

# Domestic courts and the Promotion and Protection of the Right to Freedom from Torture in Southern African Development Community Countries

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## 1. INTRODUCTION

SADC is made up of 15 countries, which, as the name suggests, are located in Southern Africa.<sup>1</sup> The constitutions of all these countries prohibit torture, cruel inhuman and degrading treatment or punishment. All these countries have also ratified the African Charter on Human and Peoples' Rights which prohibits torture.<sup>2</sup> Most of these countries have also ratified the UN Convention against Torture<sup>3</sup> and all of them have ratified or acceded to other international treaties such as the International Covenant on Civil and Political Rights<sup>4</sup> and the Convention on the Rights of the Child that expressly prohibit torture.<sup>5</sup> The purpose of this article is to discuss the jurisprudence emanating from different SADC courts on the measures taken to protect the right to freedom from torture. The article starts by highlighting the provisions on the right to freedom from torture in the constitutions of different SADC countries and thereafter the author discusses the definition of torture, the difference between torture on the one hand and cruel, inhuman and degrading treatment or punishment on the other hand, the status of the right to freedom from torture in the eyes of the courts, the factors that courts consider as creating a conducive environment for torture, the issue of deporting or extraditing a person to a country where he or she could be subjected to torture, proving allegations of torture, actions that courts have taken or have recommended to be taken against

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<sup>1</sup> These countries are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>2</sup> See <http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.pdf> (last accessed 19-03-2012). Article 5 of the African Charter on Human and Peoples' Rights prohibits torture.

<sup>3</sup> The countries that had not yet ratified this treaty were: Angola, Tanzania and Zimbabwe.

See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last accessed 19-03-2012).

<sup>4</sup> See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last accessed 19-03-2012). See article 7 of the International Covenant on Civil and Political Rights.

<sup>5</sup> See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last accessed 19-03-2012). See Article 37(a) of the Convention on the Rights of the Child.

public officials implicated in torture, some forms of punishment that have been declared as torture, and the admissibility of evidence obtained through torture. Some examples have been drawn from as many SADC countries as possible but this has not been possible in respect of all issues and all countries because of the lack of readily accessible case law.<sup>6</sup> Had the author had access to all the relevant case law from all SADC countries on all the issues discussed here, the paper would have represented a complete picture of the measures taken by the courts to protect the right to freedom from torture.

## 2. CONSTITUTIONS

The right to freedom from torture is protected in the constitutions of Botswana,<sup>7</sup> Lesotho,<sup>8</sup> Mozambique,<sup>9</sup> South Africa,<sup>10</sup> Tanzania,<sup>11</sup> Zambia,<sup>12</sup> Seychelles,<sup>13</sup> Swaziland,<sup>14</sup> Malawi,<sup>15</sup> Mauritius,<sup>16</sup> Namibia,<sup>17</sup> and Zimbabwe.<sup>18</sup> It is important to note that the constitutions of Botswana, Lesotho, Tanzania, Zambia, Swaziland, and Mauritius although provide that no one shall be subjected to torture, they, unlike the UN Convention against Torture, exclude the word “cruel.” This, however, does not mean that they do not prohibit cruel punishment or treatment. Unlike the constitutions of all the above countries, the constitution of Mozambique provides that “all citizens... shall not be subjected to torture...” A strict reading of that provision could lead to an interpretation that the right to freedom from torture of non-citizens

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<sup>6</sup> Because of language barrier, the author was unable to refer to case law from Angola, DRC, Madagascar and Mozambique.

<sup>7</sup> Article 7(1) provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading punishment or other treatment.’

<sup>8</sup> Article 8(1) provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading punishment or other treatment.’

<sup>9</sup> Article 40(1) provides that ‘[a]ll citizens shall have the right to life and to physical and moral integrity, and they shall not be subjected to torture or to cruel or inhuman treatment.’

<sup>10</sup> Section 12(1)(d) and (e) provide that ‘[e]very one has the right to freedom and security of the person, which includes the right – not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.’

<sup>11</sup> Article 13(6)(e) provides that ‘no person shall be subjected to torture or inhuman or degrading punishment or treatment.’

<sup>12</sup> Article 15 provides that ‘[n]o person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment.’

<sup>13</sup> Article 16 provides that ‘[e]very person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.’

<sup>14</sup> Article 18(2) provides that ‘[a] person shall not be subjected to torture or to inhuman or degrading treatment or punishment.’ See also Article 29(2) which prohibits the torture of children.

<sup>15</sup> Section 19(3) provides that ‘[n]o person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.’

<sup>16</sup> Article 7(1) provides that ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.’

<sup>17</sup> Section 8(2)(b) provides that ‘[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’

<sup>18</sup> Article 53 provides that ‘[n]o person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.’

is not protected. The correct interpretation is that the right to freedom from torture of everyone including non-citizens is protected. The constitutions of Swaziland,<sup>19</sup> South Africa<sup>20</sup>, Malawi,<sup>21</sup> and Zimbabwe<sup>22</sup> provide that the right to freedom from torture is absolute, that is, non-derogable. The other remaining constitutions do not expressly provide that the right to freedom from torture is non-derogable. However, they provide that no one “shall” be subjected to torture. This could be interpreted to mean that the right to freedom from torture is absolute. The right to freedom from torture is also absolute under international law.<sup>23</sup> Therefore, the fact that the constitution does not expressly provide that the right to freedom from torture is absolute should not be interpreted to mean that that right is not absolute. Unlike the above constitutions, the Constitution of Swaziland specifically provides that children shall not be subjected to torture and that

“Law enforcement officials may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”<sup>24</sup>

Unlike all the above constitutions, the Constitution of Mozambique expressly provides that “[a]ll evidence obtained through the use of torture ... shall be invalid.”<sup>25</sup> As will be discussed later, although the constitutions of the other countries do not expressly provide that evidence obtained through torture is inadmissible, there are other pieces of legislation that provide that such evidence is inadmissible. Also unlike all the above constitutions, the Constitution of Mozambique expressly bars the extradition of a person to a country where he could be subjected to torture. Article 67(3) of the Constitution of Mozambique provides that:

“Extradition shall not be permitted for crimes which are punishable by death or by perpetual imprisonment under the law of the requesting State, or when there are grounds to believe that the extradited person may be subjected to torture or inhumane, degrading or cruel treatment.”

However, as will be discussed shortly, jurisprudence emanating from other countries that do not have the same constitutional provision also make it clear that it would be unconstitutional

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<sup>19</sup> Article 38(e).

<sup>20</sup> Article 29(2).

<sup>21</sup> Section 44(1)(b).

<sup>22</sup> Section 86(3)(c).

<sup>23</sup> Committee against Torture, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2/ 24 January 2008, para 1 (where it is stated that the prohibition of torture is absolute in customary international law).

<sup>24</sup> Article 57(3).

<sup>25</sup> Article 65(3).

and contrary to international law to extradite a person to a country where he could be subjected to torture. Our attention now shifts to the discussion of the jurisprudence emanating from SADC courts on the question of the right to freedom from torture.

