

The criminalization of torture in South Africa

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Abstract

This article describes the politics related to the criminalization of torture in South Africa. It studies the differences between torture as an international crime and as a crime under international human rights law. The South African anti-torture law is analysed and critiqued against the standards and provisions set out in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The article recommends amendments to the South African law, aimed at making the combating of torture more effective.

Introduction

The South African Constitutions of both 1993 (Interim Constitution)¹ and 1996 (Final Constitution) made provision for the right to be free from torture and not to be treated or punished in a cruel, inhuman and degrading way. Even before the first democratic elections of 1994, the then National Party government of South African had signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1993. The new African National Congress government ratified it in 1998, thus signifying that a democratic South Africa would take its obligations under international human rights law seriously. In July 2013, South Africa incorporated UNCAT into national law by enacting the Prevention and Combating of Torture of Persons Act (PCTPA).² Until then, acts of torture were punishable under the common law as either common assault or assault with intent to commit grievous bodily harm. These types of assault attracted lesser punishments than the kind of punishment envisaged under UNCAT. Besides, where the police were charged with acts amounting to torture, it was the cabinet minister responsible who was held to account under civil law in his official capacity, and not the perpetrator himself, as provided under UNCAT.

This article is divided into three parts. The first deals with the history and politics related to the passing of the PCTPA. The second studies the differences between torture as a crime under international criminal law and as a crime under international human

¹ Sec 11 provides: "Freedom and security of the person: (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

² Act 13 of 2013.

order to give fuller effect to the range and reach of the prohibition set out in UNCAT, the act needs to be amended to provide for the criminalization of cruel, inhuman or degrading treatment or punishment. As regards the perpetrator element, the PCTPA needs to include persons in the employ of private institutions or organizations that are contracted to carry out work on behalf of the state. A separate law would be necessary to provide for torture in the private sphere as provided by article 1(2) of UNCAT. In order to ensure that torture does not take place under the guise of lawful sanctions, “lawful sanctions” need either to be qualified by a concluding clause referring to the relevant provisions in the ICCPR, or be tested by using the limitations clause in the constitution as a yardstick. The penalties for torture need to be categorized as under the discretionary minimum sentencing provisions, with clear guidelines as to how the aggravating factors should be interpreted.

Finally, the PCTPA has now prompted the Parliamentary Portfolio Committee on Justice and Correctional Services to propose changes in the current law that will limit the ability of someone charged with torture to obtain police bail and to be released with a warning in lieu of bail.¹³⁸ Furthermore, it is expected that the Criminal Matters Amendment Bill [20 of 2015] will remove the current 20 year statute of limitation on the crime of torture.

¹³⁸ PMG report on the meeting of the Parliamentary Portfolio Committee on Justice and Correctional Services on 19 August 2015, available at: <<https://pmg.org.za/committeemeeting/21350/>> (last accessed 3 September 2015).