minister shall, as soon as practicable after the publication of a statutory instrument under this section, cause the instrument to be laid before Parliament.*
- (3) *Notwithstanding the Interpretation Act, the Minister may, while exercising his or her powers under subsection (1), by statutory instrument, prescribe such fines and imprisonment as may be appropriate in the circumstances which may be in excess of the penalties prescribed by section 38 of the Interpretation Act”*

#### COMMENTARY

This section grants the Minister power to make regulations to enable effective implementation of the Act.

### Section 25

#### “25. Amendment of Schedules

*The Minister may, by statutory instrument, and with the approval of the Cabinet, amend the First and Second Schedules to this Act.*

#### COMMENTARY

This section gives the Minister power to amend the Schedules on currency points and acts of torture respectively. The Minister can only amend the schedules with the approval of cabinet.

# ANNEX

# ANNEXURE ONE

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**ACTS**

**SUPPLEMENT No. 1**

**18th September, 2012.**

**ACTS SUPPLEMENT**

*to The Uganda Gazette No. 52 Volume CV dated 18th September, 2012.*

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**Act 3**            *Prevention And Prohibition of Torture Act*            **2012**

THE PREVENTION AND PROHIBITION OF TORTURE ACT, 2012.

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*Section*

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PART VI—JURISDICTION OVER THE OFFENCE OF TORTURE

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20. Duty to report torture.
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**SCHEDULES**

First Schedule—Currency point.

Second Schedule—Acts constituting torture.

**THE PREVENTION AND PROHIBITION OF TORTURE  
ACT, 2012.**

**An Act to give effect, in accordance with Articles 24 and 44(a) of the Constitution, to the respect of human dignity and protection from inhuman treatment by prohibiting and preventing any form of torture or cruel, inhuman or degrading treatment or punishment; to provide for the crime of torture; to give effect to the obligations of Uganda as a State Party to the United Nation's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other related matters.**

WHEREAS Article 24 of the Constitution provides that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment;

AND WHEREAS Article 44(a) of the Constitution provides that notwithstanding anything in the Constitution, there shall be no derogation from the enjoyment of the freedom from torture and cruel, inhuman or degrading treatment or punishment;

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AND WHEREAS it is necessary to give effect in Uganda to the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10th December, 1984 and ratified by the Republic of Uganda on 26th June, 1987;

DATE OF ASSENT: 27th July, 2012.

*Date of Commencement:* 18th September, 2012.

BE IT ENACTED by the Parliament as follows:

PART I—PRELIMINARY

**1. Interpretation.**

In this Act unless the context otherwise requires—

“commission” means the Uganda Human Rights Commission established by article 51 of the Constitution;

“Convention” means the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by the Republic of Uganda on 26th, June, 1987;

“currency point” has the meaning assigned to it in the First Schedule;

“deadly weapon” includes—

- (a) (i) an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;

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(ii) any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and

(b) any substance intended to render the victim of the offence unconscious.”

“Minister” means the Minister responsible for justice;

“offender”, means a person who performs an act of torture.

“public official” means a person whether a public officer or not, employed by the government or local government or any Government agency or any other person paid out of public funds;

“spouse” means a husband or wife by a lawful marriage;

“superior officer” means a person in a higher position of authority than the officer alleged to have committed torture;

“victim” means a person who suffers an act of torture.

PART II—PROHIBITION AND CRIMINALISATION OF TORTURE

**2. Definition of torture.**

(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—

(a) obtaining information or a confession from the person or any other person;

(b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or

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- (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

(2) For purposes of this Act, “severe pain or suffering” means the prolonged harm caused by or resulting from—

- (a) the intentional infliction or threatened infliction of physical pain or suffering;
- (b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (c) the threat of imminent death; or
- (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule.

(4) The definition of torture set out in subsection (1) does not include pain or suffering arising from, inherent in or incidental to a lawful sanction.

**3. Prohibition of torture.**

(1) Notwithstanding anything in this Act, there shall, be no derogation from the enjoyment of the right to freedom from torture.

