Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as adopted in 2002 by the UN General Assembly 57/1999: Implications for South Africa

LOVELL FERNANDEZ
Professor of Law, University of the Western Cape

1 INTRODUCTION

Since the advent of democracy in 1994, the South African government has keenly supported the human-rights cause both nationally and internationally. South African lawyers, too, have played a prominent role in the international criminal tribunals created to try allegations of grave human-rights violations.[1] At the national level, the courts have over the past decade given concrete meaning to the fair-trial principle. Yet, for all the enlightened accomplishments in the area of criminal justice, the practice of torture, cruel or inhuman treatment or punishment reminds us that the constitutional command that the State protect and respect the dignity and inviolability of the person is violated repeatedly.

This article examines South Africa's legal obligation to put an end to torture. It does so under five headings. Part One studies the meaning of torture under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: the Convention). Part Two examines South Africa's international-law obligations under the Convention. Part Three describes the underlying idea, the aim and the mechanics of the Optional Protocol to the Convention (hereafter: the Protocol). Part Four looks at the workings of the European Committee for the Prevention of Torture and Inhuman or Degrading

1 Richard Goldstone, a South African Constitutional Court judge (as he was then), was the first prosecutor (1993–1996) of the International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY) [UN SC Res 827 (1993)]. Navanethem Pillay, then a practising Durban attorney, was appointed as judge to the International Criminal Tribunal for Rwanda (hereafter: ICTR) [UN Res 955 (1994)]. She is now a judge of the International Criminal Court. Bongani Majola, a human-rights lawyer, is presently Chief of Administration and Budget Officer of the ICTY - *ICTR Newsletter* March 2005 at 5. Other African judges sitting on the International Criminal Court are Akua Kuenyehia (Ghana) and Fatoumata Dembele Diarra (Mali).

Treatment or Punishment (hereafter: ECPT). Part Five discusses the implications of the Protocol for South Africa upon ratification.

2 PART ONE: THE MEANING OF TORTURE UNDER THE CONVENTION

The Convention was adopted by the United Nations General Assembly in 1984. It came into force in June 1987 and South Africa ratified it in 1998. The Convention aims to reinforce the prohibition against torture by requiring states to assert jurisdiction over acts of torture under international law.[2] It obliges states not to expel or repatriate people to a country where they are in danger of being tortured; to prosecute or extradite perpetrators of acts of torture; to review systematically rules and methods of interrogating suspects; to investigate allegations of torture impartially; and not to allow as evidence statements made under torture.

The Convention defines 'torture' as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of 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 from, inherent in or incidental to lawful sanctions.[3]

The five core elements of the definition are that the conduct must: (a) intentionally harm the victim; (b) cause severe physical or mental suffering; (c) be specifically purposeful; (d) be perpetrated by a public official or by someone acting in a public capacity; and (e) not include lawfully sanctioned pain or suffering.

Briefly, as to the core elements of the definition under the Convention:[4]

Since the *mens rea* requirement is intention, it follows, therefore, that negligence in observing the legal rules of, say, interrogation, detention, or imprisonment will not amount to a violation of Article 1.[5] To be regarded as torture, the conduct must result in 'severe pain and suffering'. This means that where there is no *severe* suffering there is no torture. The question is whether the *threat* of inflicting pain is also proscribed by the definition. One point of view here is that the threat of torture by the state official is sufficient to constitute a breach of the definition as contained in the Convention. This is grounded in the principle that one may not threaten to do what one is forbidden from doing.[6] On the other hand,

2 See Burgers J and Danelius H *Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 1.

3 Art 1 of the Convention *United Nations Treaty Series (UNTS)* 113-114.

4 As compared to the definition of torture under Art 7(2)(e) of the Rome Statute of the International Criminal Court.

5 De Than C and Shorts E *International criminal law and human rights* (2003) 187.

6 Argument of Sauerbaum J, cited by Herzberg R 'Folter und Menschenwürde' (2005) 60 (7) *Juristenzeitung* 321 at 325.

Herzberg argues that the Convention mentions only 'infliction', not 'infliction or threat of infliction', and that lawyers should not ignore the definition limits by 'throwing everything into one pot'.[7] He contends that the omission of 'threat' in the definition was deliberately intended to place a blanket ban on issuing the threat of torture without exception, even in such cases where a threat of torture might move the accused to reveal information which could result in the saving of lives.[8]

2.1 International case-law

Given the fact that the requirement of 'severe pain and suffering' is part of the definition of torture under both the Convention (human-rights law) and the Rome Statute (international criminal law),[9] the jurisprudence of the international criminal tribunals on the interpretation of this phrase is instructive.

International case-law, however, does not prescribe the absolute degree of pain required for conduct to constitute torture. In the *Čelebići* case, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereafter: ICTY) held that the grey area occasioned by the absence of a precise cut-off degree of suffering should not be regarded as 'an invitation to create an exhaustive list of acts constituting torture, in order to neatly categorise the prohibition'.[10] In its *Kvocka* judgment, the Trial Chamber of the ICTY stated that, beyond considering the objective severity of the harm inflicted, one has to evaluate the subjective factors such as the physical and mental effect of the conduct on the victim and, in some cases, also the victim's age, gender, or health in determining the gravity of harm.[11]

The Convention obliges state parties to criminalise under national law all acts of torture and to punish offenders appropriately.[12] The definition of

7 Herzberg (fn 6 above) at 328.

8 *Ibid* 326. Within the German debate on the issue of whether the threat of inflicting torture contravenes the definition of torture under the Convention, writers such as Lüderssen and Roxin hold the view that the right to the protection of the dignity of the person is an absolute, basic right. It has no limitations and is not subject to any state interference whatsoever. Therefore, even the weightiest grounds which speak for giving priority to a colliding basic right, such as someone else's right to have his or her life safeguarded, would not justify tampering with the dignity of the person (Herzberg *loc cit*).

9 Art 7(2)(e).

10 *Prosecutor v Delacic, Mucic, Delic and Land* case no IT-96-21-T of 16 November 1998 par 469. See also the judgment of the Appeal Chamber of the ICTY in *Prosecutor v Kunarac, Kovac and Vulkovic* of 12 June 2002 para 149. In the United States, s 3(2) of the Torture Victim Protection Act of 1999 attaches to the words 'severe mental pain and suffering' the meaning of a 'prolonged mental harm caused by or resulting from' (a) the intentional infliction or threat of severe physical pain or suffering, (b) the use of mind-altering substances, (c) the threat of imminent death, or (d) the threat that another individual will imminently be subjected to (a), (b), or (c).

11 *Prosecutor v Kvocka, Kos, Radic, Zigic and Prcac*, case no IT-98-30/1 of 2 November 2002 par 143.

