SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE (CSPRI) ON THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE BILL [B 15 OF 2010] AND THE CIVILIAN SECRETARIAT FOR POLICE SERVICE BILL [B16 OF 2010]

Introduction

The Civil Society Prison Reform Initiative (CSPRI), established in 2003, is a project of the Community Law Centre at the University of the Western Cape. CSPRI has, amongst others, a particular focus on the prevention and eradication of torture and other ill treatment in situations where people are deprived of their liberty.

We thank the Portfolio Committee on Police for the opportunity to make this submission and regard it as a valuable opportunity to promote the protection of people deprived of their liberty. The submission will focus in particular on obligations emanating from the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which South Africa ratified in December 1998. The right to be free from torture is guaranteed in section 12(e) of the Constitution and is a non-derogable right. However, South Africa has to date failed to criminalise torture as required by Article 4 of UNCAT. Despite this lacuna, the crime of torture has particular importance in international human rights and humanitarian law.

Today, the international ban on the use of torture has the enhanced status of *ius cogens* or a peremptory norm of general international law.[1] This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated[2] from by states

[1] See the House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate*, *Ex parte* Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at Paras 147-157.

[2] When states become parties to international human rights treaties, they are allowed to 'suspend' some of the rights under those treaties in certain situations or circumstances until the situation or circumstance that gave rise to the 'suspension' has come to an end. This is called derogation. For example, a state may ban people from travelling to some parts of the country during an outbreak of an epidemic. This may be interpreted by some

through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[3]

This prohibition of torture imposes on states obligations which are owed to all other members of the international community; each of these obligations has a correlative right.[4] It signals to all states and to the people under their authority that "the prohibition of torture is an absolute value from which nobody must deviate."[5] At the national level it de-legitimates any law, administrative or judicial act authorising torture.[6]

Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Because the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they be a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind",[7] and torture itself as an act of barbarity which "no civilized society condones,"[8] "one of the most evil practices known to man"[9] and "an unqualified evil".[10]

Following from the status of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution".[11] The UNCAT therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT places the obligation on states to **either prosecute or extradite** any person suspected of committing a single act of torture. Doing nothing is not an option.

Although South Africa does not have the crime of torture defined on the statutes, common law crimes such as assault and attempted murder have been used to prosecute officials. This is, however, not

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people to mean that their right to freedom of movement has been infringed. International and national human rights law permit such derogations.

[3] *Prosecutor v Furundzija* op cit Para 153.

[4] Ibid at Para 151. In other words, all countries of the world are 'hurt' when a person is subjected to torture by another country. It does not matter whether the person tortured is a citizen of country A or B. All countries have a duty to ensure that torture is not committed by their officials and also that it is not committed by other countries.

[5] Ibid at Para 154.

[6] Ibid at Para 155.

[7] *Filartiga v Pena-Irala* [1980] 630f (2nd Series) 876 US Court of Appeals 2nd Circuit at 890.

[8] *A (FC) and others v Secretary for the State for the Home Department* op cit at Para 67. Even states that use torture never say that they have a right to torture people. They either deny the allegations of torture or they try to justify it by calling it different names such as 'enhanced interrogation techniques' or 'intensive interrogation.' They know that torture should not be used under any circumstances.

[9] Ibid at Para 101.

[10] Ibid at Para 160.

[11] *Ex parte Pinochet* (no. 3), 2 All ER 97, pp 108-109 (Lord Browne-Wilkinson) citing *Extradition of Demjanjuk* (1985), 776 F2d 571 in Robertson, G. (2006) *Crimes against Humanity – the struggle for global justice*, Penguin, London, p. 267.

satisfactory and the use of common law is, according to the Committee against Torture (CAT), inadequate to prosecute perpetrators of torture: *By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and ill treatment. Naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself and c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.*[12]

The proposed mandate of the IPID must therefore be seen against this important lacuna in South African law. The sooner that South Africa complies with its obligation under Article 4 of UNCAT, namely to criminalise torture in domestic law, the better it will be for the effectiveness of the IPID.

