

# Torture in South Africa

Exploring torture and cruel,  
inhuman and degrading treatment  
or punishment through the media

**Amanda Dissel, Steffen Jensen and Sandra Roberts**  
Centre for the Study of Violence and Reconciliation  
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# ABBREVIATIONS

ACHPR – African Charter on Human and People’s Rights

CAT – United Nations Committee against Torture

CIDT – Cruel, inhuman and degrading treatment or punishment

Ciri – Cingranelli-Richards Data Set

CoRMSA – Consortium for Refugees and Migrants in South Africa

CRC – United Nations Convention on the Rights of the Child

CSVV – Centre for the Study of Violence and Reconciliation

DCS – Department of Correctional Services

ECHR – European Court of Human Rights

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

ICD – Independent Complaints Directorate

MMA – Media Monitoring Africa, formerly Media Monitoring Project (MMP)

OPCAT – The Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

Popcru – Police and Civil Rights Union

RCT – Rehabilitation and Research Centre for Torture Victims

SAPS – South African Police Service

UDHR – Universal Declaration of Human Rights

UN- United Nations

UNCAT – United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

UNESCO – United Nations Educational, Scientific and Cultural Organization

# 1 INTRODUCTION

Little information exists on the practice of torture and other cruel, inhuman and degrading treatment or punishment (CIDT) in post-apartheid South Africa. However, despite the dearth of research and information, due to the history and widespread use of torture against political activists, it is not surprising that there is, in some quarters, a stated commitment to the eradication of torture. This is reflected in South Africa's ratification in 1998 of the UN Convention against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment (UNCAT)<sup>1</sup> the signing of other international instruments outlawing torture;<sup>2</sup> and the inclusion of the prohibition of torture and CIDT in the Constitution.<sup>3</sup> South Africa has also signed the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

However, despite the official commitment to eradicate torture and CIDT in South Africa, both remain a problem. There is a reported lack of knowledge about the ban on torture and a lack of commitment to implementing this ban (Muntingh, 2008), especially when torture and CIDT target those less fortunate in society – the criminals, the prisoners and the migrants. Indeed, although South Africa is more transparent than some countries, investigations into acts of torture and CIDT, as well as follow up prosecutions, remain problematic. The definition of torture adopted by the UNCAT refers, amongst other requirements, to acts inflicted by or at the instigation of, or with the acquiescence of, a public official or person acting in an official capacity. Since torture and CIDT are not generally State-sanctioned acts, they are rarely reported by the State Actors themselves. There are few oversight mechanisms which properly record, monitor or report on torture or CIDT, and where they do report on abuses by State Officials, this is usually done under common law and statutory offences in the absence of domestic legislation criminalising torture, as required by Article 4 of the UNCAT.

In the absence of official records, this report uses media reports to explore torture and CIDT in South Africa today. There are multiple methodological problems associated with such a method that will be explicated below. However, there are also sound reasons for cautiously using the media to analyse practices of torture and CIDT. While victims of alleged torture usually complain to official mechanisms, the media often provides a more immediate avenue of complaint, and it may become a prompt for official action. Because of the accessibility of the media to a larger number of people, it is likely that a greater number of acts of torture are reported in the media than in official State records. However, the media also reports on incidents that come to its attention through official media statements issued by the police and other State institutions, or during court trials. In this way, the media reports on a wide range of allegations of torture and cruel, inhuman and degrading treatment or punishment occurring in a variety of situations and which fall under the State's control.

This study set out to explore the violent acts of torture and cruel, inhuman and degrading treatment or punishment (also referred to as ill-treatment)<sup>4</sup> as reported in the South African print media. We had two complementary goals in mind:

Firstly, through the lens of the print media we wanted to explore the nature of torture and CIDT in post-apartheid South Africa. This includes questions concerning who are the perpetrators and the victims of torture and CIDT; in what context do acts of torture and CIDT occur; what forms of torture and CIDT are practiced; and what are the State's responses to allegations of torture and CIDT?

Secondly, we wished to explore how the media portrays acts of torture and CIDT. The reason for this second focus was that the media represents an important actor in the public arena in which organisations working on torture prevention operate. Furthermore, media coverage is an indicator of the extent to which torture and CIDT have been rendered invisible or visible in contemporary South Africa. The media also plays an important role in shaping and responding to public opinion on torture and State brutality, as well as at times reflecting on the State's response and approach towards torture and ill-treatment.

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1 The UNCAT adopted by the UN Assembly on 10 December 1984, and ratified by South Africa in 1998.

2 South Africa is party to the following instruments prohibiting torture and ill treatment: the Universal Declaration on Human and People's Rights (UN General Assembly Resolution 217 A (III) of 10 December 1948); the International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200 A (XXI) of 16 December 1966); and the African Charter on Human and People's Rights OAU CAB/LEG/67/3 of 27 June 1981). Various international standards and principles also prohibit torture and ill-treatment, such as: Body of Principles for the Protection of all persons under any form of Detention or Imprisonment (General Assembly Resolution 43/173 of 9 December 1988); the Code of Conduct for Law Enforcement Officials (UN General Assembly resolution 341169 of 17 December 1979). These are non-binding on States Parties.

3 Section 12 (d) and (e).

4 The UN Committee against Torture refers to cruel, inhuman and degrading treatment or punishment as 'ill-treatment'. See paragraph 3, UN Committee against Torture (2008) General Comment 2, CAT/C/GC/2, 24 January 2008.

The report begins by outlining relevant definitions and legislation concerning torture and CIDT internationally and in South Africa (Chapter 2). This is followed by a discussion of methodologies (Chapter 3), which have proved complex and challenging in this study. The chapter includes an outline of the data selection criteria for both understanding torture and CIDT in the media, as well as exploring the nature of torture and CIDT through the lens of the media. Outlining the methodologies of the study also allows us to briefly discuss how torture and CIDT were reported on in the media during 2006. The following chapter (Chapter 4) explores the nature of torture and CIDT (focusing on incidents, structures and agents of torture and CIDT). Throughout the chapter, which is based on a close and critical reading of media reports from 2006, the report attempts an understanding of what reaches the newsrooms and ultimately the pages of the newspapers. Finally, in Chapter 5 the report compares what features in the news with what is known from other forms of reporting (academic work and NGO reports) in post-apartheid South Africa. The reasons why this other form of reporting was not included on an equal footing with the media reports were:

- That we wished to focus on one year in a systematic manner and other reports often explore processes over time; and
- That the comparison allowed us to gain a deeper understanding of the gaps in media reporting as an indication of the selective reporting on torture and CIDT in the mass media of South Africa.

The report ends with conclusions and recommendations. As our analysis was based on a close reading of media reports from an entire year, we have been able to comment on the position of torture and CIDT in the South African public arena during that time.

In 2006 we identified 483 print media articles detailing acts of violence that we categorised as falling within the purview of the UNCAT. Of these, 293 reports concerned cases that we categorised as CIDT; 75 concerned torture. In 133 cases, although the cases clearly fell within the purview of the UNCAT, it was difficult to judge whether the case referred to torture or to CIDT. This challenge is significant in that it illustrates how difficult it is to distinguish between torture and CIDT, especially based on media reports that are often short of detail. Secondly, although there were 75 articles involving what we called "torture", some of these articles covered the same incidents. Finally, courts of law, which are the only local institutions that might credibly make the call, might arrive at a different conclusion based on law, fact and evidence. Throughout the report, we explicate our reasons for categorising a specific case as torture or not. In terms of institutions in which torture and CIDT occur, most of the reports concern either police practice or prison conditions or treatment of offenders. In Chapter 3 the sample will be discussed in more detail.

In analysing the nature of violence through the lens of the media, it became evident that **torture and CIDT still occur in South Africa**. This conclusion echoes the findings of one of the few instruments for measuring the levels of torture over time, the Cingranelli-Richards data set (Ciri). In the Ciri-data set, it emerged that South Africa had practiced either occasional or frequent torture since 1981. In 2006, according to the data set, South Africa practiced torture frequently.<sup>5</sup> In our report, State violence sometimes included spectacular forms of torture in some of the high profile cases, where police officers perpetrating the violence probably knew that they were doing something wrong; some may have even known they were in contravention of the UNCAT. However, at other times torture and CIDT appeared to be routine and everyday occurrences, where perpetrating State Officials transgressed the legal boundaries of the Convention against Torture and CIDT, either because they did not care or because they were unaware that they had crossed a legal boundary. Throughout the report, we reflect on the relationship between legal norms and social practices of State-sanctioned violence.

Finally, comparing media reporting with NGO reports and academic work illustrates that media reporting during our specified time, for probably obvious reasons, was turned towards the visible and spectacular rather than the clandestine and secret. Therefore, the comparison between the media reported incidents and alternative reporting allows for an important understanding of what entered the public arena through the media and what did not. There was for instance very little focus on what happened when the police entered hostile township areas. Mental health institutions, often places where even the richest countries abuse the rights of people in their care, were almost non-existent in our sample. Absent from the sample was also the military. Journalists and the media in general would do well to pay more attention to such areas.

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5 The Ciri-data set is built on the qualitative interpretation of data from the US State Department and Amnesty Internal Reports. These accounts are subsequently turned into quantitative measures using a tri-partite scale – no torture, occasional torture and frequent torture. In 18 out of 26 recorded years, South Africa tortured frequently. Only in 1981, 1984, 1989, 1993, 1996, 2000, 2001 and 2004 did the levels of torture seem to have decreased. Interestingly, according to the Ciri-data set, there are few differences before and after the fall of apartheid. The Ciri-data set has been criticised for using the statistics for the sake of statistics. In this report, we only note there is a correlation between our conclusions and that of the Ciri-data set. For information on the data set, see: <http://ciri.binghamton.edu/>.



The analysis suggests a number of legal, policy and media recommendations:

## Legal recommendations

### 1. Criminalise torture

Throughout the report we have illustrated how torture and CIDT were part and parcel of the practices of State Officials. By criminalising torture, it will be possible to expose and sanction unacceptable behaviour. Furthermore, throughout the report we have illustrated how difficult it is to reach final decisions on categorisation. Only through the court of law can legitimate decisions on torture and CIDT be made.

### 2. Ratify OPCAT

Oversight is crucial. Despite the many problems with oversight, it does help to install effective mechanisms. OPCAT does this through a system of regular visits to places of detention which also serves to bring about improvements in detention treatment and conditions over time through ongoing engagement with the authorities.

### 3. Expand oversight to other institutions besides prisons and police

Oversight is often restricted to the cursory monitoring of prisons and police detention. As a matter of urgency, oversight must be extended to also encompass places of safety, secure care centres for children, repatriation camps, military and mental health institutions.

### 4. Improve conditions for migrants and asylum seekers

Like other reports, this report illustrates the need to improve the legal processes around asylum and the general conditions in which migrants find themselves. Furthermore, as many abuses of migrants are carried out by State Officials, institutional mechanisms must be set up to prosecute State Officials that abuse migrants.

### 5. Focus on "rights of the child" as victims of torture and CIDT

The reports recommends that the UNCAT is used to bring to light the abuses that children suffer when under State care, as it provides more stringent protection against torture and ill-treatment of children. Such a move must be followed through by advocacy towards State Officials signalling the absolute prohibition against abusing children.