(2) The following shall not be a defence to a charge of torture—

- (a) a state of war or a threat of war;
- (b) internal political instability;

- (c) public emergency; or
- (d) an order from a superior officer or a public authority.

**4. Criminalisation of torture.**

(1) A person who performs any act of torture as defined in section 3 commits an offence and is liable on conviction to imprisonment for fifteen years or to a fine of three hundred and sixty currency points or both.

(2) A person shall not be punished for disobeying an order to undertake actions amounting to torture, cruel or inhuman treatment

**5. Circumstances aggravating torture.**

Notwithstanding section 4, where it is proved that at the time of, or immediately before, or immediately after the commission of torture the—

- (a) offender uses or threatens to use or used a deadly weapon;
- (b) offender uses or used sex as a means of torture;
- (c) victim was a person with a disability;
- (d) victim was pregnant or becomes pregnant;
- (e) offender causes death;
- (f) the victim was subjected to medical experiments;
- (g) victim acquires HIV/AIDS;
- (h) victim was under the age of 18 years;
- (i) the victim is incapacitated;
- (j) the act of torture is recurring;
- (k) offender commits any act which court considers aggravating;

the offender and any other person jointly connected with the commission of an act of torture is liable, on conviction to life imprisonment.

**6. Compensation, rehabilitation or restitution to be made by court in certain cases.**

(1) The court may, in addition to any other penalty under this Act, order for reparations, which may include—

- (a) restitution of the victim, his or her family or dependents to the greatest extent possible and such restitution may include—
  - (i) the return of any property confiscated;
  - (ii) payment for harm or loss suffered;
  - (iii) payment for the provision of services and restoration of rights; or
  - (iv) reimbursement of expenses incurred as a result of victimisation.
- (b) compensation for any economically assessable damage resulting from torture such as—
  - (i) physical or mental harm, including pain, suffering and emotional distress;
  - (ii) lost opportunities, including employment, education and social benefits;
  - (iii) material damage and loss of earnings, including loss of potential earnings;
  - (iv) costs required for legal or expert assistance, medicines, medical services, and psychological and social services; and
- (c) rehabilitation including—
  - (i) medical and psychological care; or
  - (ii) legal and psycho-social services to the victim in case of trauma.

(2) Restitution, compensation, rehabilitation or any payment ordered by the court under subsection (1) may be satisfied by the property of the person convicted of torture.

**7. Cruel, inhuman or degrading treatment or punishment**

(1) Cruel, inhuman or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official or private capacity, which does not amount to torture as defined in section 2, is a criminal offence and shall be liable on conviction to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

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

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

**PART III—OTHER PARTIES TO THE OFFENCE OF TORTURE**

**8. Other parties to offence of torture.**

- (1) A person who, whether directly or indirectly—
- (a) procures;
  - (b) aids or abets;
  - (c) finances;
  - (d) solicits;
  - (e) incites;
  - (f) recommends;

- (g) encourages;
- (h) harbours;
- (i) orders; or
- (j) renders support to;

any person, knowing or having reason to believe that the support will be applied or used for or in connection with the preparation or commission or instigation of torture commits an offence and is liable on conviction, to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

**9. Accessory after the fact to the offence of torture.**

(1) A person who receives or assists another who is, to his or her knowledge, guilty of an offence under this Act, in order to enable him or her to escape punishment, becomes an accessory after the fact to the offence of torture.

(2) A person who is or becomes an accessory after the fact to the offence of torture commits an offence and is liable on conviction, to imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

(3) A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment by receiving or assisting in her husband's presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part in order to enable that other person to escape punishment, nor does the husband become an "accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.

**10. Responsibility of a superior over actions of a subordinate.**

A superior officer is liable for any act of torture committed by a subordinate under his or her authority and control where—

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- (a) the superior knew, or consciously disregarded information which clearly indicated, that the subordinate was committing or about to commit an act of torture;
- (b) the acts committed by the subordinate concerned activities that were within the responsibility and control of the superior; and
- (c) the superior failed to promptly investigate, diligently pursue administrative and disciplinary measures to prevent re-occurrence, and cooperate with judicial authorities to prosecute the offence.