12 Art 4(1) and 4(2). In the United Kingdom, for example, anybody found guilty of torture is punishable with life imprisonment. See s 134 of the Criminal Justice Act 1988.

torture here is broad and not limited to torture perpetrated as part of a large-scale or systematic pattern of crimes against humanity. It does not limit torture to conduct during an armed conflict. However, this is not to say that the Convention's definition of torture necessarily extends fully to other areas of international law.[13]

The torturer need not be a public official, although the act must have taken place with the consent or acquiescence of someone in an official capacity.[14] Although the term 'official capacity' does not refer to members of a private gang of criminals who torture their opponents to extract information from them, it includes members of organisations intent on exercising political control over territory, such as guerrilla groups.[15] In the *Čelebići* case, the Trial Chamber of the ICTY held in a 1998 judgment that the word 'official' 'must be interpreted to include officials of non-state parties to a conflict, in order for the prohibition to retain significance in situations of internal conflicts or international conflicts involving non-state entities'.[16] Claire de Than and Edwin Shorts submit that, where a central government loses control over the whole of its own territory, the meaning of 'public official' would include persons belonging to factional warring groups if such persons hold themselves out to be the *de facto* governing power of that state or part thereof.[17]

3 PART TWO: SOUTH AFRICA – LEGAL DEFICENCIE AND OBLIGATIONS

Despite having ratified the Convention, South Africa has not incorporated it into national law. According to South African law, a treaty does not become part of domestic law until it is enacted into law by national legislation.[18] South Africa, is therefore, not bound under the Convention to prosecute and penalise the crime of torture. Although customary international law is part of South African law,[19] a South African court is unlikely to regard itself as having jurisdiction to try the crime of torture in the absence of a national law expressly penalising the conduct. But South Africa

13 See, for example, the judgment of the Trial Chamber of the ICTY in *Prosecutor v Kunarac, Kovac and Vukovic*, case no IT-96-23/1-T of 22 February 2001 where the court found at par 482 that 'the definition of torture contained in the Convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied'. This was confirmed by the ICTY Trial Chamber in *Prosecutor v Kvocka, Kos, Radic, Zigic and Prcac* (fn 11 above) pars 138–139.

14 *Ibid.*

15 Ratner S and Abrams J *Accountability for human rights atrocities in international law* 2 ed (2001) 119.

16 *Prosecutor v Delacic, Mucic, Delic and Land* (see fn 10 above) par 473.

17 See (fn 5 above) at 188. The recent examples they cite include the Democratic Republic of Congo, Rwanda, Sudan, Columbia, Afghanistan and Somalia. They contend that '[t]he fact that such groups may never achieve their ultimate goal of legitimacy should not detract from their legal obligation of upholding, even in times of protracted civil war or other internal conflict, the rules of international criminal law' (*loc cit*).

18 s 231(4) of Act 2000 of 1993.

19 S 232 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

has a duty under customary international law to prohibit torture,[20] which is today generally accepted as having the status of a peremptory norm from which no derogation is permitted (*ius cogens*) and recognised as an obligation *erga omnes*, which means an 'obligation which a state owes to the international community as a whole and in the enforcement of which all states have an interest'.[21] Customary international law requires states not only to prohibit torture and other forms of ill-treatment but to prevent the placing of persons in situations liable to result in torture.[22]

Gerhard Werle, however, draws attention to the fact that, since the enactment of the Rome Statute, the ICTY has distanced itself from the view that the Convention's definition of torture should be interpreted to reflect customary international law.[23] He compares the earlier judgments of the international tribunals in *Akayesu* (1998),[24] *Čelebići* (1998),[25] and *Furundžija* (2000),[26] which took the view that the definition of torture in the Convention reflects customary international law, with the judgment in *Kunarac* (2002).[27] In the last case, the Appeal Chamber of the ICTY held that the definition of torture under the Convention can only serve as an interpretative aid and is meant to apply only in the context of that Convention.[28]

South African criminal law does not define the crime of torture as an independent crime. Cases of torture are dealt with under the common-law crimes of assault or assault with intention to cause grievous bodily harm, or as intimidation. The accused is prosecuted only after the victim has laid a charge and the complaint has been investigated. Under the Convention, on the other hand, a state is obliged to investigate promptly and impartially wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.[29] This is so

---

20 S 12(1)(e) of the Constitution guarantees everyone the right 'not to be treated or punished in a cruel, inhuman or degrading way'. See also *Filartiga v Pena-Irala* 630 F 2d 876 (2nd Cir 1980) where the United States Second Circuit Court of Appeals, without examining the requirement of *usus* in detail, held the following at 882–884:

> 'This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights . . . which states, in plainest of terms, "no one shall be subjected to torture". The General Assembly has decreed that the Charter precepts embodied in the Universal Declaration "constitute basic principles of international law". GA Res 2625 (XXV) (1970) . . . These UN declarations are significant because they specify with great precision the obligations of member nations under the Charter'.

21 Dugard J *International law* 2 ed (2000) 40.

22 De Than and Shorts (fn 5 above) 194.

23 Werle G *Völkerstrafrecht* (2003) fn 169 at 694–695.

24 *Prosecutor v Akayesu* ICTR-96-4-T par 593.

25 *Prosecutor v Delacic, Mucic, Delic and Land* (fn 10 above) par 459.

26 IT-95-17/1 App Ch 21 July 2000.

27 *Prosecutor v Kunarac, Kovac and* Vulkovic (fn 13 above) par 482; and *Prosecutor v Kunarac, Kovac and Vulovic* (fn 10 above) par 147.

28 See Werle (fn 23 above) 694–695 fn 169, who also provides a fuller and carefully differentiated comparison of the judicial shift in viewpoint from the period before 2002 and thereafter.

29 Art 12.

regardless of whether or not a complaint has been made. Also, whereas under South African law the crime of assault prescribes after 20 years,[30] the Convention does not limit the period within which the crime of torture may be prosecuted. There are no exceptions.[31]

Indeed, to rely on other crimes to deal with what is in fact torture, detracts from the gravity of the crime as a crime under international law.[32]

Furthermore, under the Convention, jurisdiction is recognised on the principles of territoriality, active and passive neutrality, and presence.[33] Each state is required to exercise its jurisdiction and enforce the provisions of the Convention irrespective of whether the act of torture occurred in any territory under its jurisdiction or whether it has obtained personal jurisdiction over the alleged torturer. The justification is that 'since states are unlikely to take effective measures against their own agents someone else should be able to do so in order that torturers do not enjoy de facto impunity'.[34] The idea is to prevent torturers or so-called 'live dockets' from seeking refuge in states that are party to the Convention.

South African courts would, therefore, be permitted, though not compelled, to try the crime of torture under the principle of universal jurisdiction. However, South Africa, like most states, will not prosecute a person for an international crime unless the conduct has been criminalised under municipal law.[35]

4 ILL-TREATMENT AND OTHER FORMS OF INHUMAN OR DEGRADING TREATMENT

Whereas the Convention defines torture, it is less explicit about other forms of cruel, inhuman or degrading treatment or punishment. It nevertheless obliges states to counteract cruel, inhuman or degrading treatment or punishment which does not amount to torture but is meted out at the behest of a public authority.[36]

In the European judicial system, the European Commission of Human Rights and the European Court of Human Rights have, since the 1960s, developed an increasingly refined and expansive jurisprudence which distinguishes between torture, inhuman or degrading treatment or punishment in violation of Article 3 of the European Convention on Human

30 Exceptions are murder, treason committed when the country is at war, robbery with aggravating circumstances, kidnapping, child stealing, rape, genocide, crimes against humanity and war crimes, as contemplated in s 4 of the Implementation of the Rome Statute of the International Criminal Court Act. See s 18 of the Criminal Procedure Act 51 of 1977 as substituted by s 39 of Act 27 of 2002 and as amended by s 27(1) of Act 27 of 2002.