## Policy recommendations

### 6. Revisit training programmes of State Officials in regard to torture and CIDT

From the report it emerged that although police officers knew about human rights and torture, they seldom connected that knowledge with their own practices. This suggests the need for a radical rethinking of the training programmes, with a particular focus on connecting the everyday life experiences of State Officials, their activities and the Convention.

### 7. Revisit conditions for State Officials

Although outside the direct scope of this report, we suggest that there is an urgent need to revisit conditions of State Officials (including pay scales, recognition and levels of stress), because they constitute risk factors in relation to the commitment to prevent torture and CIDT.

### 8. Create or expand complaints structures in poor and violent areas

As the lack of trust in the police is very low in poor and violent areas, structures that can channel complaints must be strengthened.

## Media and advocacy recommendations

### 9. Train journalists to recognise torture and ill-treatment

Journalists, as important actors in the public arena, need to recognise and investigate torture and ill-treatment. For this to happen, they need additional training on the international instruments and the nature and circumstances of torture and ill-treatment.

### 10. Redirect the attention of journalists to other modes and places of torture

Torture and CIDT also happen in places like the military, townships, remote villages and mental institutions. There is a wealth of stories that journalists might easily tap into.



## 2 BACKGROUND: TORTURE AND CIDT IN INTERNATIONAL AND SOUTH AFRICAN LAW

In this chapter we introduce the concepts of torture and CIDT as they are described in South African and international law. The purpose of this exercise is to map out the common ground for understanding the subject matter, as well as to introduce operational ways of distinguishing between what falls and what does not fall under the UNCAT (torture and CIDT) and what incidents constitute torture and CIDT respectively. Hence, in this chapter, we introduce our framework for making the methodological and analytical decisions we describe in Chapters 3 and 4.

Section 12 of the South African Constitution (1996) entrenches the country's commitment to prevent torture by guaranteeing everyone 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.

Under South Africa's Constitution, these rights cannot be derogated from under a State of Emergency declared in terms of Section 37.

The right not to be tortured is a peremptory norm of international law meaning that it:

“...enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”<sup>6</sup>

Like many other African countries, South Africa has taken its commitment to the eradication and prevention of torture to the international level. In addition to being party to the primary international human rights instruments which prohibit torture and cruel, inhuman and degrading treatment, such as the Universal Declaration of Human Rights (1948), and the International Covenant on Civil and Political Rights (ICCPR)(1966), South Africa also ratified the UNCAT in 1998. In terms of this, there is an absolute prohibition of torture (Article 2(2) of the UNCAT), and no national law, administrative or judicial act may authorise torture,<sup>7</sup> and no State may excuse itself from the application of the peremptory norm.

The Convention obliges States Parties to take legislative, administrative and judicial measures to prevent torture when such acts are committed with the consent or acquiescence of a public official or other persons acting in an official capacity (Article 2). The obligation on States Parties to prevent ill-treatment is indivisible and inter-related to the obligation to prevent torture (Article 16) as it is recognised that many of the conditions that contribute to ill-treatment frequently facilitate torture (CAT, 2008, para 3). States Parties must also criminalise acts of torture in their domestic legislation and ensure that these offences are punishable by appropriate penalties that take into account their grave nature (Article 4).

More recently, in 2006, South Africa signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which seeks to prevent torture and CIDT through independent oversight and regular visits to places of detention.

At the regional level, South Africa is also party to the African Charter on Human and Peoples' Rights which prohibits, “all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment” (Article 5). South Africa also participated in the creation of, and is party to, the Robben Island Guidelines relevant to preventing torture in Africa (2002) that was adopted by the African Commission on Human and Peoples' Rights.<sup>8</sup> Although these guidelines are non-binding, they express a strong moral commitment to taking steps to eradicating torture.

6 *Prosecutor v. Furundzija* ICTY (Trial Chamber) Judgment of 10 December 1998 at para 153 (Case no. IT/95-17/1/T), cited in Muntingh L. (2008d).

7 *Prosecutor v. Furundzija* Para 155 Note 3, cited in Muntingh L. (2008d).

8 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa'. *The Robben Island Guidelines*. October 2002.

The UNCAT obliges States to ensure that acts of torture are criminal offences in their respective countries. South African legislation is not yet compliant with this requirement of the Convention. So far, this final step of translating the commitment against torture into law has not been completed. Since 2003 three draft Bills have been circulated, although not at an official or public level. In recognition of its international obligations and its stated commitment to eradicating torture, the Department of Justice circulated the Draft Criminalisation of Torture Bill in 2003 for comment. This was revised and issued as the Combating of Torture Bill in 2005, and then further revised and circulated as the Draft Combating of Torture Bill in July 2008. However, none of these drafts has yet passed into law. Each of the three drafts have been criticised for their shortcomings (Muntingh, 2008b). Other than the Constitution, no legislation in South Africa explicitly prohibits torture or ill-treatment, though various Acts and policies seek to ensure that people deprived of their liberty are treated with human dignity.<sup>9</sup> Only the South African Police Service, in 1998, has adopted a specific policy on the prevention of torture, and this deals with aspects of arrest, interrogation and detention.

As a consequence Professor Lovell Fernandez has argued that there remains a “reliance on other crimes to deal with what is, in fact, torture, [which] detracts from the gravity of the crime as a crime under international law” (Fernandez, 2003). The common law also does not cater sufficiently for non-physical forms of torture. In its General Comment 2, issued in 2008, the UN Committee against Torture (CAT) stated that defining a separate crime of torture will give effect to the general intention to prevent torture and ill-treatment. Codifying the crime will also:

- emphasise the need for appropriate punishment which takes into account the gravity of the crime;
- strengthen the deterrent effect of the prohibition;
- enhance the ability of law enforcement officials to track the crime of torture; and
- enable and empower civil society to monitor or challenge the State for its inaction or when it violates the Convention (CAT, 2008, para 11).

## Defining Torture and Cruel, Inhuman and Degrading Treatment or Punishment

In attempting to understand what constitutes torture and ill-treatment it is useful to look at both the ICCPR and the UNCAT as well as how the UN committees and international courts of human rights have interpreted it.

Article 7 of the ICCPR states that:

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

In terms of this provision, there is an absolute prohibition against torture and ill-treatment, though the terms “torture” and “CIDT” are not defined in the ICCPR. The prohibition does not require any purposive element, nor is it confined to acts conducted by the State or its Actors.

Article 1 of the UN Convention against Torture defines torture as follows:

1. 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, whether 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 or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which may or does contain provisions of wider application.

According to the UNCAT definition above, then, torture must:

- Cause severe mental and/or physical pain or suffering;
- Be caused intentionally;

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<sup>9</sup> See Muntingh, L. (2008c). *Guide to the UN Convention against Torture in South Africa*. Cape Town: Civil Society Prison Reform Initiative, pp. 17-23, for a discussion on legislation and regulations affecting people under detention in South Africa.

- Be for a purpose (though this is often a contested requirement);
- Be committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity (Nowak & McArthur, 2008, p. 28; Bishop & Woolman, 2007, pp. 40-57.) The Committee Against Torture confirms that the State bears responsibility for acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under the colour of law (CAT, 2008, para 15).

Article 1 of the UNCAT definition of torture should furthermore be read together with Article 16 which obliges States to prevent other acts of CIDT which do not amount to torture, when those are committed by or at the instigation of, or with the consent or acquiescence of a public official or person acting in such official capacity (Article 16 (1)). What constitutes cruel, inhuman and degrading treatment or punishment is not defined in the Convention, but it has no purposive requirement – which torture does.

The definition of torture, and its distinction from CIDT, is open to some interpretation and has developed over the years in international jurisprudence, in deliberations of the UN Committee on Human Rights and the UN Committee against Torture, as well as by the special procedures, such as the UN Special Rapporteur on Torture. Regional bodies, such as the European Commission and the European Court of Human Rights, and the African Commission on Human and People's Rights also influence the development of understandings of torture and ill-treatment. This may be further interpreted by domestic law and jurisprudence.

The defining cases of the distinction between torture and cruel, inhuman and degrading treatment or punishment are from the European Commission and European Court. Though South Africa does not fall under the jurisdiction of the European Human Rights system, its deliberations form part of international law and help us to understand what constitutes torture. In *The Greek Case*<sup>10</sup> the Commission distinguished between torture and "inhuman" and "degrading treatment" and found that torture has a purpose and is generally an aggravated form of inhuman treatment. However, in subsequent decisions, the purposive element of torture was marginalised in favour of a sliding scale of severity. In the case of *Ireland v the United Kingdom*, the European Court of Human Rights found the distinction between torture and cruel, inhuman and degrading treatment or punishment lies in "the intensity of suffering inflicted".<sup>11</sup> This assessment depends on "all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some circumstances the sex, age and state of health of the victim" (para 162). However, more recently the European Court, in referring to the UNCAT definition, seems to be moving back to the purposive aspect of torture.<sup>12</sup>

Prior to the adoption of the UNCAT, the United Nations considered "torture as an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment" (Art 1(2) of GA Res 3452 (XXX) of 9 December 1975). The Human Rights Committee in its General Comment 7 did not find it necessary to establish sharp distinctions between torture and ill-treatment since the Article [Article 7 of the ICCPR] prohibits both torture and ill-treatment, though it stated that such "distinctions depend on the nature, purpose and severity of the treatment applied" (HRC, 1992, para 4).

The CAT has found that in practice the definitional threshold between torture and ill-treatment is unclear, and that experience has shown that acts which give rise to ill-treatment frequently facilitate torture (CAT, 2008, para 3).

However, the UN Special Rapporteur on Torture, Professor Manfred Nowak, has argued that the UNCAT intended a distinction between torture and ill-treatment because different legal consequences flow from this. In addition, he argued that this issue is of extreme importance in the current climate where "an increasing number of governments, in the aftermath of 11 September 2001 and other terrorist attacks, [are] adopting a legal position which, while acknowledging the absolute prohibition of torture, put the absolute nature of the prohibition of CIDT in question" (Nowak & McArthur, 2006, p.147). The Special Rapporteur has expressed specific concern about policies introduced by the United States of America that weaken the absolute prohibition of torture (UNESCO, 2006, paras 41- 56).<sup>13</sup> Consequently, in a separate academic article, the Special Rapporteur argues that the distinction between torture and ill-treatment lies not in the test of the intensity of suffering inflicted, applied by the European Court of Human Rights, but the purpose of the conduct and the powerlessness of the victim. In other words, as long as a person is at liberty and able to escape

10 Nos. 3321/67, 3322/67, 3323/67 and 3344/67, in Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL). (2008). *Torture in International Law: a guide to Jurisprudence*, pp. 56-57. Switzerland: APT and CEJIL.

11 ECHR 5310/71, of 1978, para 167.

12 *Ihan v Turkey*, no 22277/93, ECHR 2000-VII, judgement of 27 June 2000.