**11. Right to complain.**

(1) A person alleging that an offence under this Act has been committed, whether the person is the victim of the offence or not, has a right to complain to the Police, Commission or any other relevant institution or body having jurisdiction over the offence.

(2) Where a complaint is made, a prompt investigation into the complaint shall be conducted, and where there are substantial grounds to support the complaint, the police shall arrest and detain the person and accordingly charge the person with the offence he or she is alleged to have committed.

(3) Any person arrested and detained under subsection (2), shall be assisted in communicating as soon as legally possible with the nearest appropriate representative of the state of which he or she is a national or if the person is a stateless person, with the representative of the state where the person ordinarily resides.

**12. Institution of criminal proceedings.**

(1) Criminal proceedings under this Act, may be instituted in one of the following ways—

- (a) by a police officer bringing a person arrested with or without a warrant before a magistrate upon a charge;

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- (b) by a public prosecutor or a police officer laying a charge against a person before a magistrate and requesting the issue of a warrant or a summons; or
- (c) by any person, other than a public prosecutor or a police officer, making a complaint.

(2) The validity of any proceedings instituted or purported to be instituted under subsection (1) shall not be affected by any defect in the charge or complaint or by the fact that a summons or warrant was issued without any complaint or charge or, in the case of a warrant, without a complaint on oath.

(3) Any person, other than a public prosecutor or a police officer, who has reasonable and probable cause to believe that an offence has been committed by any person under this Act, may make a complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be.

(4) A complaint made under subsection (3) may be made orally or in writing signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant.

(5) Upon receiving a complaint under subsection (3), the magistrate shall consult the local authority of the area in which the complaint arose and put on record the gist of that consultation; but where the complaint is supported by a letter from the local authority, the magistrate may dispense with the consultation and thereafter put that letter on record.

(6) After satisfying himself or herself that *prima facie* the commission of an offence has been disclosed and that the complaint is not frivolous or vexatious, the magistrate shall draw up and shall sign a formal charge containing a statement of the offence or offences alleged to have been committed by the accused.

(7) Where a charge has been—

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- (a) laid under the provisions of subsection (1)(b); or
- (b) drawn up under the provisions of subsection (9), the magistrate shall issue either a summons or a warrant, as he or she shall deem fit, to compel the attendance of the accused person before the court over which he or she presides, or if the offence alleged appears to be one which the magistrate is not empowered to try or inquire into, before a competent court having jurisdiction; except that a warrant shall not be issued in the first instance unless the charge is supported by evidence on oath, either oral or by affidavit.

(8) Notwithstanding subsection (7), a magistrate receiving any charge or complaint may, if he or she thinks fit for reasons to be recorded in writing, postpone the issuing of a summons or warrant and may direct an investigation, or further investigation, to be made by the police into that charge or complaint; and a police officer receiving such a direction shall investigate or further investigate the charge or complaint and report to the court issuing the direction.

(9) Without prejudice, nothing in subsection (7) shall authorise a police officer to make an arrest without a warrant for an offence other than a cognisable offence.

(10) A summons or warrant may be issued on a Sunday.

(11) Nothing in this section shall be so construed as to affect the powers conferred upon justices of the peace by the Justices of the Peace Act.

**13. Control over private prosecutions.**

(1) Where criminal proceedings under this Act have been instituted, the Director of Public Prosecutions may—

- (a) take over and continue the conduct of those proceedings at any stage before the conclusion of the proceedings;
- (b) discontinue the prosecution of the proceedings at any stage; and

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- (c) require the victim or the person reporting the offence—
- (i) to give him or her all reasonable information and assistance; and
  - (ii) to furnish him or her with any documents or other matters.

(2) For the avoidance of doubt, any person other than a public prosecutor or a police officer, may institute criminal proceedings for any offence committed under this Act.

(3) This section shall not prejudice the mandate of the Uganda Human Rights Commission to entertain matters under this Act as cases of human rights abuse, and in such cases, the Commission shall deal with the cases as it ordinarily deals with human rights cases.