31 *Cf* Amnesty International *End impunity: Justice for the victims of torture* (2001) 34.

32 *Ibid* 33.

33 Art 5.

34 Evans M 'Getting to grips with torture' (2002) 51 *International & comparative law quarterly* 365 at 376.

35 Dugard (fn 21 above) 141.

36 Art 16, which also covers obligations under arts 10, 11, 12 and 13.

Rights.[37] In her searching study of European case-law on the issue of inhuman or degrading treatment or punishment, Debra Long states that 'the purposive element of the definition of torture, whilst still important, has been marginalised in favour of a threshold based upon a sliding scale of severity between acts'.[38] More recent decisions of the European Court of Human Rights point to the fact that even absence of the intention to debase or humiliate a person does not conclusively rule out the possibility of a finding in violation of Article 3 of the Convention.[39] Thus, despite the absence of any evidence to humiliate and debase, the Court has found that the omission by the authorities to improve poor and inappropriate conditions of detention constituted 'a lack of respect' and was, therefore, in violation of Article 3.[40]

In extradition or expulsion cases, the European Court of Human Rights has extended the protection of the person against ill-treatment to include situations where the threat has emanated from private individuals in the receiving state[41] or where ill-treatment in the receiving state would be knowingly caused by lack of medical care, which care had been rendered by the returning state.[42]

In view of the difficulties detainees have to prove a case of abuse beyond a reasonable doubt – because of a lack of supportive evidence, denial of access to medical treatment, and a lack of an effective complaints procedure – the European Court has increasingly moved to the position where states are now obliged to conduct an effective investigation into all allegations of ill-treatment because:

> The general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with real impunity.[43]

The notion of an effective remedy, the European Court has found, 'entails . . . a thorough and effective investigation'.[44] And the duty to investigate is owed not only to the victims but to the relatives as well.[45]

In deciding whether the effect of treatment or punishment is incompatible with Article 3, the European Court has held that, although it might

37 See, for example, 'The Greek Case' (1969) 12 *Yearbook: European Convention on Human Rights* 186; *Ireland v UK* (1978) ECHR (Series A) No 25; *Campbell and Cosans v UK* (1982) ECHR (Series A) No 48; *Tyrer v UK* (1978) ECHR (Series A) No 26. For a comprehensive discussion of the refinement of the definitions by European judicial bodies, see Long D *Guide to jurisprudence on torture and ill-treatment – Article 3 of the European Convention for the Protection of Human Rights* (2002).

38 Long (fn 37 above) 12.

39 *V v UK* (1999) ECHR (Series A) No 9.

40 *Price v UK* judgment of 10 July (cited by Long fn 37 above) 17.

41 *HLR v France* (1997) 26 EHHR 29.

42 *D v UK* (1977) 24 EHRR No 423.

43 *Assenov v Bulgaria* (1998) EHRR-III 1998 par 102.

44 *Selmouni v France* (1999) 95 EHRR 1999-V pars 79–80.

45 *Kurt v Turkey* (1998) EHRR 1998-III. For a fuller discussion on the special factors the Court has taken into account when considering claims of relatives, see Long (fn 37 above) 30–31.

be difficult for a prisoner to prove how the conditions of detention led to the suffering contemplated in Article 3, this is not necessarily the decisive factor, (as to whether authorities fulfilled their obligation under Article 3), such as in the treatment of mentally ill persons who may not be able or capable of pointing to any specific ill effects.[46]

The South African Constitution guarantees everyone the right 'not to be treated or punished in a cruel, inhuman or degrading way'.[47] The South African Constitutional Court has on a few occasions dealt with this phrase and the conceptual relationship between the descriptive terms. It found the death penalty to be cruel, degrading and inhuman in the context of the Constitution, having regard to customary international law and the inherent arbitrariness and irrationality with which such penalty is imposed.[48] The Court has also held that the state's permitting the removal of a person to another country where he or she may face the death penalty or punishment threatening human dignity, which punishment would qualify as cruel and unusual in South Africa, would violate South Africa's commitment 'not to be party to the imposition of cruel, inhuman or degrading punishment'.[49]

As regards corporal punishment, the Constitutional Court noted an international trend denouncing court-sanctioned whipping as offensive to society's notions of decency and as invading the person's right to dignity. In view of this and the arbitrariness accompanying the severity of the pain inflicted, the Court found that authority legitimising violence is inconsistent with the values underpinning the Constitution and, absent a showing of a compelling interest justifying whipping or proof of the deterrent effect of judicial whipping, juvenile whipping is cruel, inhuman and degrading. This is so whether one looks at the concepts as seperate from each other, or together, as a compact expression.[50]

South African cases have dealt essentially with the constitutionality of the *nature* of the punishment and not with the conditions of detention. However, the soaring incidence of HIV/AIDS in prison and the threat it poses to both pre-trial detainees and sentenced prisoners is an issue the judiciary will have to confront sooner or later. To be sure, added to this is the systematic sub-cultural practices of physical abuse which are now commonly regarded as inherent in or incidental to conditions of involuntary deprivation of freedom, such as coerced sodomy or being intimidated, on the pain of death, into joining a criminal gang.[51]

---

46 *Keenan v UK* (2001) judgment of 3 April.

47 S 12(1)(e) of Act 108 of 1996.

48 *S v Mankwanyane and Another* 1995 (6) BCLR 665 (CC).

49 *Mohamed and Another v President of the RSA and Others* 2001 (7) BCLR 685 (CC) at par 52.

50 *S v Williams* 1995 (3) SA 632 (CC). For a general discussion of the application of the proportionality principle in the judicial interpretation of s 12(1)(e) of the Constitution, see Cheadle H, Davis D and Haysom N *South African constitutional law: The Bill of Rights* (2002) 162ff.

51 Many of those who are incarcerated in prisons and are HIV-positive were already infected outside. The appalling prison conditions, inadequate health services, and lack of

[continued on next page]

5 PROGRESS IN SOUTH AFRICA: THE CRIMINALISATION OF TORTURE BILL

In February 2002 the Association for the Prevention of Torture (APT) and the African Commission on Human and People's Rights (ACHPR) ran a workshop on preventing torture in Africa. The workshop, held in Cape Town, resulted in the adoption of a set of guidelines and measures (Robben Island Guidelines).[52] These aim to help states fulfil their international obligation preventing torture and other forms of inhuman or degrading treatment. Participants were drawn from various national and international associations.

At the Robben Island workshop, the then South African Minister of Justice and Constitutional Development, Dr Penuell Maduna, said that the South African government was not yet ready to make the Convention part of national law. He added, however, that 'we are getting closer to the point where indeed the UN Convention is going to be part of our legislation and therefore we will deal with torture as torture rather than call it by any other name'.[53]

Indeed, in 2003, the South African government published the draft Criminalisation of Torture Bill for comment.[54] The Bill aims chiefly to: (a) criminalise torture and other cruel, inhuman or degrading treatment or punishment; and (b) provide for the prosecution in South African courts of persons accused of torture in South Africa and in certain circumstances, outside its borders.