The Bill mentions torture specifically and this is an important advancement in protecting the rights of persons under police custody or control, although the crime of torture is not defined in the Bill. The definition of torture enacted in domestic legislation need not be a carbon copy of the UNCAT definition but must cover at minimum the elements of torture defined in Article 1[13], and meet the requirements of Article 4.[14] This is also affirmed by Article 4 of the Robben Island Guidelines. [15] An important aspect of Article 4 of UNCAT is that it also covers the attempt to commit torture, as well as those persons who are complicit or participate in the commission of torture. Those who torture are often assisted or encouraged by others, or may indeed be 'the tool in the hands of someone else', but this does not absolve them from or dilute their criminal responsibility.[16] Experience has also shown that states which have enacted specific legislation implementing the measures of CAT (including

[12] Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 11

[13] 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.

[14] Committee against Torture (2007) *General Comment No. 2 on the implementation of Article 2*, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, para 8

[15] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

[16] Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Marthinus Nijhof Publishers, Dordrecht, pp. 129-130

criminalising torture), and not relying on universal jurisdiction or humanitarian law to prosecute perpetrators, have shown themselves to be more open to try torture cases.[17] The Robben Island Guidelines also encourage African states to pay particular attention in their laws criminalising torture to the prevention and prohibition of gender-based forms of torture and CIDT, as well as the torture and CIDT of young people.[18] Seen together, UNCAT and the Robben Island Guidelines enable a definition of torture starting from a set of core elements which can be expanded to allow for the local context and conditions.

Whereas UNCAT defines torture in Article 1, no definition is provided for cruel, inhuman or degrading treatment (CIDT) but referred to in 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 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In 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*." The distinction between torture and CIDT has been the subject of much scholarly writing as well as court decisions.[19] The key question is whether something is inherently torture or, whether it becomes torture when a certain threshold is transgressed and CIDT meets the requirements of the definition of torture? The UN Declaration against Torture, in Article 1.2, refers to aggravation: 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.' The UNCAT definition does, however, not make the link that torture is an aggravated form of CIDT, but the CAT invokes the concept of 'degree of severity' to distinguish torture from CIDT.[20] Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment are left to courts to decide.[21] A growing body of international case law on this issue provides increasing guidance and South African courts should take note of these.[22]

Despite these challenges, it should be noted that both torture and CIDT are prohibited under UNCAT (see Articles 1 and 16), and that protection against CIDT is also guaranteed in Section 12 (e) of the

[17] C Ryngaert 'Universal criminal jurisdiction over torture: A state of affairs after 20 Years UN Torture Convention' (2005) Vol 23 No 4, *Netherlands Quarterly of Human Rights* 571 574.
[18] Article 5 of the Robben Island Guidelines
[19] For a discussion on changes in the interpretation of the definitions of torture see Rodley N (2002) 'The Definitions of Torture in International Law' *Current Legal Problems*, Vol. 55, pp. 467-493.
[20] UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 10.
[21] See *Ireland* v *UK* 1976 2 EHRR 25; Rodley N.S. (2002) 'The Definition of Torture under International Law' *Current Legal Problems*, Oxford University Press, Vol. 55, pp. 467-493.
[22] See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002; Cantoral Benavides Case (2000) I-A Ct. HR, Ser. C, No. 69 (Peru);

South African Constitution. There is an obligation on States Parties to prevent both torture and CIDT. Most importantly, experience has also demonstrated that the conditions that give rise to CIDT frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent CIDT.[23] The mandate of the IPID must therefore, first and foremost, be seen against the absolute prohibition of torture and other ill treatment.