### 3. DEFINITION OF TORTURE

Torture is defined in Article 1 of the Convention against Torture.<sup>26</sup> At the time of writing Mauritius and South Africa were the only countries in SADC that had enacted legislation incorporating the CAT definition of torture.<sup>27</sup> Namibia was in the process of enacting legislation to criminalise torture and also to incorporate the CAT definition in domestic legislation.<sup>28</sup> Because of the fact that torture is prohibited by the constitutions of all SADC countries, courts have had to deal with cases alleging the violation or abuse of the right to freedom from torture. The lack of the definition of torture in domestic law prompted the South African Supreme Court of Appeal<sup>29</sup> and High Court<sup>30</sup> to rely on the definition of torture under the Convention against Torture in giving meaning to the right to freedom from torture. This was the case although the CAT was yet to be domesticated in South Africa.<sup>31</sup> The High Court of Zimbabwe relied on the definition of torture under CAT to hold that the assaults meted out on the applicant amounted to torture.<sup>32</sup> This was so despite of the fact that Zimbabwe has not yet signed or ratified CAT and the then Constitution of Zimbabwe did not empower the court to refer to international law in interpreting the Bill of Rights.<sup>33</sup> The Supreme Court of Zimbabwe held that the prohibition of torture could be found in the African Charter on Human and Peoples' Rights, the ICCPR, the Inter-American Convention

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<sup>26</sup> Article 1 of the Convention against Torture defines torture to mean '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.'

<sup>27</sup> See Criminal Code of 29 December 1838 (amended by Bill No.XVI, 2003) (Mauritius) and section 3 of the Prevention and Combating of Torture of Persons Act 13 of 2013 (South Africa).

<sup>28</sup> See Namibia's Third Periodic Report to the African Commission on Human and Peoples' Rights (2010) pg 24 (where Namibia informs the African Commission that it is in the process of enacting a law on torture and that a bill had been drafted) at [http://www.achpr.org/english/state\\_reports/Namibia/3rd%20report.pdf](http://www.achpr.org/english/state_reports/Namibia/3rd%20report.pdf) (last accessed 19-03-2012).

<sup>29</sup> *S v Mthembu* 2008(2) SACR 407(SCA) para 30.

<sup>30</sup> *Kutumela v Minister of Safety and Security* [2008] ZAGPHC 430 (12 December 2008) para 86.

<sup>31</sup> It has to be recalled that section 39 of the South African constitution empowers courts to refer to international law in interpreting the Bill of Rights.

<sup>32</sup> *S v Reza* [2003] ZWHHC 219; HH 2-2004 (11 February 2003) at 6.

<sup>33</sup> The 2013 Constitution of Zimbabwe provides that when interpreting the Bill of Rights 'a court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party.' See section 46(1)(c).

on Human Rights and other international instruments.<sup>34</sup> The court came to that conclusion although the constitution of Zimbabwe makes it very clear that international conventions do not form part of the law of Zimbabwe unless they have been incorporated by or under an Act of Parliament.<sup>35</sup> However, the High Court of Zimbabwe made it very clear that because of the fact that Zimbabwe is not a party to the CAT, it has not assumed the obligations imposed by that treaty.<sup>36</sup> Although, as mentioned earlier the High Court of Zimbabwe relied on the definition of torture in the CAT and the Supreme Court also referred to international and regional instruments in finding that international law prohibits torture, there is still a degree of uncertainty on the issue of whether the CAT definition of torture is applicable in Zimbabwean law. This is because of two reasons: one, Zimbabwe is yet to ratify the CAT and international law does not form part of the law of Zimbabwe unless such law is domesticated by an act of parliament and two, the High Court decision could be departed from by another High Court judge or it could be overruled by the Supreme Court.

Like the South African courts and the Zimbabwean courts, the High Court of Malawi has referred to Article 1 of CAT in its definition of torture.<sup>37</sup> This should be viewed against the background that the constitution of Malawi, like that of South Africa, also empowers courts to rely on international law in interpreting the Bill of Rights.<sup>38</sup> The Constitutional Court of Seychelles referred to the definition of torture in Article 1 of CAT to define torture.<sup>39</sup> Like the constitutions of South Africa and Malawi, the constitution of Seychelles empowers courts to refer to international law in interpreting the Bill of Rights.<sup>40</sup> What is emerging from the above discussion is that courts in some SADC countries have relied on the definition of torture under CAT in an attempt to protect the right to freedom from torture. This has been the case although in most countries the CAT has not been domesticated and in Zimbabwe it has not been ratified. The reference to the CAT definition of torture should also be viewed against the background that in some countries such as Zimbabwe domestic law did not require or empower courts to refer to international law in interpreting the constitution. It is a

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<sup>34</sup> *Kachingwe v Minister of Home Affairs NO (17/03) [2005] ZWSC 134 (18 July 2005).*

<sup>35</sup> Article 111B(1)(b) of the Constitution of Zimbabwe (1980). Section 327(2)(b) of the 2013 Constitution provides that “[a]n international treaty which has been concluded or executed by the President or under the President’s authority – does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.”

<sup>36</sup> *Mann v Republic of Equatorial Guinea (Case No. CA 507/07) [2008] ZWHHC 2 (23 January 2008) at 5.*

<sup>37</sup> *Masangano v Attorney General (15 of 2007) [2009] MWHC 31 (9 November 2009) at 25.*

<sup>38</sup> Section 11(2)(c) of the Constitution of Malawi.

<sup>39</sup> *Ponoo v Attorney General (05/2010) [2010] SCCC 4 (16 November 2010) para 36.*

<sup>40</sup> Article 48 of the Constitution of Seychelles.

positive development that domestic courts have referred to the definition of torture in CAT in these different countries in a sense that courts are invoking international law to enrich domestic jurisprudence. In countries where CAT has not been domesticated, countries are called upon to adopt the definition of torture under CAT in their legislation. This is because of at least five reasons: one, the definition of torture is now considered to be part of customary international law;<sup>41</sup> two, the SADC tribunal has relied on this definition;<sup>42</sup> three, the African Commission on Human and Peoples' Rights has relied on this definition;<sup>43</sup> and four, in some countries such as Malawi, Zimbabwe and South Africa courts have relied on this definition and changing the definition will upset the jurisprudence developed by the courts. Lastly and perhaps most importantly, the Committee against Torture had called upon states parties to the CAT to make sure that the definition of torture in their domestic legislation is in line with that under CAT.<sup>44</sup> By clearly defining torture courts are in a position to distinguish between the treatment that amounts to torture and treatment that amounts to cruel, inhuman or degrading treatment or punishment (CIDT). Our attention now shifts to discussion of the cases in which courts have dealt with CIDT.

#### 4. CIDT

The constitutions of SADC countries and international treaties prohibit torture and cruel, inhuman, degrading treatment or punishment. Although there are cases where it is difficult to distinguish torture from CIDT,<sup>45</sup> it is critical that the distinction between these different but closely related types of treatment is maintained. This is because of the seriousness of torture as an international crime.<sup>46</sup> Courts in SADC have drawn a distinction between torture on the one hand and CIDT on the other hand. In one case the plaintiff was arrested for a traffic offence and detained in the following conditions:

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<sup>41</sup> See generally, Van der Vyver "Torture as a Crime under International Law" 2003 *Albany Law Review* 427 – 463.

<sup>42</sup> See *The United Republic of Tanzania v Cimexpan (Mauritius) Ltd*, Case No. SADC(T) 01/2009 (Judgement of 11 June 2010).

<sup>43</sup> See for example, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06 (decided at the 9<sup>th</sup> extra-ordinary session held from 23 February to 3 March 2011) para 162. For a detailed discussion of this case, see Mujuzi "The African Commission on Human and Peoples' Rights and the admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*" (2013) *The International Journal of Evidence and Proof* 284 – 294.

<sup>44</sup> Committee against Torture, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2/ 24 January 2008, para 9.

<sup>45</sup> Committee against Torture, General Comment No. 2, para 3.

<sup>46</sup> See generally, Van der Vyver 2003 *Albany Law Review* 427 – 463; Cassese *et al*, *International Criminal Law: Cases and Commentary* (2011) Chapter 5.