Section 1 of the Bill adopts the Convention's definition of torture, word for word.[55] This is a narrower definition of torture than that found in the Rome Statute (which South Africa has incorporated into domestic law), which includes conduct of an arbitrary nature and which is not limited to conduct by or at the behest of a public official as required by the Convention. From this, it follows that conduct perpetrated by non-state aggressors, extremist groups or terrorist organisations would by definition not fall under the rubric of torture as defined in the Bill. Consequently, indiscriminate, purposeless and sadistic acts perpetrated without reference to official authority are excluded from the definition in the Bill.

---

imaginative remedial or prophylactic action on the part of prison authorities make a fertile breeding ground for the increasing incidence of HIV/AIDS-related deaths in South African prisons. See, generally, UN Office for the Co-ordination of Humanitarian Affairs Integrated Regional Information Networks *PlusNews* available at http://www.plusnews.org/webspecials/HIV-in-prisons/d (accessed on 11 April 2005).

52 See Niyizurugero J *Preventing torture in Africa* Proceedings of a Joint APT-ACHPR Workshop, Robben Island, South Africa, 12–14 February 2002 (2003).

53 Opening speech at the Joint APT-CHPR Workshop, in Niyizurugero (fn 52 above) 54–55.

54 Published by the Minister of Justice and Constitutional Development [B-03].

55 The Draft Bill leaves out attempt and conspiracy as s 256 of the Criminal Procedure Act 51 of 1977 already provides that, if the evidence in criminal proceedings does not prove the commission of the offence charged, but proves an attempt to commit that offence, or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.

Section 2(2) of the Bill gives effect to Article 2 of the Convention, which Article does not exempt from liability a head of state, a government, or a member of the security service or army who was under an obligation to carry out a manifestly unlawful order issued by a superior. Section 3 of the Bill provides for extra-territorial application of the legislation, giving effect to Article 5 of the Convention and harmonising the Bill's provisions with those of the Implementation of the Rome Statute of the International Criminal Court Act, 2002.

6 PART THREE: THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT[56]

An optional protocol is a subsidiary treaty or a kind of appendix to the original convention.[57] It is an internationally binding document but, because it is optional, binds only those states that have ratified it. States that have signed and ratified the original Convention against Torture can choose to ratify or accede to the Protocol as well.

The Protocol has been added to the original Convention to help state parties to implement their existing obligations to prevent torture. It aims

> to establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[58]

It is proactive rather than reactive.

The Protocol establishes a new international entity, the International Visiting Mechanism (hereafter: IVM), which is a sub-committee of the Committee against Torture (CAT), established under the Convention in order to report on state compliance. The Protocol also obliges each state party to establish one or more National Visiting Mechanisms (NVM) to visit places of detention within the state and to enter into a co-operative dialogue with the authorities in order to help them ensure that torture does not take place.

6.1 The International Visiting Mechanism (IVM)

The IVM is the international expert body which shall consist of 10 independent members (to be increased to 25 on the fiftieth ratification or accession to the Protocol)[59] with proven multi-disciplinary experience.[60] The members will be elected by state parties[61] and their composition, as a whole, must reflect equitable geographic, gender and legal system representation.[62]

56 Adopted by the UN General Assembly on 18 December 2002 (A/RES/57/199).

57 'Although a self-standing treaty is sometimes called a Protocol, it is more common to use that name for an amending or subsidiary treaty' (Aust A *Modern treaty law and practice* (2002) 333).

58 Art 1.

59 Art 5(1).

60 Art 5(2).

61 Art 6.

62 Art 5(3) and (4).

The Protocol requires all state parties to give the international entity unrestricted access to all places of detention, as well as to information about persons deprived of their liberty, where they are detained, the conditions under which they are detained, and how they are treated.[63] The state concerned must grant the IVM delegation an opportunity to interview detainees privately (or with a translator), without witnesses' being present. The IVM will be free to choose the places it wants to visit and the persons it wants to interview.[64]

States may object to a visit to a particular place of detention 'only on compelling grounds of national defence, public safety, national disaster or serious disorder in the place to be visited'. A state may not, however, invoke the existence of a declared state of emergency to object to a visit.[65]

The IVM must communicate its observations and recommendations confidentially to the state party and, if relevant, to the NVM.[66] If requested by the state party, the IVM must publish its report, together with any comments by the state concerned. Only if the state party refuses to co-operate with the IVM or to act on its recommendations may the IVM make a public statement without the consent of the state party. But this step may only be taken after thorough consultation with the Committee against Torture and the state concerned.[67]

6.2 The National Preventative Mechanism (NPM)

The Protocol requires each state party to set up and maintain one or more National Preventative Mechanisms (hereafter: NPM) to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment.[68] It does not prescribe any particular form that the NPM must take. Such mechanisms already exist in various states and include bodies such as human-rights commissions, ombudsmen, parliamentary commissions, lay people's schemes, non-governmental organisations (hereafter: NGOs), as well as other composite entities. States must ensure that NPMs are functionally independent[69] and must provide them with the necessary resources to keep functioning.[70] State parties must ensure, too, that NPMs

63 Art 14(1)(a) and (b).
64 Art 14(1)(e).
65 Art 14(2).
66 Art 16(1).
67 Art 16(4).
68 Art 3.
69 Art 18(1).
70 Art 18(3). On this point, the Geneva-based Association for the Prevention of Torture (APT), an international NGO which is active in running workshops worldwide, explaining the essence of the Protocol and its mechanisms, emphasizes financial autonomy as a fundamental prerequisite for functional autonomy. APT suggests that the so-called 'Paris Principles' on the Composition and Guarantees of Independence and Pluralism could guide states in setting up NPMs. On financial independence, Art 2 says: 'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not to be subject to financial control which might affect its independence'

[continued on next page]

have the requisite professional expertise and must, when establishing NPMs, strive for gender balance and the representation of ethnic and minority groups in the country.[71]

Each state party must give its NPM access to all information on the number of people in detention where they are being held and to all information concerning their treatment and conditions of detention.[72] In addition, it must grant the NPM access to all places of detention and must enable it to conduct interviews, without witnesses, with persons who are deprived of their liberty, either personally or with a translator.[73] NPMs may, like the IVM, also choose the places they want to visit and the persons they want to interview and they have the right to contact the IVM, meet with it, and send it information.[74] National bodies may also visit places of detention regularly and make recommendations to the relevant authorities after such a visit.[75] The state party and NPM must then enter into a dialogue regarding the possible implementation of the recommendations.[76] State parties are required to publish and distribute the annual reports of their respective NPMs.[77]

The IVM's expenses are to be paid by the United Nations, in line with the UN Resolution that treaty bodies should be funded from the regular UN Budget.[78] A Special Fund shall be set up to help finance the implementation of recommendations made by the IVM after a visit to a state party.[79]

The Protocol will enter into force once it has been ratified by 20 states. A ratifying state may make a declaration, postponing its obligations either in relation to the IVM or the NPM,[80] but not both. As at 15 April 2005, the Protocol has been ratified by four states and signed by 25.[81]

A striking feature of the Protocol is that it breaks with the pattern of compliance procedures established by earlier human-rights conventions. The two main preventative means of the Protocol, the national and the international preventative visits, seek to commit state parties through co-operation and constructive dialogue. The Convention alone, through its Committee against Torture, has proven insufficient in overcoming the hurdle posed by the principle of non-intervention. Developing states, in particular, have traditionally opposed international human-rights oversight mechanisms on the grounds that supervision amounted to unacceptable intervention in their domestic affairs. During the Apartheid period, South

(Association for the Prevention of Torture *Implementation of the Optional Protocol to the UN Convention against Torture: National Visiting Mechanisms* (2003) 9).