PART IV—USE OF INFORMATION OBTAINED BY TORTURE

**14. Inadmissibility of evidence obtained by torture.**

(1) Any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceeding.

(2) Notwithstanding subsection (1), such information, confession or admission may be admitted against a person accused of torture as evidence that the information, confession or admission was obtained by torture.

**15. Prohibition of Use of information obtained by torture.**

A person who uses information which he or she knows or ought to have reasonably known to have been obtained by means of torture in the prosecution of the person tortured, commits an offence and is liable on conviction to imprisonment not exceeding two years or a fine not exceeding forty eight currency points or both.

PART V—TRANSFER OF DETAINEES

**16. No transfer of persons where likelihood of torture exists.**

(1) A person shall not where there are reasonable grounds to believe that a prisoner or detainee is likely to be tortured—

- (a) release, transfer or order the release or transfer of a prisoner or detainee into the custody or control of another person or group of persons or government entity;
- (b) transfer, detain or order the transfer or detention of a prisoner or detainee to a non-gazetted place of detention; or
- (c) intentionally or recklessly abandon a prisoner or detainee, in any place where there are reasonable grounds to believe that the prisoner or detainee is likely to be tortured.

(2) Subsection (1) applies to any prisoner or detainee in the custody of any public official irrespective of the—

- (a) citizenship of the prisoner or the detainee;
- (b) location in which the prisoner or detainee is being held in custody or control; or
- (c) location in which or to which the transfer or release is to take place or has taken place.

PART VI—JURISDICTION OVER THE OFFENCE OF TORTURE.

**17. Jurisdiction of Uganda courts in relation to the offence of torture.**

(1) The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed—

- (a) in Uganda;

- (b) outside Uganda—
- (i) in any territory under the control or jurisdiction of Uganda;
  - (ii) on board a vessel flying the Uganda flag or an aircraft which is registered under the laws of Uganda at the time the offence is committed;
  - (iii) on board an aircraft, which is operated by the Government of Uganda, or by a body in which the government of Uganda holds a controlling interest, or which is owned by a company incorporated in Uganda;
- (c) by a citizen of Uganda or by a person ordinarily resident in Uganda;
- (d) against a citizen of Uganda;
- (e) by a stateless person who has his or her habitual residence in Uganda; or
- (f) by any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda.

**18. Torture bailable by the Chief Magistrates Court.**

Bail in respect of the offence of torture may be granted by a Chief Magistrate.

PART VII—GENERAL

**19. Consent of DPP required for prosecution of non citizen.**

A person who is not a citizen of Uganda shall not be prosecuted for an offence under this Act except with the consent of the Director of Public Prosecutions.

**20. Duty to report torture.**

A person who suspects or has reasonable grounds to suspect that torture is being committed by a public official, person acting in official capacity or private capacity, has a duty to report to the police, the commission, of his or her suspicion of torture.

**21. Protection of victim, witnesses and persons reporting torture.**

It shall be the responsibility of the State to ensure that any person including the—

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

is protected against all manner of ill-treatment or intimidation as a consequence of his or her complaint or any evidence given.

**22. Restriction on extradition or deportation where person is likely to be tortured.**

(1) Torture is an extraditable offence.

(2) Notwithstanding subsection (1) and the provisions of the Extradition Act, a person shall not be extradited or deported from Uganda to another state if there are substantial grounds to believe that that person is likely to be in danger of being subjected to torture.

(3) For the purposes of subsection (2), it shall be the responsibility of the person alleging the likelihood of being tortured to prove to the court the justification of that belief.

(4) In determining whether there are substantial grounds for believing that a person is likely to be tortured or in danger of being subjected to torture under subsection (2), the court shall take into account all factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state seeking extradition or deportation of the person.

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(5) Where a person is not extradited or deported as a consequence of the provisions of this section, that person shall be tried in Uganda.

**23. No amnesty for offence of torture.**

Notwithstanding the provisions of the Amnesty Act, a person accused of torture shall not be granted amnesty.