“In one corner of the cell is the toilet for use by the inmates. The toilet is separated from the rest of the cell by a one and a half metre high wall. There is no door to the toilet. The toilet was used throughout the night. The flushing system of the toilet is operated from outside the cell. On this night, it was only flushed once despite the frequent use the inmates subjected it to throughout the night. There was no room to sleep. The temperatures were high and no drinking water was provided. No police officer checked upon the inmates the entire night. The police have regulations that inmates are to be periodically checked upon whilst held in the cells at night in case of emergent illness or some other eventuality that may require the opening of the cells. There was no water to wash one’s hands after using the toilet. There was no toilet paper. The plaintiff and the inmates were released the following morning ... in preparation for court. A pot of tea (without milk) was given the inmates together with three cups from which all twenty- four inmates were to share the tea.”<sup>47</sup>

The High Court of Zimbabwe, in awarding him damages for degrading and inhuman treatment observed that the “standards that may be acceptable today may constitute inhuman and degrading treatment a decade away.”<sup>48</sup> The Court added that “treatment of an arrested, detained or convicted person that affronts the dignity of that person, that exceeds the limits of civilised standards of decency and involve the unnecessary infliction of suffering or pain is inhuman and degrading for the purposes of the supreme law of the land.”<sup>49</sup> The Supreme Court of Namibia held that section 8 of the Constitution which prohibits torture or cruel, inhuman and degrading treatment or punishment prohibits seven different conditions: torture; cruel treatment; cruel punishment; inhuman treatment; inhuman punishment; degrading treatment; and degrading punishment.<sup>50</sup> In a case where prisoners argued that their imprisonment in overcrowded and poorly ventilated prisons amounted to torture, cruel, inhuman or degrading treatment or punishment, the High Court of Malawi held that:

“Prisoners have the right not to be subjected to torture and cruel treatment. In this case we hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore unconstitutional.”<sup>51</sup>

The Court of Appeal of Lesotho, after an inspection in loco, in a case in which the facts were more or less like in the Malawian case above held that:<sup>52</sup>

<sup>47</sup> *Chituku v Minister of Home Affairs* (HC 2587/99) [2004] ZWHHC 6; HH 6-2004 (14 January 2004) at 3.

<sup>48</sup> *Chituku v Minister of Home Affairs* at 6.

<sup>49</sup> *Chituku v Minister of Home Affairs* page 6.

<sup>50</sup> *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State*; 1991 (3) SA 76 (NmSc) at 19. See also *McNaband v Minister of Home Affairs NO* (I2852/05) [2007] NAHC 50 (12 July 2007) para 47; *Namunjepo v Commanding Officer, Windhoek Prison* 2000 (6) BCLR 671 (NmS).

<sup>51</sup> *Masangano v Attorney General* (15 of 2007) [2009] MWHC 31 (9 November 2009) pg 38.

<sup>52</sup> *Mothobi v Director of Prisons* [1996] LSCA 92 (16 September 1996).

“It should be emphasised that awaiting trial prisoners are suspects not convicts. The state is obliged to keep them in reasonably healthy and comfortable surroundings than they do. In these days when there are water-flush toilets, there is no conceivable reason why any human should stay ... along with others in a cell measuring 8 paces by 8 paces with a bucket or pail containing his excrement and that of others for fourteen hours. Staying with one's excrement might be understandable but staying with that of others is simply torture. Conditions for awaiting trial prisoners cannot be allowed to remain as they are at present. If the purpose of keeping awaiting trial prisoners in this way was to torture them that could be understandable (assuming in this day and age the State considers itself to have a right to torture people) a right the State no more has even in respect of convicted prisoners.”<sup>53</sup>

It is argued that the above facts disclose inhuman or degrading treatment as opposed to torture. Although the conditions in which the applicants were detained were clearly far below internationally acceptable standards, it is doubtful that their treatment amounted to torture in terms of Article 1 of CAT. The Court of Appeal of Lesotho held that the state has an obligation to provide healthcare to a prisoner and that “[a] prisoner may not be detained in inhumane conditions. If a prisoner becomes ill, and he is not given sufficient or any medical treatment, then his detention becomes inhumane and relief will be granted by the Courts.”<sup>54</sup> SADC courts have thus clearly distinguished between torture on the one hand and CIDT on the other hand.<sup>55</sup> Although courts have not defined what amounts to CIDT,<sup>56</sup> this is not unique to SADC courts. These terms are also not defined in the Convention against Torture. This is attributable to the drafting history of the Convention where the drafters of the Convention found it “impossible to achieve a definition of the cruel, inhuman or degrading treatment or punishment.”<sup>57</sup> As a result, the Committee against Torture has taken a case-by-case analysis of what amounts to CIDT.<sup>58</sup> The Committee against Torture has expressed the view that although the circumstances leading to torture also lead to CIDT, there is a difference between torture and CIDT. It is the degree of the severity of the pain or suffering

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<sup>53</sup> *Mothobi v Director of Prisons* at 14 – 15.

<sup>54</sup> *Mothobi v Director of Public Prosecutions* [1992] LSCA 89 (5 August 1992) at 5.

<sup>55</sup> Although in one case the High Court of Zimbabwe expressed the view that ‘[t]orture is a degrading and inhuman treatment.’ See *S v Reza* (Crim. Appeal 159/03) [2003] ZWHHC 219; HH 2-2004 (11 February 2003) pg 7.

<sup>56</sup> The Constitutional Court of Seychelles mentions the fact that the Attorney-General refers to the dictionary meaning of “inhuman” treatment but it does not give a definition of that term. See *Simeon v Attorney General* (1/2010) [2010] SCCC 3 (28 September 2010) para 35. In *Woods v Commissioner of Prisons* (78/01) [2003] ZWSC 74 (17 November 2003) the Supreme Court on Zimbabwe referred to some jurisprudence from the European Court of Human Rights on what amounts to inhuman and degrading treatment to hold that the refusal by the respondent to transfer the applicant to South Africa for specialised medical treatment did not amount to inhuman treatment.

<sup>57</sup> Ingelse, *The UN Committee against Torture: An Assessment* (2001) 248.

<sup>58</sup> See generally Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (2008) 540 – 576.



that distinguishes torture from the CIDT.<sup>59</sup> This is the same approach that has been taken by the SADC courts.

## 5. THE STATUS OF THE RIGHT TO FREEDOM FROM TORTURE IN THE EYES OF THE COURTS

As indicated earlier, the right to freedom from torture is an absolute right under the constitutions of various SADC countries and under international law. We will now have a look at the jurisprudence of various SADC courts to establish how courts have approached the question of the status of the prohibition of torture. The Court of Appeal of Lesotho held that “[t]he right not to be tortured, together with the right to life ... are the two most fundamental of all the rights conferred by the Constitution.”<sup>60</sup> The High Court of Lesotho held that under no circumstances should the right to freedom from torture be violated<sup>61</sup> and that the state does not have the right to torture people.<sup>62</sup> The High Court of Lesotho took judicial notice of the fact that law enforcement officers widely tortured suspects in Lesotho.<sup>63</sup> The Supreme Court of Namibia held that the constitution absolutely prohibits torture or cruel, inhuman or degrading treatment or punishment.<sup>64</sup> The Supreme Court of Zimbabwe held that citizens and non-citizens have the right to freedom from torture.<sup>65</sup> The High Court of Zimbabwe held that the prohibition of torture has attained the status of customary international law which is superior over all other laws.<sup>66</sup> Referring to international law, the High Court of Zimbabwe held that:

“The first corollary of the universal proscription of torture is that it imposes upon every State obligations which are applicable *erga omnes*, that is to say, towards all other States, which are then endowed with correlative rights. The second corollary is that the principle against torture has evolved into a peremptory norm or *jus cogens*, viz. a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it cannot be derogated or deviated from by any State or group of States.”<sup>67</sup>

<sup>59</sup> Committee against Torture, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2/ 24 January 2008, para 10.