71 Art 18(2).
72 Art 20(a) and (b).
73 Art 20(c) and (d).
74 Art 20(e) and (f).
75 Art 19(b).
76 Art 22.
77 Art 23.
78 Art 25. See also UN General Assembly Resolution 47/111.
79 Art 26(1).
80 Art 24.
81 Available at http://www.apt.ch/un/opcat/switzerland.html.

Africa, for one, notoriously exploited Article 2(7) of the United Nations Charter[82] to suppress international action against its racial policies.

7 PART FOUR: THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (HEREAFTER: ECPT) – A BEST-PRACTICE EXAMPLE

In 1976, Jean-Jaques Gautier,[83] inspired by the work of the International Committee of the Red Cross, suggested a convention which would enable independent experts to visit all places of detention with the aim of recommending to governments ways of preventing torture or other kinds of ill-treatment. This proposal resulted in the adoption by the Committee of Ministers of the Council of Europe in 1989 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[84] This Convention established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: ECPT). To date, the Convention has been ratified by 45 member states of the Council of Europe.[85]

The ECPT comprises one member per ratifying state. Its secretariat forms part of the Council of Europe's Directorate General for Human Rights and is based in Strasbourg, France.

The ECPT members are independent and impartial experts elected by the Committee of Ministers of the Council of Europe from a list drawn up by the Consultative Assembly of the Council of Europe. They serve for four years and may be re-elected once only.[86] The present committee consists of lawyers, medical doctors (psychiatrists and specialists in forensic medicine), psychotherapists, psychologists, a criminologist, a municipality health commissioner, a police officer, a director for prison and police reform, and a mathematician.[87] They meet *in camera* and draw up their own rules of procedure.[88]

The ECPT visits all types of places of detention, such as police stations, prisons and juvenile detention centres, military detention facilities, psychiatric hospitals and holding centres for asylum-seekers or for immigration

82 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

83 Swiss banker and founder member of the Swiss Committee against Torture, today called the Association for the Prevention of Torture (APT).

84 Adopted by the Council of Europe on 26 November 1987. It entered into force on 1 February 1989.

85 *14th General Report on the CPT's Activities (covering the period 1 August 2003 to 31 July 2004)* available at http://www.cpt.coe.int/en/annual/rep-14.htm (accessed on 15 April 2005).

86 Art 5.

87 http://www.cpt.coe.int/en/members.htm (accessed on 21 June 2005).

88 Art 6.

detainees (for example, airport holding centres[89]). The aim of the visits is to see how people deprived of their liberty are treated and to recommend improvements where necessary.

The state to be visited must be notified beforehand but not necessarily of when precisely the visit will take place. The visitors may decide to conduct impromptu visits, even at night, to other unlisted detention centres. Delegations have unlimited access to such places and to go anywhere inside them without restriction.[90]

After the visit, the ECPT draws up a comprehensive report which is sent to the state concerned with a list of recommendations and comments. The state is asked to respond to the ECPT's findings within a time limit routinely set and to confirm that the recommendations have been implemented. Although confidentiality and co-operation are at the heart of the Convention, in practice almost all states now allow the publication of the report, some taking longer than others to do so.

The frequency of ECPT visits has increased very considerably in successive years. Whereas, for example, in 1996 there were 11 visits lasting a total of 93 days, from 1 August 2003 to 31 July 2004 there were 22 visits totalling 169 days.[91] The ECPT's on-site activities now stretch from Iceland in the north to Portugal in the south and from Ireland in the west to the whole of the Caucasus.

Malcolm Evans and Rod Morgan, who have published what is clearly the most detailed and independent analysis of the work of the ECPT over the past twelve years,[92] regard it as a 'resounding success'.[93] In their critique of the work of the ECPT the authors emphasise repeatedly the importance of reliable NGOs for the effectiveness of the ECPT's work.[94] International NGOs such as Amnesty International and Human Rights Watch play very meaningful roles alongside the ECPT, for their work traverses common ground. Other international member-based NGOs of value to the ECPT are the Geneva-based Association for the Prevention of Torture (APT) and the Prison Reform Initiative. Both organisations routinely furnish the ECPT with information and useful contacts when it is preparing its visits. The APT, in particular, organises conferences across the world to discuss the work of the ECPT and to acquaint NGOs with its work. The ECPT also relies a great deal on other NGOs with national branches, such as the International Association of Christians against Torture (ACAT) and the French-based *Observatoire international des prisons*

89 These were first regarded by the Commission as not being places of detention for the purposes of Art 5 of the ECHR [*Amuur v France* Comm Rep 10 January 1995 but reversed in a subsequent decision, *Amuur v France* judgment of 25 June 1996].

90 Art 8.

91 *14th General Report* (fn 85 above) 6.

92 Evans M and Morgan R *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (1998) (hereafter: *Preventing torture*). Their more recent book, *Combating torture in Europe: The standards of the European Committee for the Prevention of Torture*, was published in 2001.

93 *Preventing torture* (fn 92 above) 341.

94 *Ibid* 326.

which also publishes an annual review of prison conditions world-wide.[95] Apart from NGOs, in most member countries, the ECPT turns to 'motivated members of parliament or campaigning legal practitioners or academic researchers to follow up its findings and recommendations'.[96] The ECPT typically begins each periodic visit with a consultative meeting with NGOs and such individuals.[97]

In recent years, the ECPT reports have contributed considerably towards shaping the jurisprudence of the European Court of Human Rights when it comes to ascertaining detention conditions and the cumulative effects of overcrowding, inadequate sanitation facilities, heating, lighting, sleeping arrangements, food, recreation and contact with the outside world.[98] In the past, both the Commission and the Court relied not only on witness evidence but also conducted on-site visits to places of detention in respect of which complaints were received. Today, the Court attaches a lot of weight to the ECPT reports.[99]

8 PART FIVE: WHAT WOULD RATIFICATION OF THE PROTOCOL IMPLY FOR SOUTH AFRICA?

The implications of ratification may appear more challenging than they are. First, we should not overlook the fact that South Africa has an independent judiciary – a feature of democracy identified as being one that is likely to make an international mechanism work in a state. Secondly, the country has a Constitution which protects the dignity of the person, one's right not to be tortured, the right not to be treated or punished in an inhumane and degrading manner, and the right to a fair trial.

South Africa also has perhaps two or three existing, state-funded human-rights-monitoring agencies the work of which could be streamlined to enable them to function as a NVM.[100] But, before we discuss how to do this, we must stress that any rationalisation or re-alignment of organisational work needs to go hand-in-hand with efforts aimed at (a) changing the mind culture within the criminal justice system, and (b) stepping up criminal procedural reform.