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE BILL [B 15 OF 2010]

Independence and impartiality

1. Clause 3 of the Bill states that the Independent Police Investigative Directorate (IPID) functions independently of the South African Police Service (SAPS). The independence of investigative institutions, such as proposed in the Bill, lie at the heart of their legitimacy and effectiveness. It is therefore with good reason that the UNCAT, in Articles 12 and 13, requires that investigations be done by impartial authorities. This means that the body conducting the investigation must not be the same as the one under whose responsibility the torture was perpetrated.[24] A high premium is set on the *impartiality* of the investigation, for this is the central pillar that holds its credibility intact. The term "impartiality" means free from undue bias. It is conceptually different from 'independence' which denotes that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The two notions are, however, closely interlinked, as the lack of independence is commonly seen as an indicator of partiality,[25] The European Court of Human Rights has stated that "independence" does not only mean a lack of hierarchical or institutional connection, but also practical independence.[26]
2. Clause 5 of the Bill deals with the appointment of the Executive Director and states that the Executive Director will be appointed by the Minister of Police. Furthermore, the process by which the Minister will appoint the Executive Director is not set out in the Bill and this is regarded as a shortcoming. Given the critical importance of the Executive Director in guiding the IPID and to ensure the independence and impartiality of the IPID, it is submitted that the appointment process needs to be set out in the legislation and, further, that the final selection

[23] UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-ninth session, 5-23 November 2007, para 3.
[24] UNCAT/C/SC/SR 16 Para 25; UNCAT/C/SR 101 Para 27; UNCAT/SC/SR 111 Para 48; UNCAT/C/SR 228 Paras 14 and 24; UNCAT/C/SR 585 Para 46.
[25] Redress op cit 17.
[26] *Finucane v United Kingdom* (2003) 22 EHRR 29 at Para 68.

be made though a selection panel comprising of Members of Parliament, the proposed Civil Secretariat for Police Service, and other selected stakeholders.

3. It is furthermore noted in clause 6(6) that the Executive Director must at any time when requested to do so by the Minister or Parliament, report on activities of the Directorate to the Minister of Parliament. While little fault can be found with the requirement to report regularly to Parliament, questions can be raised about the same requirement in respect of the Minister. By way of comparison, for the Judicial Inspectorate for Correctional Services (JICS) no such requirement exists. Section 90 of the Correctional Services Act (111 of 1998) requires that the Inspecting Judge must submit an annual report to the President and to the Minister and that the latter must table the annual report in Parliament. Furthermore the Inspecting Judge must submit a report in respect of each investigation undertaken to the Minister and to the relevant Portfolio Committees of Parliament. There is no requirement that the Inspecting Judge must report at any moment to the Minister when called upon.
4. While the intentions of clause 6(6) may be noble, there is a real risk that they may make the Executive Director of the IPID vulnerable to excessive reporting and meddling in the substantive affairs of the Directorate.

A duty to investigate and criminal prosecutions following investigations

5. The UNCAT, in Article 2, places a duty on all states parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." This general obligation is given more detail, in respect of investigations, in Articles 12 and 13. Article 12 sets the threshold for initiating an investigation: "*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.*" The meaning of 'reasonable grounds' for initiating an investigation is important, as it does not require a complaint to be lodged by the victim. Victims often do not report victimisation for fear of reprisal, or they are not able to complain. For the purposes of initiating an investigation, it really does not matter where the suspicion comes from.[27] Other international instruments regarding the treatment of people deprived of their liberty err on the side of caution. The *Standard Minimum Rules for the Treatment of Prisoners*[28] obliges the State to deal with any complaint '[u]nless it is evidently

[27] Burgers JH and Danelius H (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Marthinus Nijhof Publishers, Dordrecht, pp. 144.

[28] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

frivolous or groundless'.[29] The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[30] does not qualify this obligation, providing simply that 'every request shall be promptly dealt with and replied to without delay.'[31] Research by the Redress Trust suggests that a state will have violated a victim's rights by failing to investigate despite the existence of an 'arguable claim' – the merits of which are determined on a case-by-case-basis.[32] An allegation is 'arguable' when it is supported 'by at least some other evidence, be this witness testimonies or medical evidence or through the demonstrated persistence of the complainant.'[33] European courts have developed the notion that an investigation should be triggered by a 'reasonable suspicion'.[34]