13 On 1 August 2002 Jay S. Bybee then assistant Attorney-General for the Office of Legal Council at the US Department of Justice introduced a memorandum which attempted to significantly narrow the definition of torture, and claimed that the necessity of self-defence could justify certain acts of torture. It also maintained that "severe" pain was limited to in "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death". This memorandum was superseded by a memorandum of the Deputy Attorney General, James Comey on 30 December 2004 (US Department of Justice, 2004).

or flee from the use of force by law enforcement officials, the proportionality principle applies. The use of force in a situation outside of detention depends firstly on the principle of legality – whether it is compliant with national laws and regulations. Secondly, the use of force must aim at a lawful purpose, such as the arrest of a person suspected of having committed an offence. Thirdly, the type of weapons used and the force applied must not be excessive but necessary in the particular circumstances for achieving a lawful purpose (proportionality). Shooting at a person suspected of having stolen a toothbrush would, for example, be considered to be disproportionate, when less intrusive measures could have been used to make an arrest. “If such use of force is disproportionate in relation to the purpose to be achieved and results in severe pain or suffering, it amounts to cruel or inhuman treatment or punishment. If such force is used in a particularly humiliating manner, it may be qualified as degrading treatment even if less severe pain or suffering is thereby inflicted” (Nowak & McArthur, 2006, p.150).

On the other hand, the authors argue that as soon as a person is under the legal or factual control of a member of the State, such as a person arrested or detained by the police, then the use of mental or physical force is not permitted. No proportionality test should be applied and the prohibition of torture and CIDT is absolute. “If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession of information, it may even be considered torture,” and any “use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment” (Nowak & McArthur, 2006, p.151).

While a distinction between torture, on the one hand, and cruel, inhuman and degrading treatment or punishment, on the other, may be difficult to make, it may be important for the following reasons:

- The moral judgment passed on a State found to have been engaged in torture is more severe than if it were found to have committed a lesser violation of cruel, inhuman or degrading treatment or punishment;
- Such distinction is crucial in terms of reputation, international standing, the level of reparation to be afforded, and propaganda value;
- Certain consequences may flow in international law from a finding of torture, which do not apply to ill-treatment. For example, the UNCAT provides for the prosecution, investigation or extradition of a person alleged to have committed acts of torture; the right to redress and compensation for victims of torture; and the prohibition on refoulement of a person to another State where he is in danger of being tortured.

The CAT has increasingly taken the stance that torture and CIDT are indivisible and their prohibition cannot be derogated from – it is the State’s duty to prevent both from occurring. In addition, in its second General Comment, the CAT stated that it considers Articles 3 to 15 (which explicitly refer only to torture) to apply to both torture and ill-treatment. States Parties may choose the measures by which they fulfil these obligations, so long as they are effective and are consistent with the object and purpose of the Convention (CAT Committee, 2008, p. 2).

The African Commission on Human and Peoples’ Rights (ACHPR) has not sought to make a distinction between torture and ill-treatment, though it does consider torture as an aggravated and serious form of ill-treatment (APT & CEJIL, 2008, p.127).

The South African courts, although having frequent occasion to consider acts of torture, are yet to define the term “torture” (Bishop & Woolman, 2007, pp. 40-57).<sup>14</sup> Still, the courts have condemned the use of torture and considered its effects on the criminal justice process. Article 15 of CAT obliges States Parties to ensure that any statement made as a result of torture shall not be invoked as evidence in any proceedings. The South African Constitution provides that any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice (Section 35(5)). Yet, it was only in the landmark Supreme Court of Appeal judgement in 2008 of *Mthembu v The State*<sup>15</sup> that JJA Cachalia held that to admit evidence improperly obtained, after torture, would “require us to shut our eyes to the manner in which the police obtained this information ... More seriously, it is tantamount to involving the judicial process in ‘moral defilement’”. This would further compromise the integrity of the judicial process and dishonour the justice process. Moreover, he said that the admission of torture-induced evidence would have a corrosive effect on the criminal justice system, and the public interest demands its exclusion (para 36).

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14 See for example *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC) and *S v Williams* 1995 (3) SA 632 (CC), cited in Bishop & Woolman, 2007, p. 40-57.

15 *Mthembu v The State* (64/2007)[2008] ZASCA 51(10 April 2008).

In South Africa the courts have, however, applied their minds to defining CIDT. In the case of *S v Williams*<sup>16</sup> the court noted that each generation will understand the terms cruel, inhuman and degrading treatment through the lens of the social mores of the time (para 22). In the case of *S v Dodo*<sup>17</sup> the court found that although it is difficult to distinguish between behaviour which is “cruel”, “inhuman” or “degrading”, they all three involve the impairment of human dignity (para 35). “Dignity” refers to the inherent worth of a person. “Cruelty” implies some form of intentional or wilful conduct with a callous disregard for the suffering of the victim.<sup>18</sup> “Inhuman” treatment or punishment involves the treatment of a person as if they were not human, though it does not necessarily require intentionality. For example, Bishop and Woolman (2007) argue that although “a State’s negligent failure to provide adequate prison facilities due to a lack of resources may constitute inhuman or degrading treatment, it cannot be deemed cruel” (Bishop & Woolman, 2007, pp. 40-68). “Degrading” treatment would refer to a subjective, though human, experience of humiliation.<sup>19</sup> European courts have found that such treatment causes feelings of fear, anguish and inferiority capable of humiliating and degrading victims.<sup>20</sup> However, these feelings must go beyond the consequence of legitimate conviction or sanction (Bishop & Woolman, 2007, pp. 40-68).

It may often be difficult to distinguish between “treatment” and “punishment” for the purposes of the UNCAT. Ordinarily, punishment may be understood to include both sanctions imposed in terms of the criminal justice system, as well as institutional disciplinary procedures administered, for instance within schools, workplaces, or prisons. Treatment on the other hand would include the circumstances under which an action takes place, such as the conditions in which a person is held in custody, or deported (Bishop & Woolman, 2007, pp.40-64). Treatment and punishment are often not subject to separate analysis, since in many cases punishment must involve treatment.

## Applying the definitions to the media study

Since the South African Constitution guarantees a general right not to be tortured and subject to CIDT, this media study was interested in print media portraying both torture and CIDT. In this regard, each of the cases was analysed according to the four dimensions listed above: purpose, intention, severity and State involvement – i.e. each of these dimensions was tested against the incidents described. Secondly, while noting that this is difficult, we also attempted to distinguish between torture and CIDT. Although we primarily followed the distinction made by Professor Nowak when analysing the individual cases we constantly reflect in our report on the differences in interpretation between what we might call an expansionist interpretation (that of Professor Nowak) and a restrictive one (the proportionality interpretation). In general we applied the proportionality principle in respect of incidences occurring when an individual was not in custody, and a test of purpose and severity if an individual was in custody. Custody in this context extends beyond formal detention to apprehension and arrest. In our report, we explain how the cases described fell into our reading of this definition. If a case featured a strong purpose, direct State involvement, severe (threats of) violence and intentionality, it could be classified as torture depending on the severity of the abuse or injuries. If one of the elements was missing, we tended towards classifying the case as CIDT.

Besides the thorny issue of severity, purpose and intent, what constitutes State involvement has also been debated much amongst experts. The UNCAT imposes a responsibility on the State, rather than on individuals, to prevent acts of torture and ill-treatment. As discussed above, the Convention specifically talks about acts “inflicted by or with the consent or acquiescence of a public official or any other person acting in an official capacity”. But the UN Committee against Torture expands this responsibility to instances where:

... State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States Parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking. (CAT, 2008, para 18, p. 5).

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16 1995 (3) SA 632 (CC).

17 2001 (3) SA 382 (CC).

18 See *S v Williams* 1995 (3) SA 632 (CC) para 24.

19 Mohammed J in *S v Makwanyane*, Op Cit.

20 See *Ireland v United Kingdom* Commission Report (25 January 1976), quoted in Bishop & Woolman, 2007, p. 40-68.

This interpretation of the State's obligation leaves very little room for the State to argue that an event or incident was outside of its sphere of responsibility. In the report we reflect on the degree of State involvement and what it takes to be either torture or CIDT. Again, and largely following Professor Nowak, we used the concept of a power differential to indicate that there is a difference between State involvement in detention and on the streets. Hence, a similar incident in terms of severity and purpose might be classified differently according to whether it is mistreatment of a child in a children's home or on the streets of a township. However, we probably differ from the Committee in the sense that we are concerned here with acts committed directly by or with the acquiescence of a State Official, or in instances where State Officials most directly fail to take action to prevent torture or ill-treatment. We do not engage with broad acts of community level violence or gender-based violence as described in deliberations of the Committee, though we recognise that they also broadly come under the ambit of the UNCAT.



## 3 RESEARCH DESIGN

The media presents a mediated view of reality to its audiences. By looking at the media's representation of a phenomenon such as torture or CIDT, we have been able to access elements of the public debate at the time (2006) about State violence – in which the media played an important role. Furthermore, a data set of media reports over a particular time frame enables us to begin to understand the nature of torture and CIDT in South Africa.

In order to ensure that data is consistent, effective methodology is critical. There are distinct methodological challenges associated with examining any social phenomenon based on media reports. Firstly, they are selective of the actual events, and secondly the data captured in reports is not always sufficient for the needs of in-depth analysis. Torture and CIDT offer additional challenges as, as explicated earlier in this report, it is difficult to assess what amounts to torture or CIDT – whether or not the incident falls inside or outside the ambit of the Convention. Therefore, assessing torture and CIDT through the media is a somewhat biased approach, as it relies on the media's prioritisations, editorial choices, scope of vision, as well on tortured victims' access and willingness to discuss experiences with reporters. Furthermore, the media reports in the main contain only allegations of abuse untested by courts of law, and often relying on the testimony of only one or two informants. We cannot be sure that the incidents covered in the reports (in the absence of court rulings) actually occurred as stated in the report.

However, despite the difficulties, considering the dearth of information on torture and CIDT, this form of research represents one of the few avenues available to broadly explore the phenomenon of torture and CIDT. It also has some distinct merits. Firstly, while some official statistics do exist for torture, they are insufficient and only available for some institutions.<sup>21</sup> Furthermore, media presents torture in several different contexts and may reveal contexts previously unknown. Thirdly, some newspaper stories allow victims of torture to tell their stories in a way that might otherwise be denied to them, or where they feel they have no official avenue of complaint. Some of these stories have never been investigated further and charges have never been pressed.

For the purposes of this study we focused on identifying incidences of torture and CIDT in English and Afrikaans print newspapers. However, we continually held in mind that stories about torture and CIDT are not representative of all occurrences in South Africa. There are several reasons for this. Firstly, there is an urban centre bias – most stories tended to come from Gauteng and Western Cape provinces, rather than the whole country. Secondly, torture is by nature often a secret occurrence. For this reason it may not be accessible to and identified by news reporters, nor may sufficient information be available on which to base a story, furthermore victims may not wish to talk about it. With increasingly junior, understaffed and under-resourced newsrooms, good investigative journalism is thin on the ground in South Africa. Few torture stories are fully investigated and written about, serving further to enhance the secrecy surrounding the issue. Thirdly, even if torture is identified by the media, it is not necessarily written about in a way that demonstrates whether it is an act of torture or not. Because torture itself does not constitute a crime by South African law, it is questionable whether journalists would recognise it and understand it fully. In the stories analysed, sources often identified behaviour as torture, rather than the journalists themselves. This may discourage the coverage of torture as a news focus. Later in this chapter, after outlining the methodology, we detail what our sample looked like and what biases can be identified.