8.1 Changing the mind culture

A culture cannot be jettisoned at the drop of a hat; all the more so when it is steeped in the tradition of opaque governance intolerant of public 'inquisitiveness'. Apartheid bred such a culture and lasted long enough to leave its stamp on the mindset of those who oversaw the implementation of the penal regime. It produced a brand of official behaviour which easily deteriorated to the point where it sought to destroy the humanity of a

95 *Ibid.*
96 *Ibid* 332.
97 *Ibid.*
98 Long (note 37 above) 34.
99 *Ibid* 35.
100 See below.

person altogether. Nelson Mandela has described the utterly despicable detention conditions in his autobiography, *Long walk to freedom*.[101] Yet, he has chronicled, too, how the behaviour of prison guards can gradually change for the better through a process of dialogue and learning. It takes time, but it has virtue for it helps to cultivate a respect for the dignity of the person.

A well-grounded and sympathetic appreciation of human rights would need to be implanted and nurtured within the minds of people who administer places where others are detained; more importantly, in the minds of those who are in actual physical contact with people involuntarily deprived of their liberty. Perhaps an aspect of such an education could consist in helping and encouraging those in charge of detainees to act in accordance with the dictates of the Bill of Rights, for this protects not only oneself against possible recrimination, protects the state as well. By violating constitutional injunctions, one risks undermining the state of its full authority to punish the people who deserve punishment.

Some will justifiably argue that changing an attitude of mind takes too long and that such education should be buffered with judicial prompting here and there. Dirk van Zyl Smit, for example, contends that the implementation of core constitutional values may possibly occur only once prisoners enforce their rights through legal actions, as happened in the early history of prisons.[102]

8.2 Need for coherent co-operation in the government's departmental criminal justice cluster

At present, the government seems determined to transform the criminal justice system. In March 2005, the Minister of Justice and Constitutional Development, Brigitte Mabandla, announced that her Department 'will this year lead a comprehensive review of the entire criminal justice system, an initiative of the JCPS announced by the President during his state of the nation address in May 2004'.[103]

The heavily overcrowded prisons, and the dehumanising consequences they bring about, will need to be addressed as a matter of urgency. The minimum-sentence enactments[104] threaten to increase prison populations in the long run. These makeshift provisions, hastily inserted into the law of criminal procedure, have resulted in the curtailment of judicial discretion, with a concomitant increase in prison populations. For example,

101 Published in 1994. See, for example, his description of cells in Pretoria Local Prison at 231.

102 See Dissel A and Ellis S 'Reform and stasis: Transformation in South African prisons' available at http://www.csvr.org.za/paper/papadse.htm.

103 Briefing by Mabandla B, Minister of Justice and Constitutional Development, to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Cape Town, available at http://www.info.gov.za/speeches/2005/05042816451005.htm (accessed on 21 June 2005).

104 See s 51 of the Criminal Law Amendment Act 105 of 1997, which came into operation on 1 May 1998 in terms of Proclamation R43 (*Government Gazette* 18879 of 1 May 1998).

before the implementation of the minimum-sentence laws in April 1998, only 19% of sentenced prisoners were serving a prison term of more than 10 years. By September 2004, that figure had increased to 36%.[105] Life sentences, on the other hand, increased from 638 in 1997 to 5 511 at 30 September 2004.[106]

In Europe, the ECPT has found, too, that rising incarceration as a result of 'getting tough on crime policies' encourages expectations that the 'toughness' will be extended to the provisions of more restrictive regimes.[107] Indeed, a 1998 national survey showed that a third of South Africans supported the use force by the police to extract information from criminal suspects, with a further 25% being indifferent to the subject.[108]

Recent experience teaches that co-operation amongst the key role-players in the criminal justice system *does* work to bring about a desired result, but that enduring success is possible only if the government puts its shoulder to the wheel, too. For example, thanks to the concerted efforts of prosecutors, magistrates, judges, police, prison heads, and the diversion programmes of the National Institute for Crime Prevention and the Re-integration of Offenders (NICRO), the number of awaiting-trial prisoners has dropped from 63 964 in April 2000 to 49 438 in September 2004.[109] Regrettably, though, this positive development is being nullified by the continued retention of the minimum-sentence legislation which results in the numerical increase of sentenced prisoners serving long prison terms.[110]

9 IMPLEMENTING A NATIONAL PREVENTATIVE MECHANISM SYSTEM IN SOUTH AFRICA: CHALLENGES

At present, South Africa has three oversight bodies: the South African Human Rights Commission (hereafter: SAHRC),[111] the Independent Complaints Directorate (hereafter: ICD),[112] and the Judicial Inspectorate.[113] The SAHRC has a broad mandate, which is to promote human-rights awareness and to take steps against the violation of those rights.

---

105 Fagan H 'Our bursting prisons' (paper delivered at a criminal justice system conference entitled *A New Decade of Criminal Justice in South Africa – Consolidating Transformation* held at Gordons Bay, Western Cape, 7–8 February 2005), available at http://www.csvr.org.za/confpaps/fagan.htm (accessed 12 April 2005).

106 *Ibid.*

107 Evans and Morgan (fn 92 above) 325.

108 Pigou P 'Monitoring police violence in South Africa' (paper presented at the International Seminar on Indicators and Diagnosis on Human Rights: The Case of Torture in Mexico, April 2002), available at http://www.csvr.org.za/papers/papigoul.htm (accessed 12 April 2005)

109 Fagan (fn 105 above).

110 *Ibid.*

111 Established under s 184 of Act 108 of 1996.

112 Established in terms of s 50 of the South African Police Service Act 68 of 1995.

113 Established in terms of s 25 of the Correctional Services Act 8 of 1959 (as amended by the Correctional Services Act 102 of 1997).

Given its limited resources, the SAHRC is unable to monitor the treatment of people detained in various facilities. It intervenes in specific situations but, even then, only on a short-term basis. It usually refers complaints it receives against the police or the prison authorities to the ICD and Judicial Inspectorate, respectively, but does not follow up to see what comes of them. It has, therefore, since its inception in 1996, been unable to provide a comprehensive overview of findings and trends, systemic abuse, highlighting areas of concern and of improvements.[114]

The ICD, on the other hand, is the central official monitoring and investigative body of police abuses. It may investigate police misconduct on its own motion or when it receives a complaint. Thereafter, it may recommend disciplinary steps or prosecutorial action. But the police are not compelled to institute disciplinary steps; nor do the Internal Investigation Units of the various provinces provide the ICD with statistics on the outcomes of their own investigations – a remarkable drawback for the work of an oversight body[115].

A practical flaw in the work of the ICD is that the police are obliged to report to it *only* cases of deaths in custody. In turn, the ICD distinguishes between deaths in custody (limited to those occurring within police cells) and deaths resulting from police conduct (acts or omissions) – an unhelpful distinction indeed, which does not leave us any the wiser. By its own admission, the ICD considers this a deficiency which affects its ability 'to keep proper statistics and easily analyse trends and practices'.[116] In practice, too, the ICD has clung to the narrow definition of torture, according to which certain interrogation methods, such as electric shocks, suffocation, and suspension, determine whether or not conduct amounts to torture.[117]

The Judicial Inspectorate, an independent office controlled by an Inspecting Judge, was established in 1998 in order that the judge may report on the treatment of prisoners in prisons and on prison conditions.[118] In accordance with the law, the inspectorate has appointed a number of Independent Prison Visitors (IPVs) in each of the provinces. They are appointed from the ranks of people who are nominated by the public and community organisations. After a three-day induction course on the law governing prisons and prisoners' rights, they are appointed for two years, with a moderate hourly remuneration. Depending on the size of the prison, they work between 14 and 67 hours per month.