6. Clause 25(1)(e) requires that the IPID must investigate "any complaint of torture which is referred by a Station Commissioner, Magistrate, Judge, legal representative, or the complainant in the case where the complainant unrepresented". This requirement would, for example, exclude complaints lodged by the relatives of a victim of the crime of torture or by a police official who is not a Station Commissioner. While the clause does not limit the substance of the complaint, it limits the avenues to initiate an investigation. Moreover, Article 12 of UNCAT does not require a complaint to be lodged, but merely the existence of reasonable grounds to believe that an act of torture has been committed. The requirement for the lodging a compliant as set out in clause 25(1) therefore appear to prevent compliance with Article 12 of UNCAT.
7. In view of this, it is submitted that Clause 25(1)(e) be amended as follows: "The Directorate must investigate - (e) any matter wherever there is reasonable ground to believe that an act of torture or other ill treatment has been committed."
8. It is further noted that the crime of torture is omitted from clause 25(2). The reasons for the omission are not evident.
9. Article 13 of UNCAT reads: "*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.*"
10. In his 2010 report the UN Special Rapporteur identified impunity as one of the main reasons for the persistent perpetration of torture and other ill treatment across the world. This,

[29] Rule 36 (4).
[30] Adopted by General Assembly resolution 43/173 of 9 December 1988.
[31] Principle 33 (4).
[32] Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p.13.
[33] Redress Trust (2004) p.13.
[34] Redress Trust (2004) p.13.

according to the Special Rapporteur is, by and large, the result of the failure of many states to comply with the obligations under Articles 12 and 13 of UNCAT.[35] When officials who perpetrate the crime of torture and other forms of ill treatment are not held accountable through criminal prosecutions and punishments that reflect the gravity of the crime of torture, efforts to eradicate torture will by and large remain fruitless. Against this backdrop, the powers and functions of the IPID outlined in the Bill then needs to be critically examined and assessed against the international obligation to combat impunity in respect of the crime of torture.

11. In this regard clause 6(4) is of importance as it mandates the Executive Director that he or she may refer matters to the National Prosecuting Authority (NPA) for criminal prosecution. It should also be noted that the responsibilities of the Executive Director listed under clause 6 may not be delegated as per clause 10(3) of the Bill. The implication is clear: it is only the Executive Director that may refer a case for criminal prosecution to the NPA. This provision has the potential to severely limit, in a number of ways, the extent to which perpetrators of torture may be held accountable. Firstly, it may create a bottleneck in the processing of cases and thus delay a sense of justice and redress on the part of victims. Secondly, discretion centralised at the most senior level of the IPID creates the risk that the Executive Director will become the gate-keeper of which cases are prosecuted and which are not. This degree of discretion centred in one person, without any requirement in law to consult with or seek approval from other stakeholders, is at best an extremely risky situation and may be severely detrimental to the independence and impartiality of the IPID. Thirdly, the discretion afforded to the Executive Director creates a double hurdle for cases to reach active prosecution, but perhaps more importantly, it usurps at least some of the authority of the Director of Public Prosecutions (DPP). Where it concerns allegations of torture, the decision to prosecute should rest with the DPP in an unfettered manner that is not pre-empted by another official.
12. Article 7(1) of UNCAT is unambiguous in respect of the duty to prosecute: "*The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4*[36] *is found shall in the cases contemplated in article 5*[37]*, if it does not*

[35] A/HRC/13/39/Add.5 para 146

[36] 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.

[37] 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.

extradite him, submit the case to its competent authorities for the purpose of prosecution." The Convention, in an effort to limit discretionary powers, requires that where there is an allegation of torture, that such cases must be submitted to the prosecuting authorities who must make the decision to prosecute or not.

13. If it is the duty of the IPID to investigate allegations of torture against the police, as required by Articles 12 and 13 of UNCAT, then it must be compelled to submit its findings to the NPA for prosecution as required by Article 7(1).