### A phased approach

The research design involved a phased approach:

#### Phase one: identification and selection of articles

English and Afrikaans newspaper articles were selected on the basis of a comprehensive set of keywords linked to torture and CIDT. This list of key words is appended as Appendix I. The articles were then scanned according to whether they were possible torture and CIDT articles. In order to identify newspaper articles which could have been relevant for the research, Media Monitoring Africa (MMA), who conducted the initial data selection and a preliminary analysis of the data, prepared a brief of actions, contexts and agents which

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<sup>21</sup> For instance the Independent Complaints Directorate (ICD), which has oversight over the police, has sometimes included statistics on the number of torture cases reported to it. However, it does not use a clear definition in categorising cases as torture, and other cases of ill-treatment investigated by the ICD may well constitute torture.

could have been linked to torture based on CSVr's and RCT's extensive work on torture related issues. The articles were retrospectively drawn from 2006 and covered the entire year. This keyword search resulted in a total of 4,457 articles.

The keyword search included all large commercial newspapers in South Africa,<sup>22</sup> but excluded community newspapers. Articles from the newspapers from all over South Africa were monitored in depth:

**TABLE 1: NEWSPAPERS INCLUDED IN THE STUDY**

Afrikaner	Herald	Sunday Argus
Beeld	Independent on Saturday	Sunday Independent
Burger	Mail & Guardian	Sunday Times
Business Day	Natal Witness	Sunday Tribune
Cape Argus	Pretoria News	The Citizen
Cape Times	Rapport	The Star
City Press	Saturday Star	Volksblad
Daily Dispatch	Weekend Argus	Weekend Post
Daily News	Servamus	Weekender
Diamond Fields Advertiser EP	Sowetan	Witness

### Phase two: Sorting articles according to relevance

During the second phase, the selection of torture and CIDT articles, monitors were asked to identify articles that would be subjected to further analysis. Each article was assessed according to a set process. Monitors scanned each item and if it met the necessary criteria it would be placed in a pile for further analysis. If it were found to be clearly irrelevant, it would not be used for additional analysis. In those instances where monitors were unsure, the items were marked accordingly and then senior MMA researchers and the Project Coordinator reviewed the articles again and decided on whether or not they should be used for further analysis. Monitors were also asked to identify the methods of torture or CIDT in each article. Often articles featured several torture or CIDT methods or incidents. A copy of the briefing document is attached as Appendix 2.

### Phase three: Analysis

Although initially the intention was to analyse the extent of torture and CIDT, it became evident that this was difficult to do using the kind of data that was available through newspapers. Accordingly, a qualitative methodology was selected, using a form of thematic organisation and analysis. The themes selected were based on the most prominent areas where torture and CIDT occurred: police interrogation, crowd control, police shooting, police assault, police detention, prison conditions, children, "war on terror" in South Africa, harassment, arrest and deportations of migrants. This level of analysis was undertaken by research and programme staff from RCT and CSVr.

### Phase four: Comparison with other sources

As the choice of stories that make it into the newspapers is selective, the data from the project was contrasted to other sources to identify gaps in media reporting. This is covered in the final section of the findings. Apart from providing a fuller picture of torture and CIDT, the added value of an analysis of the gaps in reporting is that we might also explore how torture and CIDT are understood in the South African public debate.

## Stories in the sample

A search for terms which could be associated with torture resulted in a total of 4,457 articles. Through the process of sorting articles, 483 were found to be relevant. The 3,974 articles which were found to be irrelevant were not subjected to systematic analysis. They included stories of violent incidents with no State sanction, acquiescence or involvement. Others included stories where the word torture was used in a colloquial manner.<sup>23</sup> Many articles involved police personnel off duty or committing crimes in their personal capacity. Although less evident, they were excluded from the sample. Several stories explored poor working conditions for law

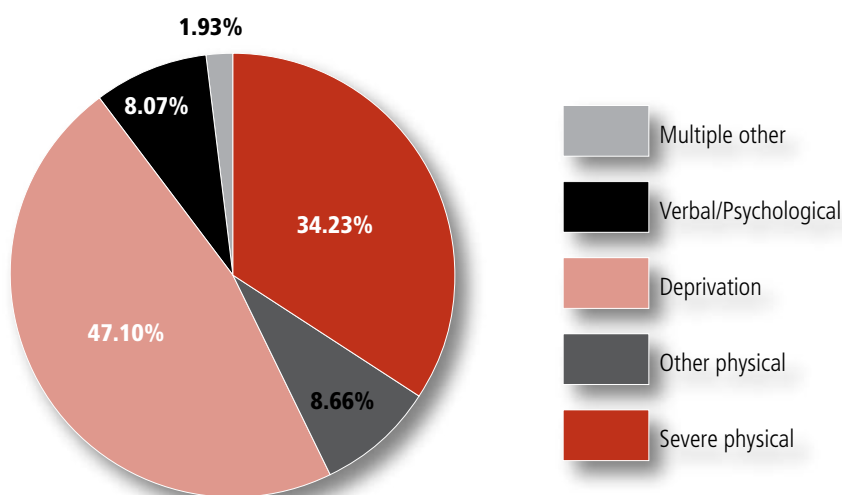
<sup>22</sup> This excluded the Natal Mercury since the content is covered in its sister newspapers.

<sup>23</sup> 'Toddler tortured to death', *Sowetan*, 25 August 2006. Dealt with a story about a 5 year old who was abused by her mother and the mother's boyfriend which resulted in her death.

enforcement workers leading to stress, suicide or domestic violence. These were also excluded, although they provide important background material to contextualise State violence as a function also of their working conditions. Stories that explored police corruption and incompetence were only included if there was evidence of sustained deliberate inaction or indifference as discussed in the definition of torture section above.

The remaining 483 articles were subjected to a thorough analysis. Firstly, it is important to note that there were not 483 incidents of torture and CIDT in South Africa in 2006. Some high profile cases, explored in the next chapter, attracted many media reports while other incidents only provoked one or few reports. Analysing these reports quantitatively, we found some interesting patterns. These patterns are not indicative of the level of torture and CIDT, but rather of the reporting of incidents by the media during the time of our research. Through the process of identifying incidents, 1,189 incidents were recorded in the sample's 483 articles (see complete table in Appendix 4). This means that on average each article featured 2.5 incidents. The incidents or methods of torture and CIDT were categorised according to severity and the extent to which they were physical, psychological or were incidents or different forms of deprivation. We identified 407 (34 percent) incidents of severe, physical maltreatment. One hundred and three (9 percent) incidents were categorised as "other physical". In 560 (47 percent) of the cases we identified incidents of deprivation. In 96 (8 percent) of the cases, verbal or psychological abuse was identified, and in 23 (2 percent) of the cases multiple other forms of abuse were recorded.

**FIGURE 1: DISTRIBUTION OF INCIDENTS IN THE SAMPLE**



One cannot a priori say that one category comprises torture and another CIDT. Although there is a greater chance of identifying torture in the "severe physical" and the "psychological" categories, the classification of incidents as either torture or CIDT depends, as we noted above, on how the incidents unfolded in terms of intentionality, purpose, severity and presence of State Actors.

Assessing the incidents in each article individually on the basis of the criteria set out in Chapter 2, we found that the incidents in 75 articles amounted to torture according to our reading of the UNCAT definition. Two hundred and ninety three articles described incidents that could be categorised as CIDT. In 133 cases, falling within the parameters of the UNCAT, we were unable to distinguish whether what was detailed was torture or CIDT. This means that approximately 60 percent of the sample reports dealt with CIDT, while 15 percent dealt with torture.

Importantly, our judgements should not be taken as definitive. Courts might disagree and interpretations will vary according to whether one adopts a test of severity or of purpose, and even within this, there is scope for argument about how severe an act was against an individual. Throughout the text, we discuss the categorisations we made. The broader point is that decisions only become legitimate as a result of proceedings in a court of law.

The cases reported in the media were often in different phases of reporting, investigation or prosecution, and the outcome of these was not often known. However, at the time of them being reported in the print media an investigation had been launched in 57 percent (n=167) of CIDT cases, and in 26 percent (n=76) of the CIDT cases the responsible perpetrator(s) had been prosecuted or was in the process of prosecution. The articles describing incidents of torture presented a similar picture with 54 percent (n=41) of them under investigation, while prosecutions had, or were being brought against perpetrators in 22 percent (n=16) of cases. In the

undecided cases, investigations had been launched in 66 percent (n=88) of the cases and the responsible perpetrator(s) was being or had been prosecuted in 31 percent (42 cases) of the 133 cases. These figures say little about the quality of investigations but are trends indicating that the State does to some extent follow up on these transgressions. However, only in a minority of cases did the articles explicitly mention human rights violations. The media reports mentioned that the incident reported constituted human rights abuses in 23 percent (n=67) of the CIDT cases, in 30 percent (n=22) of the cases involving torture, and in 25 percent (n=33) in respect of the undecided cases. Given the often extreme forms of violence employed, one should think the numbers of cases where the journalists recognised human rights abuses would be higher. This illustrates how seldom human rights violations featured in the media (during 2006) and possibly in public discussions.

## Research limitations

The picture of reality portrayed by the media is always framed by a number of factors including accessibility of information to media practitioners; the perceived “news value” of the incident; the particular perspective of the journalist; and the ideological perspective of the newspaper. This is doubtless the case with torture and CIDT, which ideally would require good investigative journalism to uncover systematic torture. “News-value” also has the effect of some reports being chosen over others (Frolin, 2003). This impacts on the picture presented of torture and CIDT in the data. Some institutions where torture and CIDT occur were not well represented in our sample, like mental health institutions. We return to this in Chapter 5.

A further problem, having analysed the articles in terms of the salient issues, was the lack of information in stories; consequently, it was near to impossible to separate torture and CIDT on the basis of quantitative coding. Concepts like “significant” and “severe suffering” are difficult to distinguish on the basis of reports from “lesser” experiences of suffering. In the end, we assessed each article individually. Some of the ambiguities and debates regarding the relationship between social practices of violence and legal conventions are reflected in the discussion of the analysis.

Furthermore, as the media most frequently reports incidents immediately after they have occurred, or during the course of the trial, they mostly do not “track” cases through from initial report or allegation to final conclusion in court (bearing in mind that often court cases take years to be completed). Hence, in the report we mainly cover allegations of torture and CIDT. Clearly some of the cases will be dismissed later in court, as suspects of crimes may suggest they have been brutalised into making confessions, or they may fail to provide the evidence required to prove their initial allegation. We decided against making any judgements regarding the substance and fairness of accusations levelled against alleged perpetrators. There were also a number of articles covering trials where allegations of torture and abuse of force resulted in trials within trials to determine the reliability and acceptability of evidence contained in a confession. The final rulings in these cases were not necessarily covered in the media. However, if we had awaited the decisions of courts in “trial-within-trials” or cases of police brutality, we would have struggled to complete a report of any kind, as these cases take a long time to get settled. In one case reported in 2006 for instance, Allister Luister had waited seven years before his case was finalised.<sup>24</sup>

There were also several analytical articles providing an overview of the extent of police brutality and misconduct, while others were less concerned with the violence but reported on the cost of civil claims made against the police.<sup>25</sup>

Despite the difficulties of exploring the prevalence of torture through an analysis of media articles and the skewed nature of reporting, this exploration has nevertheless resulted in some very interesting and important findings, both about the modality and nature of torture and CIDT, as well as how torture and CIDT are discussed in the South African public arena, where there is often little understanding or sympathy for victims of torture and CIDT. One sees for example the election promise of the President of the minority African Christian Democratic Party, Reverend Kenneth Meshoe, who promised to make life in prison unbearable for criminals.<sup>26</sup> Furthermore, by analysing media reports, what is deemed newsworthy or not, what the individual media owners’ positioning on topics is and so on, become evident. Comparing media coverage with other sources adds to our understanding of the media’s editorial choices. This provides a privileged entry point to the public discussions in South Africa around torture, CIDT and human rights. And, if our sample is an indication, public discussions are seldom about such issues when even cases of torture are only expressly reported as human rights violations in 30 percent of cases where torture appears to have happened.