IPVs are required to conduct regular visits to prisons, interview prisoners privately and take up complaints with the prison authorities. During

114 Pigou (fn 108 above)

115 *Ibid.*

116 McKenzie K 'Control mechanisms to prevent torture' in Niyizurugero (fn 52 above) 109 at 111. See also Geldenhuys T and Brink A 'Establishment of regulations for the treatment of persons deprived of their liberty from a policing perspective' in Niyizurugero (fn 52 above) 89–90.

117 Masuku T 'Numbers that count: National monitoring of police conduct' (2004) 8 *Crime Quarterly* available at http://www.iss.co.za/pubs/CrimeQ/No.8/Masuku.htm.

118 S 85(1) of the Correctional Services Act 111 of 1998.

2003/2004, the 233 IPVs collectively recorded 491 599 interviews with prisoners and received 155 721 complaints from them.[119] An important feature of their work, and one which accords with the spirit of the Protocol, is that the IPVs are required to discuss complaints with the head of the prison or the appropriate official with a view to resolving issues internally. Another very useful aspect of their role is that they report to the Judicial Inspectorate on the nature and number of the cases they receive. This provides the basis for studying trends of human-rights abuses that might exist at particular prisons and helps to identify problem areas.[120]

Most of the complaints are resolved between the head of a prison and the IPV to the satisfaction of the prisoners. Unresolved problems are taken to the Visitors' Committee meetings, which are attended by IPVs and Regional Co-ordinators, the latter being responsible for implementing the visiting scheme and also for conducting on-going IT training for IPVs. Whatever problems are not resolved at the meetings are referred to the Judicial Inspectorate's Legal Services Unit.

In practice, it seems that prisoners' complaints are related to endemic and systemic living conditions that the Judicial Inspectorate as a whole, let alone the IPVs, cannot solve. The 'awful conditions which many prisoners have to endure'[121] persist, and heads of prison have declared under oath that overcrowding 'constitutes a material and imminent threat to the human dignity, physical health or safety' of the accused.[122]

9.1 Concluding remarks on South Africa's present oversight bodies

All three oversight bodies described above are essentially complaints-driven. Their drawback is that they do not communicate with each other on their findings of ill-treatment of people in detention. The fact that they rely on matters' being brought to their attention, coupled with the fact that the ICD and the Judicial Inspectorate address primarily the needs of persons for whose benefit they were established, means that other persons who are involuntarily deprived of their liberty, such as detained immigrants, people in psychiatric institutions, juveniles in reformatories or children's homes, and soldiers in military detention facilities, are not catered for at all. For example, there is no provision for judges or magistrates to visit mental institutions.[123] The need to do so for independent preventative intervention in cases where people are detained as a result of administrative action is, therefore, critical.

119 Judicial Inspectorate of Prisons *Annual report* (1 April 2003 to 31 March 2004) 11.

120 *Ibid* 12–13.

121 *Ibid* 25.

122 *Ibid* 23.

123 For a critique of the need for monitoring the treatment of the mentally ill, see Haysom N, Strous M and Vogelman L 'The mad Mrs Rochester revisited: The involuntary confinement of the mentally ill in South Africa' (1990) 6 *South African Journal of Human Rights* 341 at 351.

If South Africa ratifies the Protocol, it would be obliged to ensure that an NPM also visits those categories of persons not catered for under present arrangements. How such a body should be constituted and who should be elected or appointed to it, is a question requiring a comprehensive discussion. The Judicial Inspectorate could provide useful insights in discussions around the question of which actual visiting approach one takes. Although it is only six years old, it has already established a far-flung physical presence throughout the country. It has developed a manner of interaction with detention centres which is not abrasive or confrontational but focussed on co-operation and getting results. For example, it has chosen, strategically, to limit its work to dealing with prisoners' complaints and not with corrupt prison practices as well – as the law requires – perhaps out of fear of stretching its resources too widely and too thinly and at the expense of compromising its good relations with prison officials it needs in order to carry out its function.[124] Its expertise and experience would be helpful in conceptualising such a mechanism. Yet, however such a mechanism may be established or composed, it will have to have strong links with reliable NGOs working in various areas in respect of which it will carry out its work.

The Open Society Foundation for South Africa and Open Society Justice Initiative have recently started a project called Strengthening Police Oversight. Run much along the lines of the IVM and the general philosophy of the ECPT, the idea here is to establish a Proactive Monitoring Group within the ICD which focuses on proactive problem-solving approaches to police misconduct.[125] The initiative is founded on the notion that the 'accountability agenda is not necessarily the issue of what is to be done, but how work in this sector is undertaken'.[126] At a practical level, the thinking is that 'a relationship of constant conflict can harden positions' and 'distance the police from the overseers making input and acceptance of recommendations for improvement all the more difficult'.[127]

10 THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS (NGOs)

Throughout the 1980s, a wide range of NGOs campaigned actively against torture and degrading treatment or punishment and for the release of political leaders from detention and prison. The publicity they generated might not have succeeded in improving the prison conditions of political detainees but it certainly helped to prevent indiscriminate, rampant abuse at the hand of the authorities. The main thrust of the NGOs' support dissipated with the release of Nelson Mandela in 1992. Today, only a few, isolated citizen-based organisations are working to prevent ill-treatment of

124 Cf Dissel and Ellis (fn 102 above) 17.

125 See, generally, Tait S 'Strengthening police oversight in South Africa: Opportunities for state-civil society partnerships' paper delivered at a criminal justice conference, (fn 105 above).

126 *Ibid.*

127 *Ibid.*

persons held in police or other forms of custody. But they purposely work very low-key to secure the co-operation of the authorities. Also, to maximise their effect, they confine themselves to particular geographic localities. This strategy of confidentiality is understandable given the short-term, region-specific goal, and is in line with the confidentiality espoused by the Protocol. However, in the main, and in the long run, in order to be taken seriously, NGOs thrive on publicity. Indeed, for most NGOs, most of the time, 'publicity is the oxygen of their operations'.[128]

Mobilising civic awareness on this issue is difficult. It does not resonate well in communities that feel victimised and 'betrayed' by the criminal justice system. The cause of marginalised minorities is not a popular one. For instance, nobody talks about the fact that, as recently as 31 December 2002, there were still 207 prisoners whose death sentences had yet to be converted,[129] seven years after capital punishment was found to be unconstitutional! A small, but maybe realistic, way would be for fledgling groups to share information, build reliable and verifiable databases and join each other or become federated to a national body. As a concrete start, existing state organs with a strong civilian component, such as the ICD and the Judicial Inspectorate, could begin sharing experiences and information with each other.