Transparency

14. In its Concluding Remarks on South Africa's Initial Report in 2006, the CAT made the following statement: "*The Committee requests the State party to provide in its next periodic report detailed disaggregated statistical data on complaints related to acts of torture, or cruel, inhuman or degrading treatment committed by law enforcement officials as well as of the investigations, prosecutions and convictions relating to such acts, including with regard to the abuses reportedly committed by South African peacekeepers. It further requests the State party to provide detailed information on compensation and rehabilitation provided to the victims*."[38]
15. Clause 8(d) requires the national office of the IPID to "gather, keep and analyse information in relation to its investigations". The particular wording of clause 8(d) creates a real risk that the information collected will only provide a partial picture of the situation when compared to the requirement set by the CAT in para 14 above. By providing more detail to clause 8(d) a better understanding stand to be gained about the crime of torture in South Africa and it will promote transparency.
16. It is therefore submitted that clause 8(d) be amended to read: "The functions of the national office are to – (d) gather, keep and analyse information in relation to, at minimum, complaints lodged, investigations initiated, investigations conducted, investigations completed, disciplinary actions against police officials, prosecutions, convictions, sentences imposed, recommendations made and action taken by SAPS, and support and redress rendered to victims and their families."
17. In view of the proposed amendment to clause 8(d), it is furthermore submitted that the annual report of the IPID, as per clause 8(j), and the reports that the IPID must submit to the Secretariat, as per clause 9(1), cross refer to the amended clause 8(d).
18. Clause 9 deals with reporting on cases to the Secretariat and while this is important, there is a real risk that broader and systemic issues may be overlooked. While the IPID has a critical

[38] CAT/C/ZAF/CO/1 para 27

mandate, namely to investigate, sight should not be lost of the duty to prevent human rights violations, and in particular to prevent torture and other ill treatment as required by Article 2(1) of UNCAT: "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*."

19. In the case of the IPID, the duty to prevent should be read together with Article 11 of UNCAT: "*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*." Based on its investigations the IPID will be in a well-informed position to make recommendations on the systemic causes of torture and other ill treatment perpetrated by police officials and recommend preventive measures to be taken by SAPS.
20. It is therefore submitted that clause 8 be amended as follows: "The functions of the national office are to – (m) conduct research into the systemic causes of human rights violations, including the crime of torture, perpetrated by police officials and make recommendations to the Secretariat and the Minister regarding the prevention of such violations."
21. The level of transparency should also be assessed in respect of investigations undertaken by the IPID. The European Court of Human Rights (ECtHR) has stressed the need for investigations to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as in theory, to maintain public confidence in the adherence to the rule of law by the authorities, and to prevent any appearance of collusion in or tolerance of unlawful acts.[39]
22. The monitoring mechanism proposed in clause 9 is a step in the right direction but it is limited to the extent that it requires the IPID to report to the Secretariat on the "finalisation of cases" and could be interpreted to mean to only report on finalised cases. Clause 9 (3) further requires that the IPID and the Secretariat meet at least four times per year. Moreover, the composition of the Secretariat does not provide for direct public scrutiny, but refers to a "civil society reference group" in clause 5(2)(a)(v) of the Civilian Secretariat for Police Service Bill [B16 of 2010], but the duties of this reference group are not set out specifically and is only broadly linked to the functions set out in clause 5(1) of the same Bill. The proposed mechanism thus falls somewhat short of the requirement of sustained public scrutiny, as articulated by the ECtHR. At a practical level the requirement means that independent persons (e.g. human rights defenders, experts in the field and representative of civil society) should have direct and unfettered insight into investigations being conducted by the IPID, or the reasons why certain cases are not being investigated.

[39] *Assenov and Others v Bulgaria* (1999) 28 EHRR 652 at Para 140.