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24 See for instance ‘Nqakula to approach court for vicarious liability ruling’, *Business Day*, 11 July 2006.

25 One report claimed that civil claims totalling R6,7 billion had been made against the police for different claims, including shooting incidents, police assaults and other undisclosed police actions. In October 2006, R38 million had been paid out by the police, mostly in out of court settlements. ‘Cop Bungles Cost R6,7BN’, *The Star*, 25 October 2006.

26 ‘ACDP confident it will run SA soon’, *Daily Dispatch*, March 3, 2009. Accessed from <http://www.dispatch.co.za/article.aspx?id=297691>

# 4 FORMS OF TORTURE AND CIDT AS REPORTED IN THE MEDIA

In this section, using the methodology outlined in the previous chapter, we present and discuss the kinds of torture and CIDT that were reported in the media during the course of 2006. We have organised the text into different sections that relate to different forms or locations of torture and CIDT. As most of the media reports relate to police practices, we explore a range of different issues in relation to the police: interrogation (during which often the most explicit forms of torture occur); crowd control; police shooting; different forms of police assaults; and incidents relating to police detention. Then we move on to prisons and prison conditions and treatment of inmates. No doubt due to the particularly invisible nature of prisons, most of the media reporting concerning prisons explores prison conditions as a collective experience, rather than individualised cases of torture and CIDT. These reports are therefore generally analytical and often based on NGO reporting, or on the reports of oversight bodies such as the Judicial Inspectorate of Prisons, or the Jali Commission of Inquiry.

Media reports also featured a number of incidents of corporal punishment of learners in schools and failure to protect children more generally. Furthermore, South Africa was briefly implicated in the so-called war on terror and some reports described the fate of individuals who were caught in this global conflict. Finally, a number of reports concerned the policing, arrest and deportation of migrants. Each of these themes will be discussed in relation to the definition of torture and CIDT defined earlier in this report.

In this chapter we analyse violent State practices, their form and legitimisation, and explore how these practices relate to the legal norms of the Convention. In the process of this analysis it became evident that sometimes the categorisation, as either inside or outside the mandate of the UNCAT, is extremely difficult and fraught with questions. As such, and this is one of the important findings of this study, questions around definitions should not be addressed by the media or report writers like ourselves, but rather, they should be decided upon in a court of law. This would demand that torture and CIDT be criminalised in South Africa.

## Police interrogation

It was during interrogations that most of the evident cases of alleged torture took place, as police officers attempted to obtain information or confessions from suspects. As Fernandez (1991) argues, in the early 1990s, the police employed similar techniques in the resolving of criminal cases as in the counter-insurgency efforts of the apartheid regime. Techniques captured in the media reports include killings, mock executions, suffocations, beatings, racial and sexual harassment, use of electricity and severe forms of beatings. All these techniques, coupled with the severity of the mistreatment, the purposefulness of the acts and the direct involvement of State Officials, clearly fall within the ambit of the UNCAT. The South African Police Services' Policy on the Prevention of Torture (1998) has attempted to rid the police of such techniques that bear the hallmark of apartheid policing practices. These have been described as confession-based policing (Brogden & Shearing, 1993) as opposed to evidence-based policing, which is what the post-apartheid South African police management aims at. From the media reports we suspect that at least in 2006 such new investigative techniques were still not fully integrated in everyday police work.

Throughout the year the media reported on several incidents where the police were accused of having used torture. Some of these were reported only once while others occupied the media and the public arena for some time. These high-profile cases were followed closely by the media and often resulted in analytical articles and editorials. We have identified three such cases that we will explore in more detail. They are the airport heist, the baby Jordan murder and the murder of Transvaal Judge President Ngoepe's granddaughter.

- **The airport heist:** The airport heist case began as a crime story about a daring robbery out of a plane in Oliver Tambo International Airport in Johannesburg, followed by an equally daring robbery of recovered money out of a police safe in Benoni Police Station. Quickly, however, the case pointed to the involvement of police officers as perpetrators and colluders in the robberies. During the investigation two civilian witnesses, Frank Mampane and Solly Hangwane, died under mysterious circumstances after allegedly having been tortured. Mampane had allegedly been doused with boiling water by police

officers in his home immediately prior to his fatal arrest.<sup>27</sup> Three police officers, Khomani Mashele, Paul Kgoedi and Serious Mthembu, were also interrogated during the investigation in ways that qualify as torture, including electric shocks. In a rather remarkable statement, during a bail application, to the investigating police officers Judge Schutte warned not to harm the prisoners and not to interrogate them without their legal defence being present: 'Dit moet end kry (This must cease)'.<sup>28</sup>

The airport heist was one of the most high-profile cases of 2006, and as it involved the police as suspects, it became imperative for the police to solve the case quickly. Furthermore, there were suspicions that some of the police officials involved attempted to cover up senior police involvement in the case by murdering witnesses. This case clearly falls within the ambit of the UNCAT, as the police officers were accused of using extreme forms of violence on suspects in custody of the police in order to obtain information and confessions, as well as covering up for or punishing those that took part in the robbery. This case would qualify as torture as it fulfils the purposive requirement, as well as the severity test, and, according to Nowak's test, the suspects had also been deprived of their liberty. We can clearly only speculate, but it would seem likely that the police officers perpetrating the torture knew that their practices qualified as torture. In all cases, the airport heist represented one of the most explicit examples of torture reported in the media in 2006.

- **Baby Jordan murder:** The Baby Jordan murder was another high-profile case in 2006 (originally occurring in 2005), this time taking place in Cape Town. The case provoked uproar throughout the country and soon five suspects were arrested, including Dina Rodriques, Mongezi Bobotyane and Siphon Mfaswe. According to the police, Rodriques had hired four men, including Mfaswe and Bobotyane, to kill Baby Jordan. Baby Jordan was the 6-month old child of Rodriques' boyfriend from a previous relationship and Rodriques was alleged to have been jealous of the child. During the course of the investigation, both Mfaswe and Bobotyane confessed to their involvement but as the case got to court, they claimed that they had been tortured into making confessions. Mfaswe claimed that his confession had been beaten out of him. Bobotyane had been threatened with murder and racially harassed in one incident, as the investigating officer is alleged to have said "We throw k\*\*\*s [kaffirs] out the window". The emotional nature of the case was underlined as one of the investigating officers showed Bobotyane a picture of his daughters, asking 'are you also going to kill my children?'<sup>29</sup>

The Baby Jordan case elicited much emotion in the South African public as it was interpreted into a broader narrative of South African infanticide. In particular, the callousness with which the accused contracted men to kill the baby and the way in which the murder was carried out fuelled public outcry. This was also reflected in the police officer's emotional reference to his own daughters. Nevertheless this doesn't excuse the suggestions that in the course of the investigation a number of violent practices were allegedly employed to obtain information and confessions. Again the suspects were in custody, so the treatment does fall within the ambit of the UNCAT, according to Nowak's test. The treatment and threats and racial harassment would qualify as CIDT, and if the beatings were severe, it would situate it in the category of torture. From the reporting of the case that we have seen, it would seem that the police did not have much other evidence than the confessions, upon which the case seemed to rest. This is clearly in line with the confessional methods of the apartheid police.

- **Judge Ngoepe's granddaughter:** This case began as a kidnapping case and ended as a huge police embarrassment. The granddaughter of a High Court judge went missing during the course of a house robbery and a vast search operation for her was set in motion. During the course of the investigation the police, eager to perform, managed to step across the line of the UNCAT on several occasions. Firstly, they threatened to throw a pregnant woman into a river. Later they arrested a young man and threatened to use pliers on his genitals, while demanding to know the whereabouts of the child: 'Where is the child? We will pull your testicles with pliers'.<sup>30</sup> Later the police had to release the young man, as the child's body, to the immense embarrassment of the police, was found under her bed in the house that was robbed.

Needless to say, the police were lambasted by politicians, the public and the police leadership, which suggested unprecedented levels of incompetence. Again the case was fuelled by emotions, as it involved threats to a child and it fed into fears that even the most powerful people's children are not safe. During the course of the initial search, the investigating officers crossed the line and engaged in practices that, at least qualify as CIDT. The suspects were in de facto custody of the police, and were being interrogated for the purposes of extracting information. Depending on the severity of mental and psychological suffering inflicted on the suspects as a result of the threats, they might also take this abuse into the terrain of torture. Lessons from therapy provided to torture victims and

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27 'Witness's death mystery deepens', *Saturday Star*, 24 June 2006.

28 'Polisiekluis: Landdros looi gesloer', *Beeld*, 9 June 2006. For additional reporting see for example 'Fear as another airport heist suspect is slain', *The Star*, 22 June 2006; 'Death after police-safe robbery still baffle', *Saturday Star*, 1 July 2006; 'Must it take a thief to catch a thief', *Saturday Star*, 17 June, 2006.

29 'We throw k\*\*\*s out the window', *Cape Argus*, 9 March, 2006. For other reporting, see 'Cops beat baby-murder accused, court told', *The Star*, 7 March, 2006.

30 'Child-murder cops accused of running amok', *Sunday Times*, 19 March 2006. See also 'Police and leadership', *The Star*, 13 March 2006.

literature (Rejali, 2008) stress that torture can be as effective when it does not leave marks and when it is only psychological. Bearing this out, the young boy who was threatened with pliers said that, "the experience had traumatised him, and associating him with the case had put his life in danger". Considering the unforgiving climate regarding child murderers in South Africa, there might well have been a very real threat to his life which might also be taken into account, when the severity of CIDT is considered.

The three cases were all high-profile cases that put considerable stress on the police to produce results and cover up either their own crimes or incompetence. It would seem that the emotional character of cases render torture and CIDT more likely. However, a number of other cases involving beatings, suffocation and other forms of torture were also reported throughout 2006. We can only speculate to what extent all the less high-profile cases have been reported.

In the remainder of this section on interrogation we would like to draw attention to two more low-key cases, during which the behaviour of the police officers might have not been deemed problematic. These are the cases of girlfriends that were used by the police to catch their boyfriends.