<sup>60</sup> *Commander, Lesotho Defence Force v Letsie* (CIV) 28/09) [2010] LSCA 26 (22 October 2010) at 14.

<sup>61</sup> *Lerotholi v Commander of Lesotho Defence Force* (CIV/APN/270/2007) [2007] LSHC 8 (2 July 2007).

<sup>62</sup> *Mothobi v Director of Prisons* [1996] LSCA 92 (16 September 1996) at 15.

<sup>63</sup> *Lerotholi v Commander of Lesotho Defence Force* at 18.

<sup>64</sup> *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSc) para 3 (Judgment by Bekker C.J) para 20 (Mohamed AJA).

<sup>65</sup> *Kachingwe v Minister of Home Affairs NO* (17/03) [2005] ZWSC 134; SC145/04 (18 July 2005).

<sup>66</sup> *Mann v Republic of Equatorial Guinea* (Case No. CA 507/07) [2008] ZWHHC 2 (23 January 2008) at 6.

<sup>67</sup> *Mann v Republic of Equatorial Guinea* at 14.

That was a profound statement that clearly reflected the status of the prohibition of torture in international law. The Court goes beyond stating that the right to freedom from torture is absolute to state that it has attained that status of *jus cogens*. The High Court of Swaziland held that the enjoyment of the right to freedom from torture is “absolute and non-derogable.”<sup>68</sup> Although at the time of the judgement torture was yet to be criminalised in South Africa, the South African high court observed that torture was “a criminal offence.”<sup>69</sup> The Court of Appeal of Botswana emphasised the importance of the prohibition against torture and CIDT in the following terms:

“The proscribed elements of torture, and inhuman or degrading punishment or other treatment are pregnant with meaning and are powerful concepts reaching down to the very depths of a person’s humanity and to his right not to be treated in a manner which robs him of his human dignity and worth.”<sup>70</sup>

The above examples show that courts in SADC have taken the prohibition against torture seriously. Aside from holding that the right to freedom from torture is absolute, some courts, like the Zimbabwean High Court, held that the prohibition of torture has attained the status of *jus cogens* in international law. This means, amongst other things, that although Zimbabwe was yet to sign or ratify the Convention against Torture at the time of writing,<sup>71</sup> it has an international obligation to prevent torture<sup>72</sup> and if it cannot prosecute those who have committed acts of torture it should extradite them to other countries for prosecution. Related to the above, the South African High court referred to torture as a criminal offence although South Africa was yet to criminalise torture.<sup>73</sup> The government should therefore make sure that torture is criminalised and its perpetrators are punished.

## 6. ENVIRONMENT CONDUCTIVE FOR TORTURE

In their jurisprudence SADC courts have also highlighted the environment conducive for torture. Understanding this environment is critical if torture is to be eliminated. Examples that

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<sup>68</sup> *Mhlanga v Commissioner of Police* (341/07,764/07) [2008] SZHC 8 (31 January 2008) para 32.

<sup>69</sup> *Molema v MEC, Safety & Security, North-West* (795/2000) [2002] ZANWHC 6 (8 March 2002) para 17.3.

<sup>70</sup> *S v Ndou* (CLCLB-029-08 ) [2008] BWCA 60 (24 July 2008) para 59. The appeal was against a 10 year sentence for robbery on the ground that it was inhuman. The Court reduced his sentence to five years’ imprisonment not because it considered the 10 year sentence to be inhuman but because, inter alia, of the personal circumstances of the accused. He was young (23 years old), HIV positive and a foreign national and also that his sentence was severer than that imposed on the co-accused.

<sup>71</sup> See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last accessed 23-04.2013).

<sup>72</sup> Committee against Torture, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2/ 24 January 2008, para 1.

<sup>73</sup> In South Africa torture is a crime if it is a war crime or a crime against humanity in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

courts have identified as conducive for torture include: removing a suspect from a prison to a military facility for interrogation in Lesotho<sup>74</sup> and removing a suspect from prison to a police station in Zambia for interrogation enabled the police to torture the accused.<sup>75</sup> There is therefore a need to ensure that people are not transferred from prisons to military or police facilities without effective measures to ensure that they are not subjected to torture. Such people should, for example, be examined before they leave correctional facilities and after they have been returned. When they allege that torture was inflicted on them, those allegations should be investigated promptly.<sup>76</sup> Officers who take them and those who bring them back should enter their details in official books at correctional facilities. Prison authorities should not readmit to prison people who have been subjected to torture when they were taken away for interrogation. The existence and use of secret or non-gazetted detention facilities<sup>77</sup> and the military assuming policing responsibility of enforcing law and order<sup>78</sup> have also been identified as some of the factors contributing to torture. It is therefore critical that people are detained in gazetted areas to which inspecting authorities have access. The army should also not assume the role of law enforcement unless the security situation requires their intervention. Law enforcement should be left to the police who are trained to deal with such situations.

The collusion of medical officers in torture which could take different forms is also a factor that contributes to torture. In Lesotho one medical officer at a military hospital refused to give a torture victim a medical report when he was treated for his torture injuries because

“The officer escorting him instructed the doctor who attended to him not to give him a medical report. The respondent requested both a report and to be admitted as a patient. The doctor said he had no sympathy for prisoners and refused both requests. He did, however, indicate that he wished to see the respondent on a daily basis in order to attend to his injuries.”<sup>79</sup>

It is therefore important that professional medical bodies sensitise their members on the prohibition of torture so that such members do not collude with law enforcement officers in the torture of suspects. In cases where medical personnel have directly or indirectly been involved in acts of torture, they should be investigated and disciplinary action, depending on

<sup>74</sup> *Commander, Lesotho Defence Force v Letsie* (CIV) 28/09 [2010] LSCA 26 (22 October 2010).

<sup>75</sup> *People v B* (1980) Z.R. 219 (H.C.) at 233.

<sup>76</sup> *Dhlamini v S* (HC 147/09) [2009] ZWHHC 24; HH 42-2009 (25 February 2009) (the court ordered that the allegations of ill-treatment by the applicants should be investigated).

<sup>77</sup> *Dhlamini v S* (state agents allegedly tortured the applicants in secret detention facilities).

<sup>78</sup> *Lerotholi v Commander of Lesotho Defence Force* [2007] LSHC 8 (2 July 2007).