23. The Consultative Forum outlined in Chapter 4 is limited in its mandate and does not explicitly mention the monitoring of investigations, not does it describe the composition of the Consultative Forum to include members of the public. In order to meet the requirement of sustained public scrutiny, it appears that structural changes are required to the national and provincial divisions of the IPID and/or the Secretariat. A possible solution may lie in changing the structure of the Consultative Forum described in Chapter 4 of the Bill.
24. In view of the above it is submitted that the requirement of sustained public scrutiny of investigations can be met by the creation of a standing sub-committee of the Consultative Forum with the explicit purpose to oversee and monitor investigations. It is furthermore proposed that the sub-committee consists of the Executive Director and no less than five persons who are not employees of the IPID or other state institutions with the exception of employees of national human rights institutions.

Forensic capacity

25. Clause 7(2) describes the functional units of the IPID and clause 22(2) sets out the requirements for investigators. In both instances no mention is made of the crucial role that forensic medicine play in investigating allegations of torture and other ill treatment. The UN Special Rapporteur on Torture made the following observation regarding the value of forensic medicine: "*One of the major challenges when it comes to proving cases of torture and CIDT is the establishment of evidence. Since such abuses are mainly inflicted behind closed doors, victims very often have to fight an uphill struggle to make their cases heard and have their complaints properly investigated. This is particularly true for persons who are accused of having committed a crime and carry a stigma of being not credible. Forensic medical science is a crucial tool in alleviating this burden. Experts can evaluate to which degree medical findings correlate with the allegations brought forward and forensic medical science therefore plays an important role in providing the evidentiary basis on which prosecutions can successfully be brought against those responsible. Forensic medical science can demonstrate that diagnosed injuries or behaviour patterns of the victim are consistent with the abuse described. Furthermore, modern medical examinations enable the detection of injuries which are otherwise not visible, such as soft tissue or nerve trauma - an important ability in light of the ever increasing sophistication of torture methods.*"[40]
26. In view of the above it is submitted that clause 7(2) be amended to include a forensic capacity within the National Office.

[40] A/HRC/13/39/Add.5 para 123-124

27. Note should furthermore be taken of the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), which the UN Special Rapporteur on Torture calls "an indispensable standard" in the investigation of torture and other ill treatment.[41] Successful investigations and prosecutions will be severely hampered in the absence of reliable forensic capacity within the IPID.

THE CIVILIAN SECRETARIAT FOR POLICE SERVICE BILL [B16 OF 2010]

Objects of the secretariat

28. CSPRI welcomes the inclusion of the objective, in clause 4(b), to ensure South Africa's engagement with relevant international obligations. It is regrettably the situation that South Africa's compliance with obligations under international human rights law, and specifically UNCAT, has been less than satisfactory. It is hoped that this Bill will make an important contribution in rectifying this state of affairs.

Functions of the secretariat

29. Clause 5(1) sets out the functions of the Secretariat and clause 5(1)(d) requires the monitoring and evaluation of the police's compliance with the Domestic Violence Act. The reasons for the specific mention of this legislation are well-founded and historical. However, the police deals with a range of vulnerable individuals such as women, children, undocumented foreigners, mentally ill and physically disabled persons. It is also the case that the police have to frequently deal with people who are under the influence and/or addicted to alcohol and drugs. These individuals are particularly vulnerable to torture and ill treatment. It is particularly when such individuals are detained by the police in police cells that they are vulnerable to ill treatment at the hands of police officials and/or fellow detainees.
30. In view of the above it is submitted that clause 5(1)(d) be amended to read: "monitor and evaluate compliance with the Domestic Violence Act, 1998 (Act No. 116 of 1998) and the

[41] A/HRC/13/39/Add.5 para 54

treatment and conditions of detention of vulnerable persons, such as but not restricted to women, children, undocumented foreigners, mentally ill and physically disabled persons, and persons addicted to and/or under the influence of alcohol and/or drugs."

31. Clause 5(2)(b)(iii) requires the Secretariat to "review police practices and develop best practice models". The clause hints in the direction of Article 11 of UNCAT which reads: "*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*." It is submitted that clause 5(2)(b)(iii) be amended to reflect the requires of Article 11 more closely and enable greater compliance with UNCAT in this regard.
32. It is submitted that clause 5(2)(b)(iii) is amended to read: "The Secretariat must, for the purpose of subsection (1), establish competencies and capabilities in its operations in order to - (b)(iii) keep under systematic review policies, interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, or detention by the South African Police Service, with a view to preventing any cases of torture and other ill treatment."