- Gladwin Chauke from Malamulele in Limpopo was arrested by the police, beaten up, driven around the area in a police car and then thrown into jail for three days to lure her boyfriend out of the veld in which he was thought to be hiding.<sup>31</sup>

The Convention prohibits the infliction of severe physical or mental suffering in order to obtain the confession of a third person, or as punishment for a third party's actions. Despite the purposive element in Chauke's arrest, unlawful detention, and assault, whether it would qualify as torture and not just CIDT would be debated. The article does not refer to the severity of Chauke's suffering, nor to the conditions she experienced in custody, and so it is unlikely to qualify as torture in terms of our categorisation. Despite its gravity the Chauke case is not as serious as the following case involving Portia Adams, which we suggest fulfils the criteria for torture:

- Portia Adams from Ruyterwacht on the Cape Flats went to the police station to report an assault but she herself ended up in police custody, as the police officer suspected that she had information about where her boyfriend was. The police officer put Portia Adams into a male detention cell, and she was made to share the cell with her alleged attacker. Afterwards, she was handcuffed in the charge office for hours while the police officer dealt with other complaints.<sup>32</sup>

Again, this kind of practice is in contravention of the Convention that prohibits the practice of maltreating third persons to gain information. The apparently unlawful arrest and subsequent imprisonment with males, among them her attacker, would, given the frequent rapes in custody, be an extreme form of sexual harassment and threat to body and life, and could cause significant mental or psychological suffering. It is also in violation of international principles regarding the separation of female from male prisoners and from police rules regarding detention of suspects.<sup>33</sup> However, we do not know the duration or circumstances of this unlawful detention and it is thus difficult to categorise it as torture, rather than as CIDT. What seems striking about these two cases is the casual manner of the threat. Again we can only speculate, but given the normal levels of conflict between police and township populations (see also Hornberger, 2007; Salo, 2004; Jensen, 2008) police officers might have little regard for those they police. The imprisonment of Adams and Chauke might in this light be very much business as usual. This is further investigated in the last section of the report where we explore forms of torture and CIDT that did not make it into the media.

To sum up, we have in this section discussed some of the high-profile cases reported in the media in 2006. There were other cases, much less publicised, which indicate that the practices of torture might be more widespread. Another possibility is that when the police are pressured by visible and emotionally charged cases, they are likely to act more brutally. However, the cases of the two young women (Chauke and Adams) indicate that there is a normalcy to violence that sometimes, maybe without the police officers realising it, brings them into conflict with the Convention. We call this the social practices of violence. This notion will be developed more fully throughout this section.

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31 'Cops hostage caper', *Sowetan*, 23 June 2006; 'Outcry as police detain suspect's lover', *The Star*, 27 June 2006.

32 'Woman held in men's cell 'to sue'', *Saturday Cape Argus*, 28 January 2006; 'Woman locked in cell with four men', *Saturday Star*, 28 January 2006.

33 See for example Art 8 of the UN Standard Minimum Rules for the Treatment of Prisoners (1955); the South Africa Police Service Policy on the Prevention of Torture and The Treatment of Persons in Custody of the South African Police Service (1999), Pretoria; and SAPS Standing Orders regarding the treatment of prisoners in detention.

## Crowd control

During 2006 a number of incidents unfolded around the policing of protests. Many of these events turned violent in one way or another. It is these incidents that were included in our sample. The policing of demonstrations, protests or riots are events where the likelihood of violence is great as antagonisms and emotions run high and because the police have been deployed as a first line of defence (demonstrations) or a first line of attack (evictions). In many cases, the police therefore have legitimate cause for employing proportionate force generally for the purposes of effecting an arrest; for securing the safety of themselves; another police member or member of the public; or to maintain peace and order (Bruce, 2006). The police are also empowered to use lethal force in effecting an arrest under certain circumstances.<sup>34</sup> Nonetheless, we have included incidents in our sample where the means of policing seemed excessive or disproportionate, and sometimes illegal in relation to the threat or intended goal. Using Nowak's classification, such treatment would probably bring the action under the scope of the UNCAT as CIDT.

There was also a wide range of issues that gave rise to public protests:

- Resistance to evictions in Ravensmead, Cape Town and Grahamstown and other housing matters;<sup>35</sup>
- Post-election demonstrations in Umlazi near Durban;<sup>36</sup>
- Labour unrest at platinum mines in Limpopo;<sup>37</sup> and especially the security guards' demonstrations nation-wide that led to clashes between the police and demonstrators in Cape Town and Johannesburg;<sup>38</sup>
- Service delivery demonstrations and protests in Orange Farm<sup>39</sup> and in Harrismith.<sup>40</sup>

In all these incidents, protests turned violent and people were hurt. We will describe three of these incidents in more detail: the case of Tebogo Mkhonza's death in 2004; the security guards' strikes and protests; and a housing conflict in Durban. These cases provoked the most media reports in this category and they are appropriate illustrations of some of the dynamics that provoke the excessive use of force in the policing of crowds.

- Tebogo Mkhonza: He died after a service delivery protest in 2004 in Intabazwe near Harrismith in the Free State. According to a video clip three policemen - Captain Visser and Inspectors Marius Nel and Hendrik de Wet, stepped in front of the police line, aimed their shotguns and fired into the crowd. Mkhonza was hit and died in hospital. The policemen, who had been charged with murder, explained that they had feared for their lives, as the police line had allegedly been broken by a crowd running towards the police.<sup>41</sup> This was disputed by an expert in riot control who alleged that the protesters posed no threat to the police.<sup>42</sup>

The Mkhonza story was covered in both the English and the Afrikaans media. The Afrikaans press provided more information on the crowd's behaviour than the English media. The question of whether the crowd threatened the police is clearly central for both the murder trial and in order to determine whether there would be a question of categorising the event as CIDT because of the use of excessive or disproportionate use of force. The fact that the three police officers broke the line and shot directly into the crowd would suggest that excessive force was used and it therefore qualifies as CIDT. The unlawful shooting of Mkhonza would be a violation of the constitutional right to life, as well as in violation of the UDHR and ICCPR. However, the incident might also fall within the category of extra-legal, summary and arbitrary executions.<sup>43</sup> We discuss this point further in the next section on police shootings.

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34 S 49(2) of the Criminal Procedure Act 51 of 1977 allows the use of "deadly force in circumstances where such deadly force is immediately necessary to protect the arrestor or third party, where delaying the arrest holds substantial risk of death or bodily harm to members of the public, and where the suspected offence is a serious one of a serious nature." (Pieterse, 2008, pp. 39-11).

35 'Police fire stun grenades at housing protesters', *EP Herald*, 12 January 2006; 'Police fire rubber bullets to evict 300 from unused school', *Mail & Guardian*, 1 November 2006.

36 'Cops deny shooting', *Sowetan*, 9 March 2006; 'Woman (25) killed by rubber bullet in Umlazi election demo', *Natal Witness*, 3 March 2006; 'Protest turns deadly', *Daily News*, 3 March 2006.

37 'Police open fire on platinum protesters', *The Star*, 12 June 2006.

38 'Guards to sue over police torture', *Citizen*, 9 December 2006; 'Police hit bystander as they open fire on striking guards', *The Star*, 6 June 2006.

39 'My son did not take part in protest', *Sowetan*, 8 September 2006.

40 'Court told protesters posed no threat to cops', *The Star*, 9 February 2006; 'Evidence becomes family's horror movie', *The Star*, 8 February 2006; 'Polisie-video glo gestop toe skietery begin', *Volksblad*, 8 February 2006.

41 'Lys van haelgewere en patrone glo weg, hoor hof', *Volksblad*, 10 February 2006. See also 'Evidence becomes family's horror movie', *The Star*, 8 February 2006.

42 'Court told protesters posed no threat', *The Star*, 9 February 2006.

43 The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council of its resolution 1989/65 of 24 May 1989, calls on governments to ensure that such executions are recognised as criminal offences in their countries.



- Security guards' strike: During May and the beginning of June 2006, security guards nation-wide went on strike to demand better pay and better conditions. A number of marches were organised and several of them turned violent. In Cape Town, after the guards' union had handed in a memorandum to Parliament, police allegedly shot into the crowd. The police explained the shooting as an attempt to stop looting and destruction caused by some of the strikers. Police used rubber bullets and arrested a number of people. Media reports connected the reports of police brutality with the police practices of the apartheid regime.<sup>44</sup> In Johannesburg, demonstrations were policed with some force. Police allegedly claimed that the strikers had set a cardboard box alight and in the ensuing scuffle a young man was hit above the eye with a rubber bullet. Union member Nyamezela suggested that police used particularly hard measures in policing the security guards' protests.<sup>45</sup>

The security guard protests lasted several months with substantial loss to property and injuries to strikers. It increased the levels of fear because the security guards were away from their jobs protecting people and property. Furthermore, security guards were also alleged to be capable of violence. The private security sector currently employs some 300,000 people nation-wide.<sup>46</sup> The fear that the strikers might resort to violence, which did come true to some extent in the Cape Town march, might explain why the police acted with such force. However, it does not excuse the often heavy-handed methods used by the police in policing the protesters. Again it is difficult to determine the circumstances of the violence, but if the police use of force appeared to be excessive or outside the boundaries of the law, then it would qualify as CIDT.

- In Durban, three local shack-dweller activists were arrested by the police for assaulting the police and resisting arrest. In the course of the arrest and in the police station, the police officers were alleged to have kicked one of the activists in the genitals, while other police officers stepped on a red t-shirt, the symbol of the organisation. Outside, in one of the squatter areas, about 500 people had gathered to discuss the arrest. Subsequently, the police barricaded the entrances and fired rubber bullets and tear gas to disperse the crowd, which they considered illegal. Reports suggested that the standoff lasted hours and at least one resident was wounded in the leg.<sup>47</sup>

From the reports, it would seem that a very antagonistic relationship had developed between shack-dwellers, the police and local housing authorities, to the extent that the housing authorities accused the shack-dwellers' association of "third force" activities – counter-revolutionary activities. This also explains why the police felt legitimised in proceeding forcefully. If the police shooting were disproportionate to the force needed to disperse the crowd then it would qualify as CIDT. It would seem that the kicking of one of the activists in the genitals would certainly qualify under our categorisation.

## Police shooting

The South African police shoot, wound or kill a number of people every year and many of these incidents make it into the news. The Independent Complaints Directorate (ICD) reported 419 deaths as a result of police action in 2006/2007, including deaths as a result of shooting during an arrest, during an escape, during the commission of a crime, shooting by a police officer while off duty and in the course of domestic violence, negligent handling of a firearm, and motor vehicle accidents (ICD, 2008, p.57).<sup>48</sup> In relation to crowd control, police shooting is difficult to categorise under the purview of the UNCAT. The situations often occur in the streets and under significant stress. As in relation to crowd control, the police often used excessive force, but in the incidents covered in this section, the randomness was significantly higher as well as the arbitrariness with which the police apparently acted. As indicated in the section on crowd control, there are specific definitional challenges in relation to shootings, because they are governed by a number of other international legal instruments and because the State, under certain circumstances, is allowed to use deadly force.<sup>49</sup> The field of law separates quite rigorously between killing people, and ill-treating them. The 1949 Geneva Conventions use the term "violence to life and person" (Article 3), whereas the 1948 Universal Declaration of Human Rights and the subsequent 1966 Covenant on Civil and Political Rights use the term "right to life" (Articles 3 and 6 respectively) and a "right to be free from torture and CIDT" (Articles 5 and 7 respectively). In the international system extra-legal killings and torture and CIDT are also covered by different conventions and treaties, and each has their own Special Rapporteur. Hence, although a person's "life" and "physical or mental integrity" are

44 'Right to protest must be defended', *Cape Times*, 23 May 2006; 'Cops behaved like cowboys at protest', *City Press*, 28 May 2006.

45 'Police hit bystander as they open fire on striking guards', *The Star*, 6 June 2006.

46 The Private Security Industry Regulatory Authority reported that there were 307,345 active registered security officers and a further 776,316 inactive security officers registered with the PSIRA on 31 March 2007. Annual Report 2006/2007, p. 36.

47 'I was punched, beaten', *Mail and Guardian* 21 September 2006; 'Shackdweller activists lay charges of assault following arrest', *Sunday Tribune*, 17 September 2006.