<sup>79</sup> *Commander, Lesotho Defence Force v Letsie* [2010] LSCA 26 (22 October 2010), para 5.

the degree of their involvement, be taken against them. Another factor that could contribute to torture is for the courts to allow a person who has been subjected to torture or who alleges to have been subjected to torture to be detained or imprisoned by those who allegedly tortured him/her. The Zimbabwean High Court held that:

“It may thus be argued that if it is proved that...torture...carried out or authorized by or connived in by the state or its officials has preceded the handing over to the police and the courts of an accused person, then, as in the case of foreign abductions the judiciary should not condone such delinquent acts.”<sup>80</sup>

The High Court of Zimbabwe in holding that the police’s detention of suspects for 14 days *incommunicado* was unlawful and violated Zimbabwe’s constitution and its obligations under the ICCPR observed that:

“The respondents have permitted the applicants to be detained *incommunicado*. People are at risk of torture or other forms of ill-treatment if they are detained *incommunicado*. The risk increases the longer they are held as this allows for a longer period for injuries to be inflicted and visible marks of these injuries to fade.”<sup>81</sup>

The same view was expressed by the High Court of Lesotho in the following terms:

“It is not unknown for torture to be used in order to obtain leads in investigations and even confessions that will not be used at the trial. It is for such reasons that lengthy detentions without access are avoided because this puts temptations on investigators to use torture and other suspect means. It is precisely to remove from investigators the temptation of extracting information oppressively or by torture and other suspect means that in our law a detained suspect cannot be detained beyond 48 hours without being given a charge.”<sup>82</sup>

The High Court of Namibia also held that one of the reasons why a suspect should be produced before court within 48 hours of his arrest is to assure a judicial officer that such a person has not been subjected to torture, cruel, inhuman or degrading treatment or punishment.<sup>83</sup> The fact that courts are aware of the environment conducive for torture means that they are able to closely scrutinise any evidence that was obtained when the suspect was under such environment. Even in cases where an offender does not allege that he was subjected to torture, if the court is convinced that the environment in which he was detained was conducive for torture, courts should treat the evidence obtained in such circumstances

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<sup>80</sup> *Dhlamini v S* (HC 147/09) [2009] ZWHHC 24 (25 February 2009) at 8.

<sup>81</sup> *Chiramba v Minister of Home Affairs N.O.* [2008] ZWHHC 82 (11 November 2008) at 10.

<sup>82</sup> *Rantuba v Commanded of LDF* [1998] LSCA 110 (27 November 1998) at 19.

<sup>83</sup> *Sheehama v Minister Safety & Security* [2011] NAHC 81 (17 March 2011) at 7.

with caution.<sup>84</sup> Treating such evidence with caution could discourage law enforcement officers from resorting to such means to extract confessions or other pieces of evidence from suspects.

## 7. DEPORTATION OR EXTRADITION

Human rights jurisprudence, especially from the European Court of Human Rights, is replete with examples of individuals who have challenged their deportation or extradition to other countries on the grounds that there is a risk that they will be subjected to torture cruel, inhuman or degrading treatment or punishment.<sup>85</sup> The Convention against Torture expressly prohibits the expulsion, return or extradition of a person to a country “where there substantial grounds for believing that he would be in danger or being subjected to torture.”<sup>86</sup> Our attention now shifts to the jurisprudence of courts in some SADC countries on the question of deporting or extraditing a person to a country where there is a risk that he/she could be subjected to torture. The South African Supreme Court of Appeal held, in a case where the Department of Home Affairs attempted to deport two Somali nationals to Somalia, that it would be unlawful to deport refugees or asylum seekers to a country which was “a failed or dysfunctional state that is unable to maintain public order or protect the lives of its citizens” and where “their lives would be in danger if they were to be forced to return to that country.”<sup>87</sup> The Court added that:

“The appellants would face a real risk of suffering physical harm if they were forced to return to Somalia. It is obvious that no effective guarantee can be given that the appellants would not be persecuted or subjected to some form of torture or cruel, inhuman and degrading treatment if they are compelled to re-enter that country. It is the prevention of this harm that the [Refugee] Act<sup>88</sup> seeks to address by prohibiting a refugee’s deportation. Deportation to another state that would result in the

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<sup>84</sup> In *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06 (decided at the 9<sup>th</sup> extra-ordinary session held from 23 February to 3 March 2011) para 212 the African Commission on Human and Peoples’ Rights observed that “[f]urthermore, in interpreting Article 7 of the African Charter, the African Commission has stated that ‘any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.’ In *Malawi African Association V. Mauritania*, this Commission has held that ‘any confession or admission obtained during *incommunicado* detention shall be considered to have been obtained by coercion’.” Footnotes omitted.

<sup>85</sup> See generally Gentili “European Court of Human Rights: An absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk” 2010 *International Journal of Constitutional Law* 311 – 322.

<sup>86</sup> For a detailed discussion of Article 3 of the Convention against Torture, see Weissbrodt and Hörteiter “The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Provisions” 1999 *Buffalo Human Rights Law Review* 1 – 72.

<sup>87</sup> *Arwah Abdi v Minister of Home Affairs* [2011] ZASCA 2 (15 February 2011) para 4.

<sup>88</sup> The Refugee Act 130 of 1998.

imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution.”<sup>89</sup>

It appears that the court could have allowed the deportation of the appellant to Somalia had there been “effective guarantees” that they would not be subjected to torture, cruel, inhuman, degrading treatment or punishment. The court looked at the general political situation in Somalia to conclude that the deportation of the appellants to Somalia would be contrary to the values in the South African constitution. In preventing the Department of Home Affairs from deporting the applicant to Libya, the South African High Court studied human rights reports which showed that political opponents were regularly tortured in Libya, and referred to Article 3 of CAT to conclude that if deported to Libya “there was a real risk, more than a reasonable possibility, that he will be subjected to cruel and inhumane treatment.”<sup>90</sup> The court added that the applicant’s political activities made “him vulnerable to the risk of being placed in the danger of torture were he to be returned to Libya.”<sup>91</sup> The court concluded that even if the applicant posed a threat to the South African society, courts are “constrained by the wider interests of [the] treaty [CAT] and constitutional obligations to avoid refoulement in the face of the risk of torture.”<sup>92</sup> This decision raises at least two important issues – one, for the court to halt the deportation of the offender on the ground that he would be subjected to torture, there has to be “a real risk” which is “more than a reasonable possibility” that the appellant would be subjected to torture. The “real risk” test is higher than the “reasonable possibility” one. It is argued that even in cases where there is a “reasonable possibility” that the appellant would be subjected to torture if deported, courts should not sanction his or her deportation. In other words, the test should be whether there are substantial grounds to believe that the appellant would be subjected to torture if deported. The second important issue raised by the court is that although the Convention against Torture was yet to be domesticated in South Africa, the court invoked it to justify its holding that the appellants should not be deported. This should be understood in the context that the South African constitution empowers courts to refer to international law in interpreting the Bill of Rights.<sup>93</sup> The Constitutional Court of

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<sup>89</sup> *Arwah Abdi v Minister of Home Affairs* [2011] ZASCA 2 (15 February 2011) para 26. Footnotes omitted.

<sup>90</sup> *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 133.

<sup>91</sup> *Tantoush v Refugee Appeal Board* para 135.

<sup>92</sup> *Tantoush v Refugee Appeal Board* para 136.

<sup>93</sup> See section 39(1)(b). Section 8 of the South African Prevention and Combating of Torture of Persons Act, 2013 provides that “(1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account,

South Africa held that the deportation or surrender of a person to a country where he could be sentenced to death, at a time when the death penalty had been declared unconstitutional in South Africa on amongst other grounds that that it violated the rights to freedom from torture and CIDT, amounted to a violation of that person's right to freedom from torture and CIDT.<sup>94</sup> The High Court of Zimbabwe held that although Zimbabwe was not party to the CAT which in Article 3 prohibits the extradition, return or expulsion of a person to a country where there are substantial grounds to believe that he/she could be subjected to torture, international customary law requires that "Zimbabwe has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture..."<sup>95</sup> The Court added that that:

"[T]he general prohibition against torture contained in Article 7 of the International Covenant [on Civil and Political Rights] and in Article 5 of the African Charter [on Human and Peoples' Rights] must be construed to incorporate, by necessary intendment, the principle of non-refoulement embodied in Article 3 of the Convention against Torture. It follows that in order to comply with its general obligations against torture under the International Covenant [on Civil and Political Rights] and the African Charter [on Human and Peoples' Rights], Zimbabwe is required to abide by and take into account the specific prohibition against extradition to a State where there exists the danger of the person extradited being subjected to torture. This is so notwithstanding that Zimbabwe is not a party to the Convention against Torture. To construe the general prohibition against torture otherwise would inevitably operate to render the prohibition nugatory and illusory on the international plane."<sup>96</sup>

However, the court although found that reports by Amnesty International and the International Bar Association showed that torture was prevalent in Equatorial Guinea, they were not admissible in evidence because they had not been tendered by experts. In other words, Amnesty International and the International Bar Association were not expert witnesses in the matter.<sup>97</sup> One has to recall that the European Court of Human Rights, on whose jurisprudence the high court partly relied on the issue of extraditing a person to a country where he could be subjected to torture, has in some cases relied on the reports by Amnesty International and other reputable non-government organisations to hold that the deportation of a person to a country in question would be a violation of Article 3 of the

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including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

<sup>94</sup> *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC). See also *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* 2012 (5) SA 467 (CC).