A visiting mechanism

33. From years of monitoring conditions of detention and the rights of detainees prisoners, it is by now well-established and accepted that a lack of transparency and, consequently, accountability are the fundamental risks to detainees' rights, in particular the right to be free from torture and other ill treatment. The Special Rapporteur on Torture is clear on this issue: "*The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials*."[42]
34. Moreover, the state's obligations extend beyond that of its own officials and the state has a duty towards non-state actors; in this case to all detainees. In the detention environment this duty of the state is of particular importance in the relationship between officials and detainees, especially with those detainees who victimise other detainees. The CAT has been clear in this regard: *"The Committee has made clear that where State authorities or others acting in*

[42] A/HRC/13/39/Add.5 para 157

official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.'[43] The implication is clear: the SAPS is responsible for the treatment and conditions of detention of detainees in its care and that includes prevention and reacting to inter-detainee violence and victimisation.

35. The UN Special Rapporteur on Torture is even more specific in this regard, noting that the UNCAT "*goes beyond the traditional concept of State responsibility and includes acts which are not directly inflicted by the State officials, but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture.'*[44]

36. The UN Human Rights Committee (HRC) recognised the value of independent monitoring of places of detention in General Comment 21 on the International Covenant on Civil and Political Rights (ICCPR) and urged states to report on the concrete measures taken "*by the competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty. States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment, and how impartial supervision is ensured*."[45] The Special Rapporteur on Torture also regards the regular inspection of places of detention, especially when carried out as part of a system of periodic visits, as one of the most effective preventive measures against torture and ill treatment.[46] The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in Principle

[43]Committee Against Torture, General Comment 2, CAT/C/GC/2, para 18.
[44] Report of the Special Rapporteur on Torture, A/HRC/13/39/Add.5 para 39.
[45] HRC General Comment 21, para. 6.
[46] E/CN.4/2003/68, 17 December 2002, para. 26(f). The regular inspection of places of detention is a central motivation behind OPCAT and is described as such in the Preamble to the protocol: "Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention".

29, recognises the importance of visits by independent parties and requires that "places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment".[47] Moreover, detained persons shall, subject to reasonable conditions to ensure security and good order in places of detention, "have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment".[48] The notion of independent persons visiting places of detention in an unhindered manner to inspect and investigate the treatment and conditions of detention is thus well-established in international human rights law. Clearly the intention in General Comment 21, as well as in the Body of Principles, is that states must be proactive and establish such mechanisms domestically. This duty emanating from the ICCPR and the Body of Principles is important as states that have not even signed or ratified the Optional Protocol to the Convention against Torture (OPCAT), also have a duty to establish monitoring mechanisms for places of detention.

37. There is at present no independent body of persons in South Africa that visit police cells with the purpose to inspect and report on treatment and conditions of detention. The Independent Complaints Directorate (ICD) does not have the mandate nor capacity to do this. This is regarded as a serious shortcoming in preventing torture and ill treatment, but an issue that can be addressed in this Bill. In South Africa the value of independent visitors was already realised in the late 1990s in respect of prisons and the creation of the Judicial Inspectorate for Correctional Services (JICS) was a direct result of this. The JICS has Independent Visitors who visit the 237 prisons throughout the country on a regular basis (weekly) to inspect conditions of detention and the treatment of prisons, including the recording of complaints by prisoners with a view to resolve such complaints. By using community members, the JICS has established a mechanism that is unique internationally and recognised for its affordability. The 2008/9 budget of the JICS was just over R15 million[49] or an estimated 0.13% of the budget of the Department of Correctional Services. There is little doubt that the JICS has over the years made a significant contribution to the improvement of prisoners' rights in South Africa.
38. South Africa signed the OPCAT in September 2006 but has not yet ratified it and this is regrettable. OPCAT entered into force on 22 June 2006 and by July 2010, 64 states have signed and 54 have ratified the Protocol. OPCAT is built on experience and knowledge that has developed over several decades; namely that regular visits by independent parties to