PART VIII—MISCELLANEOUS

**24. Regulations**

(1) The Minister may, by statutory instrument, make regulations for better carrying into effect the provisions of this Act.

(2) The Minister shall, as soon as practicable after the publication of a statutory instrument under this section, cause the instrument to be laid before Parliament.

(3) Notwithstanding the Interpretation Act, the Minister may, while exercising his or her powers under subsection (1), by statutory instrument, prescribe such fines and imprisonment as may be appropriate in the circumstances which may be in excess of the penalties prescribed by section 38 of the Interpretation Act

**25. Amendment of Schedules**

The Minister may, by statutory instrument, and with the approval of the Cabinet, amend the First and Second Schedules to this Act.

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FIRST SCHEDULE

Section 2

A currency point is equivalent to twenty thousand shillings.

## SECOND SCHEDULE

## Section 3

## Acts constituting torture

**1. Physical torture including—**

- (a) systematic beating, head banging, punching, kicking, striking with truncheons, rifle butts, jumping on the stomach;
- (b) food deprivation or forcible feeding with spoiled food, animal or human excreta;
- (c) electric shocks;
- (d) cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices;
- (e) the submersion of the victim's head in water or water polluted with excrement, urine, vomit or blood;
- (f) being tied or forced to assume a fixed and stressful body position;
- (g) rape and sexual abuse, including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of the genitals;
- (h) mutilation, such as amputation of the essential parts of the body such as the genitalia, ears, tongue;
- (i) dental torture or the forced extraction of the teeth;
- (j) harmful exposure to the elements such as sunlight and extreme cold; or
- (k) the use of plastic bags and other materials placed over the victim's head with the intention to asphyxiate.

**2. Mental or psychological torture including—**

- (a) blindfolding;
- (b) threatening the victim or his or her family with bodily harm, execution or other wrongful acts;
- (c) confining a victim incommunicado, in a secret detention place or other form of detention;
- (d) confining the victim in a solitary cell or in a cell put up in a public place;
- (e) confining the victim in a solitary cell against his or her will or without prejudice to his or her security;
- (f) prolonged interrogation of the victim so as to deny him or her normal length of sleep or rest;
- (g) maltreating a member of the victim's family;
- (h) witnessing the torture sessions by the victim's family or relatives;
- (i) denial of sleep or rest;
- (j) shame infliction such as stripping the victim naked, parading the victim in a public place, shaving the head of the victim, or putting a mark on the body of the victim against his or her will;

**3. Pharmacological torture including—**

- (a) administration of drugs to induce confession or reduce mental competence;
- (b) the use of drugs to induce extreme pain or certain symptoms of diseases; and
- (c) other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment.

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**Cross References**

1. Amnesty Act, Cap. 294
2. Extradition Act, Cap. 117
3. Uganda Human Rights Commission Act, Cap. 24
4. Justices of the Peace Act, Cap. 15

## ANNEXURE TWO

### CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

#### Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)**

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be

subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

#### **PART I**

##### **Article 1**

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering

is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

#### **Article 2**

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

#### **Article 3**

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

#### **Article 4**

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.

#### **Article 5**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;  
(b) When the alleged offender is a national of that State;  
(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### **Article 6**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence.

The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### **Article 7**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

## **Article 8**

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

## **Article 9**

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

## **Article 10**

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

## **Article 11**

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

## **Article 12**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial

investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

## **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 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

## **Article 15**

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

## **Article 16**

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

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

## PART II

### Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his

Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

#### **Article 18**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
  - (a) Six members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee.

After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

#### **Article 19**

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned.

Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

## Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article

## Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure; (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (d) The Committee shall hold closed meetings when examining communications under this article; (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
  - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
  - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of

a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## **Article 22**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned. 5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
  - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
  - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A

declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

#### **Article 23**

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **Article 24**

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

### **PART III**

#### **Article 25**

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification.

Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 26**

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

#### **Article 27**

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

## **Article 28**

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

## **Article 29**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-

General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

## **Article 30**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

#### **Article 31**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

#### **Article 32**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following: (a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

#### **Article 33**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.





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