<sup>95</sup> *Mann v Republic of Equatorial Guinea* at 6. It has to be recalled that the Zimbabwean Refugees Act 13/1978 does not expressly prohibit the return of a refugee or asylum seeker to a country where he could be subjected to torture (see section 13).

<sup>96</sup> *Mann v Republic of Equatorial Guinea* at 16.

<sup>97</sup> *Mann v Republic of Equatorial Guinea* at 7.

European Convention on Human Rights and Fundamental Freedoms which prohibits torture.<sup>98</sup> After finding that the prohibition against torture was part of customary law, it remains unclear why the court still invoked a legal technicality to exclude such vital pieces of evidence. Had the court not excluded that evidence, it would probably not have allowed the extradition of the appellant to Equatorial Guinea. Nothing barred the court from at least admitting those reports as hearsay evidence<sup>99</sup> or documentary evidence.<sup>100</sup>

## 8. PROVING ALLEGATIONS OF TORTURE

Another important issue is the type of evidence that courts have accepted in proving allegations of torture. Although, as will be discussed shortly, medical evidence has been tendered by applicants in many courts to prove allegations of torture, there have been cases where although courts have not specifically asked the applicants to adduce medical reports to substantiate the allegations that they were subjected to torture, such reports have been tendered into evidence by the applicants. This has been the case in some cases in Zimbabwe,<sup>101</sup> Malawi,<sup>102</sup> and Lesotho.<sup>103</sup> The High Court of Lesotho found the “applicant’s story of torture and maltreatment unconvincing” because the applicant did not tender medical evidence to substantiate his claim that he had been tortured.<sup>104</sup> In declining to award the plaintiff damages for torture, the High Court of Malawi held that:

“The plaintiff was kept in the cells for 5 days before being taken to court where bail was granted upon application. The plaintiff alleged that he was tortured by police and that this including beatings during the five days. I want to believe that if indeed there was torture of the level attested to by the plaintiff he would have gone to hospital upon release on bail and medical proof of the same would have been tendered in court. In the absence of the same I have difficulties assessing the level of the same.”<sup>105</sup>

In dismissing the plaintiff’s claim for damages for torture, the Namibian high court held that her claim that she had been tortured was not “plausible” because “there was no mark or signs either physically or mentally on her” and that if she had indeed been tortured she would have

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<sup>98</sup> See for example, *Saadi v Italy Application* No 37201/06 (Judgement of 28 February 2008).

<sup>99</sup> Section 253 of the Criminal Procedure and Evidence Act, Chapter 9:07 allows courts to admit hearsay evidence in some circumstances.

<sup>100</sup> Sections 275 – 281 Criminal Procedure and Evidence Act allow courts to admit documentary evidence in certain circumstances.

<sup>101</sup> *Dhlamini v S* [2009] ZWHHC 24 (25 February 2009); *S v Nyahuna* [2003] ZWHHC 135 (3 September 2003).

<sup>102</sup> *Kamchacha v Attorney General* (1053 of 2000) [2001] MWHC 70 (4 September 2001).

<sup>103</sup> *Khuto v Commissioner of Police* (CIV/T/35/84) [1988] LSCA 144 (27 September 1988) at 7.

<sup>104</sup> *Mahase v Director of Public Prosecutions* (CRI/APN/244/86) [1987] LSCA 31 (24 February 1987) at 2.

<sup>105</sup> *Mwanamanga v Episcopal Conference of Malawi* (120/99) [2008] MWHC 148 (28 July 2008) at 5.



sought medical attention.<sup>106</sup> In dismissing the accused's allegation contained in his affidavit that he had been tortured, the High Court of Lesotho held that there was "no proof of any torture having taken place", that there was "no mark or any sign whatsoever to indicate that he had been" tortured and that there was "no ground on which th[e] court can without proof accept that bare allegation especially when observations are made in court of the accused person who appears perfectly normal without any physical signs of torture."<sup>107</sup> Although this case is unique in a sense that the accused chose not to testify in his own defence, a right which is guaranteed to him by the Constitution,<sup>108</sup> the above ruling has two challenges. First, the court appears to base its finding on the wrong assumption that all torture victims should have marks on their bodies indicating that they were tortured. This assumption ignores the facts that not all torture methods leave marks on victim bodies and that some methods of torture are not physical but rather mental. The High Court of Lesotho seems to have ignored an earlier decision by the Court of Appeal to the effect that:

"There are many methods of ... torturing persons who are being interrogated which will leave no visible indications to serve later as evidence. Devices such as standing a man naked in front of his interrogators for 2 hours at a stretch, putting a bag over his head, or making him crouch while holding a stick behind his knees - all which were mentioned in this case - are examples of such methods. The practical effect of this is that plaintiffs who have been treated in this fashion will often have great difficulty in proving it..."<sup>109</sup>

The same view was expressed by the High Court of Zimbabwe when it held that torture methods that do not leave "permanent or recognisable marks" should also be regarded as torture.<sup>110</sup> The second problem is that the court seems to ignore Article 12 of CAT which stipulates that all allegations of torture should be investigated promptly. The High Court of Zimbabwe accepted the victim's allegation that they had been tortured but observed that failure to tender a medical report in evidence was a "handicap in the assessment of the seriousness of the assault."<sup>111</sup>

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<sup>106</sup> *Nghimwena v Government of the Republic of Namibia* [2011] NAHC 105 (8 April 2011) at 19.

<sup>107</sup> *Ntobo v Director of Public Prosecutions* [1999] LSCA 127 (2 December 1999) at 8 – 9. See also *R v Molomo* (CRI/T/23/2004) [2006] LSHC 16 (31 August 2006) where the high court of Lesotho dismissed the accused's claim that he had been tortured because he did not have any visible bodily injuries.

<sup>108</sup> Section 12(7) of the Constitution of Lesotho provides that "no person who is tried for a criminal offence shall be compelled to give evidence at the trial."

<sup>109</sup> *Phakisi v Solicitor-General* (C. of A. (CIV) 15 of 1983) [1985] LSCA 174 (12 November 1985) at 13.

<sup>110</sup> *S v Reza* (Crim. Appeal 159/03) [2003] ZWHHC 219; HH 2-2004 (11 February 2003).

<sup>111</sup> *S v Musindo* (CA 458-60/2001) [2002] ZWHHC 25; HH 25-2002 (3 January 2002) at 2.