48 It is interesting to note that these deaths increased to 490 during 2007/2008, with the biggest increases occurring in relation to people being shot during the course of police investigation, and deaths as a result of motor vehicle accidents caused involving police officers (ICD, 2008, p.57).

49 We are indebted to Ion Iacobs of the RCT Documentation Center for clarifying and sorting out the definitional challenges in relation to shootings, killings and the UNCAT.

considered together when it comes to researching violations, a distinction seems to be necessary – the reason arguably being that killing people may sometimes be justified and legal, and subjecting people to physical abuse or non-lethal types of force may be categorised as CIDT or not, depending on the issues of legality and proportionality. Torture, however, is never legal or justified in international or domestic law. This suggests that formally we must distinguish quite clearly between extra-judicial killing and torture. However, we would argue that although the two fall within the scope of different rights and instruments, it doesn't mean that we cannot raise issues under the other's jurisdiction, especially if we consider the police shooting in light of the use of excessive force. Special Rapporteur Manfred Nowak suggests that although it may not qualify as torture, "excessive use of force by law enforcement officials" can amount to cruel, inhuman or degrading treatment or punishment. He says:

"Since the police, of course, are entitled to use physical force and arms for lawful purposes, the principle of proportionality must be applied in order to determine whether the use of force is excessive or not. Only such use of force, which results in severe pain or suffering and which, in the particular circumstances of a given case, is considered to be excessive and non-proportional in relation to the purpose to be achieved, amounts to inhuman or cruel treatment or punishment" (Nowak & McArthur, 2008, p. 568).

The question then remains how exactly excessiveness or proportionality of violence can be assessed? Although they do not have convention-status, it might be fruitful to consider the "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials".<sup>50</sup> The principles suggest that State Agents "may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result" (Article 4); further, such force should be "in proportion to the seriousness of the offence and the legitimate objective to be achieved" (Article 5(a)). The situations in which law enforcement officials may use firearms are defined as follows:

"... self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." (Article 9)

In this way, if the use of lethal force involving firearms is found to be excessive or is disproportionate to the threat posed, a shooting might be characterised as CIDT. Going through the media reports, we focused on two different types of police shootings which pass the test of: a) causing pain and suffering; b) lacking justification; and c) being disproportionate to the threat. One type relates to what appeared to be incidental shootings in the pursuit of suspects. The other type relates to police using firearms during policing raids.

- Bongani Bheki Mncwabe was killed by the police during an investigation into a domestic violence call. The police alleged that Mncwabe tried to disarm a police officer subsequent to which another police officer shot Mncwabe in the leg. The mother, on the other hand, accused the police of shooting her son in the head as part of settling private matters. A police officer at the local station was allegedly having an affair with Mncwabe's girlfriend and wanted to get rid of him. A neighbour corroborated the mother's story, as he heard someone shout, "shoot him, shoot him" followed by three shots.<sup>51</sup>

In several media reports it appeared that police officers used violent means to solve private matters. Most of these cases, we have classified as "police crime", and hence were not included as part of our sample. However, in the above case the police officers in question seem to have combined the private and the public in ways that place the incident within the purview of CIDT: Mncwabe was killed by State Agents, who used excessive force while carrying out their official duties. The case illustrates how fluid the boundary between the public and the private is, and how difficult it can be to unambiguously categorise events as inside or outside the categories put forward by the Convention. Again, this is an incident that violated the right to life, and might rather fall within the ambit of extra-legal killings. However, whether or not the purpose was private is irrelevant as Mncwabe was killed by an officer on duty, and the incident arguably passes the test of the use of excessive force as more than one police officer was present and he was killed by a shot to the head. Hence, we classified the incident as CIDT.

In three incidents from our sample the police raided homes of people using excessive force. In two of the incidents the suspects were killed.

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50 These principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990.

51 'Why did police kill my boy?' *Witness*, 14 September 2006.

- Rodney Gxumane killed three people and injured two others after a fight over electricity. In the ensuing manhunt, police convinced his wife to show them where he was hidden. Once there, police kicked down the door and entered in numbers. Shots rang out and Gxumane was killed. Police alleged that he drew a firearm, whereas his wife suggested that the police had entered the house with the intent to kill. The shots rang out immediately after the door had been broken down.<sup>52</sup>
- In one of the much-reported cases of 2006, farmer Vusumzi Nkuzo was killed following a raid on his house. The police were looking for a suspect in another case, said to be carrying an illegal firearm. Eight police officers armed with R5 assault rifles and pistols had gone to Nkuzo's farm. According to his wife, Nkuzo and his two sons had gone out to investigate why the dogs were barking. He is said to have shouted, 'Who are you and what are you doing on my farm at this time of night?'<sup>53</sup> After which fire from automatic weapons had rung out, leaving Nkuzo dead. Police, on the other hand, suggested that they had returned Nkuzo's fire and therefore acted in self-defence. In a rather astonishing turn of events, the post-mortem report suggested that Nkuzo had died from a motor vehicle accident, not mentioning the shot to his head.<sup>54</sup> Months later, in yet another turn of events, Nkuzo's wife was arrested and charged with assaulting the police after the police came to the farm to investigate leads suggesting that there were stolen goods on the property. The arrest of the wife came only days after a second post-mortem had shown that Nkuzo indeed died from a headshot.<sup>55</sup>
- In July the police raided an apartment block in southern Johannesburg in search of illegal immigrants. Residents were woken as shots were fired at the building from a strong police force. The police entered the building and began searching the apartments. Some residents were beaten up, while others were shot with rubber bullets or sprayed with pepper spray. After the raid, it was reported, hundreds of rubber bullet shells were found lying in the vicinity. According to the police, they had to fire rubber bullets as they had been pelted with stones, as about 500 Red Ants (employed to clean up illegal squats in the city of Johannesburg (see Rasmussen, 2007)), had cordoned off the area to prevent people from escaping. During the raid, the police were alleged to have called the residents "filth".<sup>56</sup>

All three incidents suggest that police officers quite readily used firearms while conducting their duties. Furthermore, it also appeared as though excessive use of force was employed, which led to the death of several people. Questions could be raised in relation to the Gxumane incident. As he had already shot five people and possibly posed a threat to other people, it might be argued that the police were entitled to use lethal force in preventing him fleeing from arrest. However, the case would still turn on an argument of the circumstances in which the police attempted to arrest him, and whether he did in fact draw his firearm and whether this posed a threat to the police entitling them to use lethal force. In the Nkuzo case it would appear that the police actively tried to cover up the killing of the farmer, whereas, in the last case in the raid on the apartment block, it appeared that the police treated the people residing there with little respect and discriminated against them, as well as subjecting them to beatings, and shooting them with pepper spray and rubber bullets. In terms of the UNCAT, none of the incidents qualify as torture. However, due to the excessive use of force, the power differential, the State-sanctioned duties and the resulting damages to life and dignity, we classified these shootings as CIDT.

## Police assault

There were many reports of assault by the police in our sample, some of which took place during detention or interrogation, and which have been referred to elsewhere in this chapter. However, there were other reports of police assaults that took place during the course of police action, such as at a crime scene, during a police raid, a search and seizure operation, during an arrest, or during a roadblock. The frequency with which the police appeared to resort to force in a variety of situations again illustrates the pervasive use of force, threats and insults to subdue people and assert authority over a situation. There were several cases where police barged into people's homes in the early hours of the morning without a warrant, searching for suspects, only to find later that they had gone to the wrong homes:

- Mcloud Mbewu and his son Sindile Mbewu (who was also a member of the police flying squad) of Khayelitsha were woken by loud knocking at 1am. They were afraid to open the door as they'd heard stories of people being robbed and killed by men posing as police at night. The police then kicked down the door, dragged the elder Mbewu from his bed and repeatedly hit him in the face. When the son tried to intervene, the police then hit him in the face and banged his head against the wall. The

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52 'Police set out to shoot my husband, says killer's widow', *Sunday Tribune*, 16 July 2006.

53 'Three police officers suspended for farm killing', *Daily Dispatch* 20 July 2006.

54 'Family cries 'cover-up' at farmer's death', *Daily Dispatch*, 1 August 2006.

55 'Bail for shot farmer's widow', *Daily Dispatch*, 14 September 2006.

56 'Police raiders treated us like animals, say residents of flats', *The Star*, 28 July 2006.

police left when they realised that they had raided the wrong house.<sup>57</sup> In a similar incident, Francis and Frederick du Plessis of Grassy Park were woken up, assaulted and verbally abused by the police. On finding out that the police had gone to the wrong address, the police later offered the du Plessis' flowers in apology.

- Mhleli Mxatule was assaulted by the police conducting a raid on a nightclub in Port Elizabeth. He claimed that he was verbally assaulted by white policemen who called him degrading names including 'the "K word"'. One policeman had hit him in the face with a baton and later pepper-sprayed him, while another policeman had searched his pockets while he lay unconscious on the floor.<sup>58</sup>

Although it is difficult to make a final decision due to lack of information in the reports, these events could be categorised as CIDT. The people in question were under police control and physically assaulted and discriminated against. In the Mxatule case, depending on the severity of the assault (and it appears to be quite severe leading to him losing consciousness), the case might even be categorised as torture taking into account the additional racial discrimination during the incident.

The police often have to carry out their activities within a hostile environment where not everyone accepts their 'right' to police. In addition, the police are often working in environments where people are using drugs and alcohol, or participating in non-social activities, and where their own interaction within the police is less than compliant. Hornberger (2008) argues that violent authority commands the compliance of people, enabling the police to avoid lengthy or bureaucratic procedures. As such, the threat of force or use of violence becomes part of their armoury to establish "respect" and "authority" in these environments and "allows for the illusion of efficiency and potency in crime fighting" (Hornberger, 2008, p.172).

Victims of torture and CIDT seemed in our investigation to come from all walks of life, and included off-duty policemen and their families, city police, political figures, civil servants, business people, and of course the unemployed, though the violence seemed to be more pronounced in less affluent and influential communities. The violence often appeared to be indiscriminate, or aimed at someone who got in the way of police duties.

- Carl Eric Collison from Grassy Park said he was attacked and assaulted by a group of police reservists when he was on his way to buy some cigarettes. He was arrested for obstructing a police officer in his official duties. Inside the police station, he was further assaulted in the upstairs room.<sup>59</sup>

There were several reports of assaults with overtones of racism playing out on both sides of the colour spectrum. In one case, an elderly man and his middle-aged son claimed they were ill-treated and abused by the police. When they pulled their car over to make a phone call they were told by a police constable to empty their pockets and hand over their cheque book, and they were accused of having fraudulent and stolen cheques. The police grabbed the son and banged his head against the car several times, threatened to lock them up and "sort out the boertjies in the town" adding that "this is the time of Mandela and you have \*\*\* all more to say".<sup>60</sup> These cases we classified as CIDT as the assaults took place while the victims were in the custody or control of the police, yet they do not satisfy the severity test of torture, even though there were overtones of racial discrimination. On the other hand three former policemen were charged with the assault and murder of a black man for buying liquor in a "whites only bar". Before he died, the three took the victim into a police station to lay a false charge of housebreaking. The police on duty told the former police officers to take him to a hospital, but instead they dumped him and left him to die.<sup>61</sup> This constitutes deliberate indifference, as the police on duty, not the former police officers, had an obligation to take the victim to hospital. The assaults on their own would qualify as CIDT, but the additional racial insults and motivation could move these into the sphere of hate crime based on racial discrimination, as well as torture committed "for any reason based on discrimination of any kind".