11 CONCLUSION

The Protocol, which de-emphasises a confrontational international oversight role in favour of a more preventative, confidential, and collaborative approach to ill-treatment, is designed to overcome the suspicions of countries wary of international intervention. South Africa's ratification of the Protocol would entail that to be on a firm footing, a legal basis, such as an Act of Parliament, be passed to ensure that: the NVM is functionally independent and composed of multi-disciplinary experts who are able to visit all places of detention and their facilities without restriction. The enabling law needs to stipulate the procedure for the appointment of the national experts and the transparent consultative process to be followed before their appointment. The National Visiting Body should have a stipulated source of funding and would need to be able to appoint and pay its own staff.

Credibility is an important factor in this exercise. Even without having to ratify the Protocol, South Africa has the basic legal framework and the resources which, if properly put into effect, could achieve a great deal of what the Protocol seeks to accomplish. Admittedly, existing oversight bodies do not fulfil the preventative role as envisaged by the Protocol. But they provide useful starting points. Ratification is a matter of political will. South Africa is not under the same kind of pressure as that to which the new democracies in Eastern Europe were exposed within the framework of the Council of Europe, to sign or ratify the European Convention for the

128 Evans and Morgan (fn 92 above) 360.

129 Judicial Inspectorate of Prisons *Annual report 2002/2003* 29.

Prevention of Torture. Despite a lingering, deep-seated absence of openness by policing and penal authorities, these new democracies have opened themselves up to the ECPT. It is a matter of self-interest. South Africa's ratification, however, would serve to encourage other African states that have until now been willing but hesitant to ratify.[130] Indeed, some African countries have shown themselves willing to co-operate with fact-finding missions in the past. For example, Mali has implemented recommendations made by the Special Rapporteur on Prison Conditions in Africa.[131] More than this, it would add a lot more credibility to South Africa's oft-declared commitment to human-rights. But, most importantly, it would give actual currency to the constitutional principle that the dignity of the person is inviolable.

BIBLIOGRAPHY

Amnesty International End impunity: Justice for the victims of torture (2001)

Association for the Prevention of Torture Implementation of the optional protocol to the UN Convention against torture: National visiting mechanisms (2003)

Aust A *Modern treaty law and practice* (2002)

Brigitte Mabandla, briefing to the Parliamentary Portfolio Committee on Justice and Constitutional Development available at http://www.info.gov.za/speeches/2005/05042816451005.htm

Burgers J and Danelius H *Handbook on the Convention against Torture and other Cruel and, Inhuman or Degrading Treatment of Punishment* (1988)

130 Bodies similar to the ECPT do not exist under any of the Organisation of African Unity (OAU) (now African Union) human-rights treaties. The workshop that produced the Robben Island Guidelines (see fn 52 above) fell within the promotional mandate of the African Commission which, in terms of Art 45 of the African Charter, helps the Commission to induce states to comply with their obligations under the Charter. A proposal to elaborate a Protocol to the African Charter has been tabled. A Protocol to establish the African Court on Human and People's Rights was adopted in June 1998. As is the case in the Inter-American human-rights system, and as was the case in the European human-rights system, the idea is that the African Court and the African Commission would complement each other. Their jurisdiction would include human-rights instruments ratified by African states and it would have the power to remedy violations and order the payment of reparations. The African Charter does not stipulate sanctions for non-compliance with the standards set out nor with the African Commission's recommendations. See, generally, Kioko B 'Non-compliance and human rights treaties' in *Visits under public international law: Theory and practice* Proceedings of an APT Workshop, Geneva, 23–24 September 1999 133–134.

131 The Special Rapporteur was established in terms of Art 45 of the African Charter on Human and People's Rights. The office appears to have been established in response to requests by NGOs, notably the Paris-headquartered Penal Reform International (PRI). After the appointment of the first Rapporteur, PRI facilitated visits to the various states, lent administrative and secretarial support, and helped with the production and publication of his reports (Evans M and Murray R 'The Special Rapporteurs in the African system' in Evans M and Murray R (eds) *The African Charter on Human and People's Rights* (2002) 300).

Cheadle H, Davis D and Haysom N *South African Constitutional Law: The Bill of Rights* (2002)

De Than C and Shorts E *International criminal law and human rights* (2003)

Dissel A and Ellis S 'Reform and stasis: Transformation in South African prisons' available at http://www.csvr.org.za/paper/papadse.htm

Dugard J *International law* 2 ed (2000)

Evans M 'Getting to grips with torture' (2002) 51 *International & Comparative Law Quarterly* 365

Evans M and Morgan R *Preventing torture: A study of the European Convention for the prevention of torture and inhuman and degrading treatment or punishment* (1998)

Evans M and Murray R 'The Special Rapporteurs in the African system' in Evans MD and Murray R (eds) *The African Charter on Human and People's Rights* (2002) 300

Fagan H 'Our bursting prisons' paper delivered at conference, A new decade of criminal justice in South Africa – Consolidating transformation, Gordons Bay, Western Cape (7 to 8 February 2005) available at http://www.csvr.org.za/confpaps/ fagan.htm

Geldenhuys T and Brink A 'Establishment of regulations for the treatment of persons deprived of their liberty from a policing perspective' in Niyizurugero (2003) *Preventing torture in Africa*

Haysom N, Strous M and Vogelman L 'The mad Mrs Rochester revisited: The involuntary confinement of the mentally ill in South Africa (1990) 6 *South African Journal of Human Rights* 341

ICTR Newsletter (March 2005)

Judicial Inspectorate of Prisons Annual report (April 2003 to 31 March 2004)

Judicial Inspectorate of Prisons Annual report (2002/2003)

Kioko B 'Non-compliance and human rights treaties' in *Visits under public international law: Theory and practice*, proceedings of an APT Workshop, Geneva, (23–24 September 1999)

Long D *Guide to jurisprudence on torture and ill-treatment – Article 3 of the European convention for the protection of human rights* (2002)

Masuku T 'Numbers that count: National monitoring of police conduct' (2004) 8 *Crime Quarterly* available at http://www.iss.co.za/pubs/CrimeQ/ No.8/Masuku.htm

McKenzie K 'Control mechanisms to prevent torture' in Niyizurugero (2003) *Preventing torture in Africa*

Niyizurugero J *Preventing Torture in Africa* Proceedings of a joint APT-ACHPR Workshop, Robben Island, South Africa, 12–14 February 2002) (2003)

Pigou P 'Monitoring police violence in South Africa' paper presented at the International seminar on indicators and diagnosis on human rights: The case of torture in Mexico, (April 2002) available at http://www.csvr.org.za/papers/papigoul.htm

Ratner S and Abrams J *Accountability for human rights atrocities in international law* 2 ed (2001)

Sauerbaum J, cited by Herzberg R "Folter und Menschenwürde' (2005) 60(7) *Juristenzeitung* 321

Tait S 'Strengthening police oversight in South Africa: Opportunities for state-civil society partnerships' paper delivered at conference entitled A new decade of criminal justice in South Africa – Consolidating transformation, Gordons Bay, Western Cape (7 to 8 February 2005) available at http://www.csvr.org.za/confpaps/tait.htm

UN Office for the Co-ordination of Humanitarian Affairs Integrated Regional Information Networks PlusNews available at http://www.plusnews.org/webspecials/HIV-in-prisons/d

Werle G *Völkerstrafrecht* (2003)

14th General Report on the CPT's Activities (covering the period 1 August 2003 to 31 July 2004) available at http://www.cpt.coe.int/en/annual/rep-14.htm