



**SUBMISSION TO THE SPECIAL RAPPORTEUR ON TORTURE**

THE DUTY TO INVESTIGATE CRIMES OF TORTURE IN NATIONAL LAW AND PRACTICE”

FOR THE SECOND THEMATIC REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE

TO BE PRESENTED TO THE 52ND SESSION OF THE HUMAN RIGHTS COUNCIL

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1. **Introduction and Background**
	1. Lawyers for Human Rights (LHR) is an independent, non-profit human rights organization, started by a group of activist lawyers in 1979 and located in South Africa. LHR’s programs undertake strategic work in six areas of human rights law, including a key focus on refugee and migrant rights, including immigration detention. LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilization and support.
	2. LHR presents the following submission towards the Special Rapporteur on Torture’s (Special Rapporteur) forthcoming and second report with the aim to study and share a range of domestic legislative, investigative, and prosecutorial practices to address multiple challenges, impediments and obstacles standing in the way of effective accountability and justice for victims and survivors of torture in South Africa. LHR welcomes the Special Rapporteur’s report to hone in on the duty to investigate crimes of torture at the national level, which starts from establishing all acts of torture as indictable offences in national law, and proceeds through a process of complaints and investigations, and concludes only when a prosecution is completed to final judgment and a punishment is imposed that is commensurate with the gravity of the offence, and victims benefit from a just remedy.
	3. This submission seeks to focus specifically on the duty to investigate crimes of torture in national law and practice, specifically in context of torture in correctional centres. In doing so, it will set out:
		1. The legal framework in South Africa addressing the duty to investigate crimes of torture;
		2. a case study of LHR’s experience in investigating and prosecuting actual cases; and
		3. and identifying some of the outstanding challenges to holding accused accountable.
2. **Legal framework**
	1. In terms of Article 1 of the United Nations Convention against Torture (CAT), torture is defined as:

 “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/her, or a third person, information or confession, punishing him/her for an act he/she, or a third person, has committed or is suspected of having committed, or intimidating or coercing him/her, 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”[[1]](#footnote-1).

* 1. South Africa ratified the CAT in 1998. As a result of this, South Africa has held an international obligation in human rights law to pass legislation to ensure that torture becomes a crime punishable by law.
	2. Under the Constitution of South Africa, 1996, torture is absolutely prohibited. There are no permitted exceptions or derogations, even in cases of emergency. This is enshrined in the right to freedom and security of the person is protected under section 12 of the Constitution, which states that:

“Everyone has the right to freedom and security of the person, which includes the right ­

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

* 1. The Prevention and Combating of Torture of Persons Act 13 of 2013 (the Torture Act)[[2]](#footnote-2) was promulgated to give’s effect to South Africa’s obligations under the Act.
		1. The definition of torture as set out in section 3 of the Torture Act mirrors that of the definition in the CAT.
		2. Section 4 of the Torture Act sets out the offences and penalties for committing the offence of torture. The most noteworthy aspects of this section are that:
		3. Section 4(1) expands the scope of persons who are guilty of the offence of torture to include not only a person who commits torture, but also someone who attempts to commit torture or incites, instigates, commands or procures any person to commit torture.
		4. Section 4(4) of the Act provides that there are no justifications or defences for the offence torture. It states:

“(4) No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.”