[47] Body of Principles, Principle 29(1).
[48] Body of Principles, Principle 29(2).
[49] Office of the Inspecting judge (2009) *AnnualReport of the Judicial Inspectorate for Correctional Services 2008/9*, Cape Town.

places of detention are effective in preventing torture and other ill treatment.[50] It is the overall aim of OPCAT to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."[51] Article 2 of the Protocol established the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT), or international pillar, and Article 3 calls upon states to establish at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, generally referred to as a National Preventive Mechanism (NPM), or domestic pillar.[52] The two-pillar system of international and national visiting mechanisms has a different purpose to the visits provided for under Article 20 of UNCAT, which are of an enquiry nature after reliable information of systematic torture has been received. Under OPCAT, the visits are preventive in nature and the fact that the SPT visits a state or, by implication, that an NPM visits a particular facility is not an indication that there may be any particular problems regarding torture and other ill treatment in that state or facility. At the conclusion of a visit by the SPT, it will communicate its findings to the state in a confidential report and the state has the option to request the SPT to publish the report.[53] The powers and functions of the NPM are set out in Articles 19 to 23 of OPCAT. These are aimed at ensuring its independence; granting it the necessary access to places of detention and people detained there; empowering it to make recommendations on conditions of detention and draft legislation; protecting persons providing information to the NPM, publishing an annual report, and engaging authorities in constructive dialogue.

39. In view of the above it is submitted that the Bill be amended to provide for a visiting mechanism in respect of police stations and police holding facilities. Clause 8(a - b) already provides the Secretariat with the power to visit and enter any building or premises of the

[50] The Special Rapporteur on Torture made the following observation in a 1995-report: "Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Inspections of all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, should be conducted by teams of independent experts. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. When official, rather than independent teams carry out inspections, such teams should be composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts. Where such inspection teams have yet to be established, International Committee of the Red Cross (ICRC) teams should be granted access to places of detention." E/CN.4/1995/34 12 January 1995 para. 926(c)

[51] Art. 1 OPCAT.

[52] The NPM must be designated by states parties to the Protocol and states are afforded great flexibility in this regard. These may be newly established bodies or may be existing bodies. The NPM may also be an organ of state or a non-governmental structure.

[53] Between October 2006 and March 2009 the SPT undertook six visits and two of these reports (Maldives and Sweden) were made public. These reports can be accessed at: http://www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm

police service. It is submitted that this power be extended to provide for a fully fledged independent visiting mechanism as envisaged under OPCAT. It is furthermore submitted that the powers of the visiting mechanism be delegated to the provincial secretariats and that the necessary amendments be made under Chapter 4 of the Bill. It is envisaged that when South Africa does ratify OPCAT that this structure can then be designated as the NPM in respect of police custody.

Conclusion

The above submission dealt exclusively with the prevention and eradication of torture informed primarily by UNCAT and OPCAT. The submission did not, due to time constraints, deal with deaths in custody and more specifically the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.[54] It is submitted that the Portfolio Committee should consult these principles in its deliberations on the two bills.

The Portfolio Committee's attention is furthermore drawn to the International Convention for the Protection of All Persons from Enforced Disappearance and the UN Declaration on the Protection of All Persons from Enforced Disappearance.[55] Although the convention is not yet in force, it provides another step in the development of international human rights law to prevent gross human rights violations and combat impunity.

We thank the Portfolio Committee for the opportunity to make this submission and is hereby requesting to make an oral submission when public hearings are held on the two bills.

Prepared by:

Lukas Muntingh
Project Coordinator
Civil Society Prison Reform Initiative
Community Law Centre
University of the Western Cape
Bellville
Tel 021 – 959 2950
Cell 082 200 6395
Email lmuntingh@uwc.ac.za

[54] Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.
[55] Adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992.