The above jurisprudence on the question of medical evidence points to the fact that medical evidence is very important and in some countries essential in proving allegations of torture. Courts should be aware that in some cases someone might be a torture victim even if there are no physical signs that he was tortured. Where necessary courts should explore the possibility of admitting into evidence psychologists' or psychiatrists' reports which could prove that the applicant was subjected to mental torture. Courts should also remember that not all medical doctors are skilled in properly diagnosing torture as some torture marks are invisible. Courts should also be aware that not all torture victims are able to afford the costs involved in consulting with a medical practitioner for examination and the issuing of a medical report. In cases where there is no medical evidence, the court may allow the applicant to be cross-examined to test the truthfulness of his or her allegation. Corroboration from another torture victim that the applicant was tortured has also been admitted in evidence as proof that the applicant was tortured.<sup>112</sup> Photographic evidence of the injuries sustained by the victim as a result of torture has also been admitted as evidence that the accused was tortured.<sup>113</sup>

## **9. ACTIONS AGAINST PUBLIC OFFICIALS IMPLICATED IN TORTURE**

Although torture is yet to be criminalised in most SADC countries, there are at least three actions that have been taken against government officials implicated in torture in some of these countries. The Zambian Supreme Court recommended that officers who have been found to have tortured suspects should pay damages to their victims.<sup>114</sup> Such a recommendation would have no impact unless there was a law in place that allows the relevant authorities to take such an action. In *Banyane v Commissioner of Correctional Services and Another*<sup>115</sup> the High Court of Lesotho held that it was lawful for the applicant, who was found at the disciplinary hearing of the Lesotho Correctional Services to have tortured inmates, to be demoted from the rank of Senior Principle Officer to the lowest rank of Correctional Officer. However, the Court held that it was unlawful to reduce the applicant's salary in addition to his demotion because the relevant law only permitted the demotion of the applicant and not the reduction of his salary. Such a law needs to be amended to ensure that someone who has been demoted for torture and other human rights violations does not only lose his title but also has his/her income affected. The South African Supreme

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<sup>112</sup> *Jafta v Minister of Law and Order* 1991 (2) SA 286 (AD); [1991] 4 All SA 234 (AD) at 9.

<sup>113</sup> *Kutumela v Minister of Safety and Security* [2008] ZAGPHC 430 (12 December 2008) para 122.

<sup>114</sup> *Attorney General v Mofya* (SC) [1995] ZMSC 15 (22 March 1995).

<sup>115</sup> *Banyane v Commissioner of Correctional Services* (CIV/APN/80/2008) [2010] LSHC 13 (9 March 2010).

Court of Appeal has called for the prosecution police officers implicated in torture.<sup>116</sup> Unlike in the case of torture where courts have held that the perpetrators should personally be held accountable for the torture, courts have taken a different view when it comes to CIDT. The High Court of Namibia held in a case where suspects were detained in police cells in inhumane conditions that “the police officers cannot be held liable for the degrading and inhuman conditions prevailing in the holding cells.”<sup>117</sup> The High Court of South Africa held that senior police officers could not “have been so stupid” to inflict visible torture injuries on the complainant as this would have meant “risking their professions by committing such a criminal offence.”<sup>118</sup> This may be interpreted to mean that if proved to have been involved in torture, law enforcement officers are likely to lose their jobs. This has indeed been the case where some police officers have been investigated for allegedly committing acts of torture.<sup>119</sup> In sentencing the accused to 12 months’ imprisonment, the High Court of Zimbabwe held that a sentence of fine or community service was inappropriate in case where it was proved that the accused had tortured suspects.<sup>120</sup> In this case although the court found that the accused had tortured the suspects, they were convicted of assault causing grievous bodily harm because torture is not criminalised in Zimbabwe. After finding that the appellants, police officers, had tortured the suspect, the High Court of Zimbabwe held that “[t]hose who engage in the torture of suspects should ordinarily receive a substantial custodial sentence.”<sup>121</sup> However, the court sentenced them to a fine or three months’ imprisonment in the event of failing to pay the fine.<sup>122</sup> What is emerging from the above jurisprudence is that courts are willing to do whatever is permissible by the law to make sure that the perpetrators of torture are held accountable. But courts have very limited room to manoeuvre because of the fact that torture is not criminalised in the respective jurisdictions and courts cannot make orders that cannot be justified in terms of the pieces of legislation they are interpreting.

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<sup>116</sup> *S v Mthembu* 2008(2) SACR 407(SCA) para 39. Section 4 of the Prevention and Combating of Torture of Persons Act, 2013 now criminalises torture.

<sup>117</sup> *McNaband v Minister of Home Affairs NO* (I2852/05) [2007] NAHC 50 (12 July 2007) para 49.

<sup>118</sup> *Molema v MEC, Safety & Security, North-West* (795/2000) [2002] ZANWHC 6 (8 March 2002) para 17.3.

<sup>119</sup> See *Annual Report of the Independent Complaints Directorate* 2009/2010 at 101 – 102 (where it is reported that 920 police officers were being investigated for assault causing bodily harm and five police officers were being investigated for torture). The ICD makes it very clear that because torture is not criminalised in South Africa, it is being investigated as assault causing bodily harm). There have also been cases where disciplinary action has been taken against police officers found guilty of assault causing serious bodily harm. See *Annual Report of the Independent Complaints Directorate* 2010/2011 at 34 – 39.

<sup>120</sup> *S v Musindo* (CA 458-60/2001) [2002] ZWHHC 25; HH 25-2002 (3 January 2002).

<sup>121</sup> *S v Reza* (Crim. Appeal 159/03) [2003] ZWHHC 219; HH 2-2004 (11 February 2003) at 9.

<sup>122</sup> *S v Reza* at 12.

## 10. SOME FORMS OF PUNISHMENT AS TORTURE

Courts in different SADC countries have been called upon to determine whether certain forms of punishments amount to torture, cruel, inhuman or degrading punishment. In South Africa courts have referred to treaties such as the Convention against Torture to find that sentences such as capital punishment<sup>123</sup> and corporal punishment<sup>124</sup> are unconstitutional for violating the rights to freedom from torture, cruel, inhuman or degrading treatment or punishment. In Namibia it was held that a punishment, like a minimum sentence, which is disproportionate to the offence amounts to cruel and inhuman punishment.<sup>125</sup> The Court of Appeal of Botswana in reducing the appellant's sentence of 34½ years' imprisonment to 20 years' imprisonment held that:

“It is now well recognised that where the cumulative effect of consecutive sentences is so excessive as to be grossly disproportionate to the offence charged, this amounts to inhuman or degrading punishment. As such it violates section 7(1) of the Constitution which provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”<sup>126</sup>

The Court of Appeal of Botswana<sup>127</sup> and the Court of Appeal of Tanzania<sup>128</sup> held that capital punishment did not amount to torture, cruel, inhuman or degrading treatment or punishment. This is because, amongst other things, that the death penalty is not prohibited in international law and is sanctioned by the constitutions of the respective countries. The Constitutional Court of Seychelles held that a five year minimum sentence for theft for a first offender was not disproportional and therefore did not amount to torture or cruel punishment<sup>129</sup> and also that a 10 year minimum sentence for drug-related offences did not amount to torture, cruel, inhuman or degrading treatment or punishment.<sup>130</sup> The Court of Appeal of Botswana held that the Penal Code Act provision which provided that a minimum sentence for rape had to run consecutively with other sentences hence leading to offenders with multiple convictions

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<sup>123</sup> *S v Makwanyane* 1995(3) SA 391(CC). See also *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) para 55.

<sup>124</sup> See for example, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 where the Constitutional Court of South Africa referred to the Convention against Torture (para 13) to hold that corporal punishment in private schools violated the right to freedom from torture, cruel, inhuman and degrading treatment or punishment. See also *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSc) where the Supreme Court of Namibia held that corporal punishment was inhuman and degrading treatment and punishment.

<sup>125</sup> *Daniel v The Attorney General* (A 430/2009) [2011] NAHC 66 (10 March 2011) at 84 (court declared unconstitutional a legislative provision which prescribed a minimum sentence for stock theft).