* 1. The Correctional Services Act, 111 of 1998 (CSA),[[3]](#footnote-3) was promulgated in 1998 and establishes the correctional system in South Africa which is charged with “detaining all inmates in safe custody whilst ensuring their human dignity”.[[4]](#footnote-4)
	2. Chapter 3 of this CSA entitled ”Custody of all inmates under conditions of human dignity” makes provision for the standard of inmates’ treatment ranging from safe custody to security issues. What is significant about this CSA is that it is aligned to and underpinned by the basic principles of democracy characterised by the promotion, protection, and respect of inmates’ rights.
	3. The CSA does not specifically deal with instances of torture in the correctional system. However, the CSA, the Correctional Services Regulations, GN R323 in GG 35277 of 25 April 2012 and the Standing Orders issued by the National Commissioner of Correctional Services (“the National Commissioner”) under section 134(2) of the Act (“the B-orders” or “the Standing Orders”) regulates the use of force and segregation[[5]](#footnote-5), each of which has been recognised as methods and forms of torture.
		1. ***Use of force***
			1. Section 32 of the Act governs the use of force,[[6]](#footnote-6) specifically that it must be:
				1. the minimum force required to ensure safe custody, where no other means are available (section 32(1)(a));
				2. proportionate to the objective (section 32(1)(b));
				3. necessary for one of the specified purposes – i.e., for self-defence or the defence of any other person; to prevent the escape of an inmate; or to protect property (section 32(1)(c));
				4. authorised by the Head of Centre, “unless a correctional official reasonably believes that the Head of the Correctional Centre would authorise the use of force and that the delay in obtaining such authorisation would defeat the objective” (section 32(2)).
			2. If force is used without prior permission, the correctional official must report the action taken to the Head of Centre as soon as reasonably possible (section 32(3)); and reported to the Inspecting Judge[[7]](#footnote-7) immediately (section 32(6)).
			3. If force is used against an inmate, the inmate concerned must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical practitioner (section 32(5)).
			4. The Standing Orders detail the recording and reporting obligations in the event of the use of force.
		2. ***Segregation***
			1. In South Africa, segregation is regulated by section 30 of the Act and provides for instances where segregation of an inmate is permissible, including in to give effect to the penalty of the restriction of the amenities imposed under the CSA (section 30(1)(b). Section 30(9) however contains the caveat that except in so far as it may be necessary in terms of subsection (1) (b), segregation may never be ordered as a form of punishment or disciplinary measure.”
			2. Section 30(6) provides that all instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge. Further, an inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.
1. **Oversight mechanisms in the correctional system in South Africa**
	1. The CSA establishes the Judicial Inspectorate for Correctional Services (JICS), an independent office under the control of the Inspecting Judge, with the objective of facilitating the inspection of correctional centres**.[[8]](#footnote-8)**
	2. The Inspecting Judge is required to inspect, or arrange for the inspection of, correctional centres and remand detention facilities in order to report on the treatment of inmates in correctional centres and on conditions and any corrupt practices therein.[[9]](#footnote-9)
	3. The CSA also provides for certain reporting mechanisms to occur to the Inspecting Judge, including in whenever an inmate dies in a correctional centre or instances of the use of force against inmates. The CSA does not however provide JICS with any prosecutorial or judicial powers to hold to account perpetrators of excessive use of force.
	4. In December 2020, the Constitutional Court confirmed the order of constitutional invalidity made by the Western Cape High Court in *Sonke Gender Justice NPC v President of the Republic of South Africa and Others[[10]](#footnote-10)* regarding certain provisions of the CSA dealing with the independence of JICS. These provisions, set out in sections 88A(1)(b) and 91 of the CSA, deal with the position of the Chief Executive Officer of JICS, stating that they are accountable to the National Commissioner of Correctional Services for all monies spent, as well as matters relating to their misconduct or incapacity. Furthermore, that the Department of Correctional Services (DCS) is responsible for all of JICS’ expenses. These provisions do not give JICS sufficient independence to enable it to effectively oversee the DCS in respect of the conditions of detention and treatment of prisoners.
	5. In view of these findings, the Constitutional Court gave Parliament two years to rectify these issues; an approach that has been used previously by the Constitutional Court. The two-year period was due to lapse in December 2022 but the Constitutional Court has extended the period given to Parliament until December 2023.
	6. In addition, South Africa ratified the Optional Protocol to the Convention Against Torture (OPCAT)[[11]](#footnote-11) in 2019. In line with the OPCAT, JICS is part of the multi-body National Preventive Mechanism (NPM) established in South Africa, which is coordinated by the South African Human Rights Commission. The South African NPM also includes institutions such as the JICS, the Independent Police Investigative Directorate, the Military Ombud and the Health Ombud. NPM’s become fundamental to the work of monitoring places of detention and confinement and for the prevention of the scourge of torture that occurs in in these places.
2. **Examples of human rights compliant prosecutions and investigations**
	1. LHR receives numerous requests for assistance from incarcerated persons who have been subjected to assault in correctional centres by correctional services officials. We try to assist clients through opening criminal cases with the South African Police Services against perpetrators but often encounter the following issues:
		1. our clients often fear that opening a criminal cases against the correctional services officials will have negative reprisals against them and that they will be subjected to further assault and torture;
		2. the South African Police Services do not go to the correctional centres to investigate the matters and so a case is not opened; or
		3. if criminal cases are opened, investigations are not followed through or there is not sufficient evidence to charge correctional services officials as medical examinations are not allowed to be conducted.
	2. One instance where LHR has seen some progress is in an ongoing legal matter where LHR acts as co-legal representatives for five plaintiffs who were allegedly tortured while incarcerated at the Leeuwkop Maximum Correctional Centre in Johannesburg. In August 2014 the plaintiffs were brutally tortured by correctional services officials. The torture is alleged to have included being stripped naked and electrocuted under water, being forced to squat, defecate, and do handstands for prolonged periods of time. Furthermore, the plaintiffs had dogs set upon them and at one point, were instructed to lie down while an official walked on their necks and electrocuted their backs. Four of the five inmates were unlawfully placed into solitary confinement, shackled, and left without any bedding or medical treatment for the injuries they sustained.
	3. In 2015, the plaintiffs instituted action against the Minister of Justice and Correctional Services (the Minister), in his capacity as the employer of prison officials at Leeuwkop for the extensive physical and psychological injuries and suffering caused by the torture carried out by DCS officials. This matter involves consideration of intentional state conduct regarding the elements of the crime of torture under the Torture Act and is the first type of case of this nature heard in South African courts. A successful outcome will be precedent setting and is vital as it requires the court to consider South Africa’s clear, binding international treaty obligations they are obliged to respect and uphold in respect of protection against torture. Most importantly, it is a case that highlights the right to human dignity, the right to freedom and security of person, and the right to redress.[[12]](#footnote-12)
	4. In addition to assisting the plaintiffs with claiming civil damages, LHR assisted the plaintiffs with opening a criminal case against the correctional services officials. The National Prosecuting Authority declined to prosecute the correctional services officials initially. LHR then instituted judicial review proceedings seeking to review the decision not to prosecute the correctional services officials. After instituting these proceedings, the prosecuting authority decided to go ahead and prosecute the correctional services officials. Unfortunately, there has been no progress in this regard.
3. **Challenges and conclusion**
	1. Our experience is that torture often occurs in police cells, correctional services and other places of detention where freedom of liberty movement is restricted.
	2. Often due to the victims’ involvement in the criminal justice process their suffering is usually overlooked. Places of detention are also shielded from public scrutiny, and people deprived of their liberty are vulnerable to human rights violations and harm. In order to prevent violations in these places, they must function transparently and perpetrators must be held accountable.

1. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: https://www.refworld.org/docid/3ae6b3a94.html [accessed 25 November 2022] [↑](#footnote-ref-1)
2. A copy of the Torture Act is attached to this submission. [↑](#footnote-ref-2)
3. A copy of the CSA is attached to this submission. [↑](#footnote-ref-3)
4. Section 2(b) of the CSA. [↑](#footnote-ref-4)
5. This submission only touches on and attaches the CSA and the Regulations due to the sheer volume of the Standing Orders. The Standing Orders are however available upon request. [↑](#footnote-ref-5)
6. Part C of the CSA also regulates the use of certain equipment and mechanical restraints. [↑](#footnote-ref-6)
7. Further information on the Inspecting Judge is set out below. [↑](#footnote-ref-7)
8. Section 85. [↑](#footnote-ref-8)
9. Section 90. [↑](#footnote-ref-9)
10. Sonke Gender Justice NPC v President of the Republic of South Africa and Others (CCT307/19) [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (a copy of this judgment is attached to these submissions). [↑](#footnote-ref-10)
11. UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199, available at: https://www.refworld.org/docid/3de6490b9.html [accessed 25 November 2022] [↑](#footnote-ref-11)
12. <https://www.lhr.org.za/lhr-news/press-statement-closing-arguments-in-prison-torture-case-in-the-johannesburg-high-court-today/>. A copy of the plaintiffs closing arguments are attached to these submissions. [↑](#footnote-ref-12)