<sup>126</sup> *Moatshe v S* (CLCLB-073-07) [2008] BWCA 78 (28 January 2008) para 6.

<sup>127</sup> *Ntesang v The State* [1995] BLR 151 (CA).

<sup>128</sup> *Mbushuu v Republic* 1995 TLR 97 (CA).

<sup>129</sup> *Ponoo v Attorney General* (05/2010) [2010] SCCC 4 (16 November 2010).

<sup>130</sup> *Simeon v Attorney General* (1/2010) [2010] SCCC 3 (28 September 2010).

being sentenced to lengthy prison terms violated section 7(1) of the Constitution which prohibits torture, cruel, inhuman or degrading treatment or punishment.<sup>131</sup> Some courts have thus made it clear that irrespective of the heinous nature of the offence of which the offender has been convicted, the punishment to be imposed on that person should not violate his right to freedom from torture or cruel, inhuman or degrading treatment or punishment.

## 11. EVIDENCE OBTAINED THROUGH TORTURE

The constitutions of different SADC countries provide that an accused shall not be compelled to incriminate himself or herself or to give evidence at his or her trial.<sup>132</sup> The CAT expressly provides that any statement obtained through torture should be inadmissible.<sup>133</sup> As will be shown shortly, courts in different SADC countries have referred to legislation which requires the exclusion of evidence obtained coercion or torture to declare such evidence inadmissible. The Constitutional Court of South Africa held that if

“[D]erivative evidence is obtained as a result of torture there might be compelling reasons of public policy for holding such evidence to be inadmissible even if it can be proved independently of the accused. Otherwise, the ends might be allowed to justify the means. The admission of evidence in such circumstances could easily bring the administration of justice into disrepute and undermine the sanctity of the constitutional right which has been trampled upon.”<sup>134</sup>

The South African Supreme Court of Appeal has also held that evidence obtained through torture, whether the torture was inflicted on the co-accused or the accused himself is inadmissible.<sup>135</sup> Courts in Lesotho<sup>136</sup>, Swaziland,<sup>137</sup> Zimbabwe,<sup>138</sup> and South Africa<sup>139</sup> have held that evidence of a pointing-out made as a result of torture is inadmissible. The High Court of Malawi held that a confession obtained through physical or mental torture is inadmissible in evidence<sup>140</sup> and that statements obtained through torture are “entirely

<sup>131</sup> *S v Matlho* (CLCLB 019-07 ) [2008] BWCA 36 (1 January 2008).

<sup>132</sup> Article 10(7) of the Constitution of Botswana; section 12(7) of the Constitution of Lesotho; section 35(3)(j) of the Constitution of South Africa; Article 18(7) of the Constitution of Zambia; Article 19(2)(g) of the Constitution of Seychelles; section 21(9) of the Constitution of Swaziland; section 42(2)(c) and (f)(iv) of the Constitution of Malawi; section 10(7) of the Constitution of Mauritius; section 12(1)(f) of the Constitution of Namibia; and section 18(8) of the Constitution of Zimbabwe (1980) (see also section 70(1)(i) of the 2013 Constitution of Zimbabwe).

<sup>133</sup> See Article 15.

<sup>134</sup> *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 150.

<sup>135</sup> See *S v Mthembu* 2008(2) SACR 407(SCA).

<sup>136</sup> *R v Mpobane* (CRI/T/1/94) [1999] LSCA 26 (25 March 1999).

<sup>137</sup> *Rex v Dladla and Ors* (168/1998) [1998] SZHC 2 (1 January 1998) at 15.

<sup>138</sup> *S v Masera* (CRB 175-81/02) [2004] ZWHHC 50; HH 50-2004 (2 March 2004).

<sup>139</sup> *S v Mthembu* 2008(2) SACR 407(SCA).

<sup>140</sup> *Jumbe v Attorney General* (1 of 2005, 2 of 2005) [2005] MWHC 15 (21 October 2005) at 17.

inadmissible in evidence.”<sup>141</sup> The Namibian High Court held that a confession, statement or admission obtained through torture is inadmissible.<sup>142</sup> The High Court of Zimbabwe held that a confession obtained through torture is inadmissible.<sup>143</sup> The Court of Appeal of Swaziland held that evidence obtained through torture is inadmissible.<sup>144</sup> Likewise, the Court of Appeal of Tanzania held that however relevant to the case a confession is it is not admissible in evidence if “obtained through torture or threats.”<sup>145</sup> This holding is important in at least two respects, one, Tanzania is not a state party to the CAT which specifically provides that states parties shall enact laws that will make evidence obtained through torture inadmissible. Second, for the statement to be excluded, the threats do not have to be of torture. This underlines the fact that confessions have to be made voluntarily.

In holding that evidence obtained through torture should be excluded, the High Court of Malawi held that “[a] rule allowing use of evidence obtained by torture is unconstitutional, unreasonable, does not comply with international human rights standards and is not necessary in an open democratic society” and that “allowing such evidence, may licence public officials to use torture in pursuit of public goals and interests with so much compromise on citizens’ rights.”<sup>146</sup> The High Court of Zambia held that a confession obtained through physical or mental torture is inadmissible “even though a court may be satisfied that what an accused person said in a statement to the Police is in fact true.”<sup>147</sup> The law in countries such as South Africa<sup>148</sup> and Zambia<sup>149</sup> make it very clear that if the accused alleges that the a confession or statement was extracted through torture, the burden is on the prosecution to prove beyond a reasonable doubt that the statement or confession was made voluntarily. This is one of the safeguards to ensure that the accused are not compelled to testify against himself.

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<sup>141</sup> *Kara and Others* (94 of 2002) [2003] MWHC 112 (8 April 2003) at 5.

<sup>142</sup> *S v Malumo* (CC 32/2001) [2010] NAHC 20 (1 March 2010).

<sup>143</sup> *S v Masera* (CRB 175-81/02) [2004] ZWHHC 50; HH 50-2004 (2 March 2004).

<sup>144</sup> *Mahlangu Petros v Rex* (39/2002) [2002] SZSC 25; [2002] SZCA 26 (1 November 2002) at 3. See also *Rex v Bongani Mkhwanazi* (125/1998) [2000] SZHC 12 (11 May 2000) where the court held that a confession obtained through torture is inadmissible;

<sup>145</sup> *Mkika v Republic* (Criminal Appeal No. 47 of 2001) [2003] TZCA 2 (1 August 2003) para 13.

<sup>146</sup> *Palitu and Others v Republic* [2001] MWHC 43 (19 September 2001) at 7.

<sup>147</sup> *People v B* (1980) Z.R. 219 (H.C.) at 234.

<sup>148</sup> *S v Zuma* 1995(1) SACR 568 (CC).

<sup>149</sup> *People v B* (1980) Z.R. 219 (H.C.) 234. See also *Republic v Mbekeani* (48 of 2006) [2007] MWHC 22 (7 May 2007) at 9.

## **12. CONCLUSION**

The right to freedom from torture is protected not only in the constitutions of all SADC countries but also in some of the regional and international human rights instruments that have been signed, ratified or acceded to by these countries. This article has discussed the measures taken by courts in different SADC countries to protect the right to freedom from torture. The author has focused on the following issues and made recommendations where appropriate: the definition of torture, the difference between torture on the one hand and cruel, inhuman and degrading treatment on the other hand, the status of the right to freedom from torture in the eyes of the courts, the factors that courts consider as creating a conducive environment for torture, the issue of deporting or extraditing a person to a country where he or she could be subjected to torture, proving allegations of torture, some forms of punishment that have been declared as torture, and the admissibility of evidence obtained through torture.