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57 *Cape Argus*, 28 November 2006.

58 'I was assaulted in police raid', *The Herald* (EP Herald), 16 August 2006.

59 'Man lays charges after cops allegedly beat him at Grassy Park', *Cape Argus*, 11 August 2006.

60 'Father, son allege police abuse', *The Citizen*, 2 May 2006.

61 'Rustenburg's wit gevaar', *City Press*, 12 February, 2006.

## Police detention

The South African Police arrest over a million people a year for a variety of crimes, as well as undocumented migrants.<sup>62</sup> It is not always known how many of those arrested are held in police custody,<sup>63</sup> or for how long, but clearly the arrest and detention function of the police is a key one, and the police have the responsibility to ensure that people are held safely and securely while in custody. The SAPS Prevention of Torture Policy (1998) was designed to help the police to fulfil these functions by setting out the responsibilities of the police. The SAPS regulations also deal with how detainees should be treated. However, despite this, the ICD reported 279 deaths in police custody during the 2006/2007 year, of which 11 percent were attributed to injuries sustained in custody, 16 percent to injuries sustained prior to the deceased being taken into custody, 39 percent to natural causes, and 34 percent to suicide (ICD, 2008, p. 57).<sup>64</sup>

The media reports covered several cases of abuse by police while people were in custody. Most of these dealt with people who were being held in police cells or detention facilities, while some dealt with people under arrest, held in court cells, or in police vehicles. In all of these situations, the people under arrest can also be construed as being in the custody, care and control of the police. In discussing allegations regarding people in custody, we should also bear in mind the Special Rapporteur Manfred Nowak's contention that there is an absolute prohibition on the use of force while the victim is in custody.<sup>65</sup>

There were three cases dealing with reported suicide in police cells, two of them illustrate some relevant and highly disturbing issues regarding suicide.

- 13-year old Leon Joodt was arrested on a Friday at his industrial school on suspicion of housebreaking. He was taken into custody and held in the Heidelberg police cells. Two days after his arrest he was found hanging from his trousers which were attached to the cell bars. He had left a suicide note next to his body.<sup>66</sup> His mother later suspected that he had been sexually assaulted in the police cells.<sup>67</sup>
- Ian Braak was arrested following a report of domestic violence. He was found approximately 15 minutes after being put into cells hanging from the cell bars. The blankets had been torn to make a rope. According to the report, this was the second time that Braak had been arrested on charges of domestic violence. On the first occasion he allegedly ran amok in the police station pulling out his firearm and threatening to commit suicide. After a policeman managed to disarm him, he was charged with negligent handling of a firearm. Despite the initial charge being one of domestic violence, and the apparent instability of the detainee, the negligence charges were later withdrawn and his firearm returned to him.<sup>68</sup>

These two cases raise different concerns. In Joodt's case, he was a young child who should have received special care and attention from the police. In terms of the South African Constitution and the Convention on the Rights of the Child, a child should be detained only as a last resort, and then for the shortest possible time. In terms of the law operable at the time, a child under the age of 14 years could not be held in a police or prison cell for longer than 24 hours (S 29 of the Correctional Services Act 111 of 1998). Where possible, arrested children should be allowed to remain in the custody of a parent or guardian pending their trial.<sup>69</sup> Questions should therefore have been asked about why he remained in custody over such an extended period. Even if the court that would have considered his release would only have sat on the Monday, given the nature of the charges, the child could possibly have been released into the custody of his parents or another suitable adult.

In Braak's case, it was clear from previous interactions with the police that he was an unstable personality who had previously threatened suicide, yet the police failed to take steps to prevent this suicide risk. It was also concerning that his firearm had been handed back to him without an inquiry into his suitability to possess one. From the reports of the case it is not clear whether the police had maintained adequate oversight over the detainees in custody in order to prevent their suicides. The police are required to visit ordinary detainees on an hourly basis, and to remove any items from a prisoner that may pose a threat to him.<sup>70</sup> However, given the

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62 The police arrested 1,227,751 people in 2006/2007, SAPS Annual Report of 2006/2007, p. 35.

63 The SAPS Annual Report for 2005/2006 indicates that 1,132,606 people were arrested in the year, but 2,220,251 were held in SAPS custody (2006, p. 72 and p.29). It is not clear why there are reportedly more people in custody than arrested. The SAPS no longer includes details of the numbers in custody in their annual reports.

64 The numbers of deaths in custody increased by 8 percent to 302 in the 2007/2008 year (ICS, 2008, p.57).

65 See our earlier discussion on the definition on torture, Section 2.

66 'Teen cell hanging probe', Citizen, 24 October 2006. Although this article refers to the boy as 14-years old, another one quotes his mother saying the boy was 13-years, due to turn 14 the following week – '13-jarige gehang in polisieel gevind', Beeld, 24 October.

67 'Seun hang hom nie, sê pleegma', Beeld, 22 November 2006.

68 'Wag hang hom in polisieel', Beeld, 28 August 2006.

69 Section 29 of the Correctional Services Act 111 as amended.

70 Police Standing Orders (General 361). Handling of Persons in the custody of the Service from arrival at the police station. Issued by Consolidation Notice 18/2003.

short duration of Braak's detention, an hourly visit would not have prevented his suicide. Both of these cases were being investigated by the ICD in terms of its mandatory responsibility.

In another case, Mandla Ntombela allegedly hung himself with a length of plastic cut from his cell mattress. However, his family who saw him being beaten by the police who arrested him, claim he was killed by the police.<sup>71</sup> These cases may be considered, for the purposes of this report, in terms of whether the police were guilty of deliberate inaction or indifference and if so this would bring them under the ambit of the UNCAT. However, it is not sufficiently clear from the information available whether or not this would be the case.

There were several other cases dealing with the deaths of detainees in custody; either as a result of abuse by the police; or fellow prisoners; or if injured or ill detainees were taken into custody and not given medical attention. The following are examples of these:

- 23-year old Thapelo Letsie was beaten to death by six cell mates in Harare police station in the Western Cape. Letsie and his friend Ncedo Sifumba were arrested for being drunk in public. An argument had allegedly broken out in the back of the police van with the other detainees, and they had pleaded that the two of them be detained separately. This went unheeded by the police, as did their cries for help during the night. Letsie's body was found the following morning, and his family reported that he had been so badly beaten that his head had swollen to twice its size.<sup>72</sup>
- 29-year old Reggie Murenzheni was found dead in his cell two days after he was arrested and taken to the Muizenberg police cells. His family had called for the police to arrest and take him into custody in order to cool down as he was drunk and abusive at home. On Sunday morning they asked for him to be released, but they were allegedly denied access to him and told "he was safe". Twelve hours later the family was told to go to the hospital where Murenzheni had been taken to, as he was sick. He was declared brain dead 12 hours later and both his knees were broken and his skull, shoulders and ribs were fractured. His four cell mates had been charged with his murder.<sup>73</sup>

Both these cases illustrate the potential risk that detainees pose to each other. This is one of the reasons that the police are required to separate different categories of prisoners, and conduct hourly visits to the cells to ensure the safety and well-being of inmates and to respond to complaints. It would appear though that in these two cases, not only did the police fail to respond to noises of assault or cries for help, but they also apparently did not visit the cells regularly, as it seems both men were found some time after their respective assaults. In both cases, the assaults were severe, and must have occurred over a sustained period giving police ample time to respond. Apart from the regular (or irregular visits) it does not seem that other measures were taken to protect the safety of the inmates. This is clearly a case of the police failing to protect the safety of detainees, as well as failing to prevent torture or cruel and inhumane treatment.

This was found to be the situation in the case of Tani Malepane, to whom the Pretoria High Court awarded damages against the Minister of Safety and Security. As a result of an assault by his fellow cell mates, Malepane lost an eye. The court found that although regular cell visits had taken place, "the attack might have been prevented if the officer on duty had investigated the cell disturbance"<sup>74</sup>. Within our categorisation, these cases would fall under the UNCAT as torture as a consequence of the police's failure to protect the inmates. Other cases dealing with similar complaints also report on the difficulties that families have in trying to see their deceased family member timeously, or to get information from the police.

In its concluding remarks to South Africa's first report, the CAT committee expressed concern at the high number of deaths in detention and at the lack of investigation of alleged ill-treatment of detainees and impunity of law enforcement personnel. It called on the South African State to conduct prompt, impartial investigations into all deaths and allegations of torture and CIDT committed by law enforcement personnel (CAT, 2006, para 20).

While it is true too that male prisoners are often at risk of assault, and sometime sexual abuse from their cell mates,<sup>75</sup> it is clearly a violation of every international principle and national law to put a young woman into a cell with male prisoners. In one case a young woman was put into a cell in Thembalethu police station with four teenage boys, because the cells in Conville were full. She was repeatedly raped by the four boys.<sup>76</sup> This, in our view, would fall under the category of torture.

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71 'Cops killed my dad', *The Star*, 28 August 2006.

72 'Probe launched into death of young man in police cells', *Saturday Weekend Argus*, 5 August 2006.

73 'Cops told us he was safe in cell – a day later he was dead', *Cape Argus*, 12 December 2006.

74 'Judge rules Minister liable for damage', *Citizen*, 27 June 2006.

75 See for example the case of a businessman who claims he was sexually assaulted in the Wynberg Magistrate's holding cells. 'Businessman sues police for inhumane treatment', *Cape Times*, 16 January 2006.

76 'Polisielede ondersoek ná vrou in selle verkrag word', *Die Burger*, 18 July 2006.

While cell mates are one source of danger to detainees, assaults by the police also occur:

- Gideon Koeberg, who was mentally challenged, was arrested on suspicion that he had committed a robbery. He was allegedly carrying an iron bar at the time, to fend off attacks from dogs, and when accosted by police “freaked out” and tried to defend himself with the iron bar. He was allegedly assaulted and taken into custody by two policemen and a traffic officer, and the struggle continued in the holding cells of the Bellville South police station. Photographs showed that he was covered in bruises and bleeding from his ears, but ICD investigators could not at the time of the report confirm whether he had died as a result of the assault.<sup>77</sup>

Though minimum force may at times be permissible in order to subdue an arrestee, the nature of the assault documented above clearly went far beyond that. As a mentally disabled person, it appeared on the basis of the report, that he failed to receive the level of care of special treatment that he deserved, instead being cruelly beaten by the police. As in the previous case, this neglect would situate it under the ambit of the UNCAT as, if not torture, certainly as CIDT.

Frequently the police arrest people who are drunk, ill or injured, and unless they are carefully watched, there is a possibility that their condition could deteriorate; they could choke or suffocate, or even lapse into a coma (Dissel & Ngubeni, 1999).<sup>78</sup> Though he didn’t die, the following case is an illustration of this negligence, and the denial of medical treatment in this instance would constitute CIDT:

- Johannes Pieterse was arrested following a pub brawl in which he was severely injured. He was bundled into a police van, and later left in the cells until the Monday when he was due to appear in court. He repeatedly requested medical attention, but this was refused. He was later admitted to hospital where he stayed for five weeks. It emerged that he had had a fractured skull and neurological injuries, his jaw was fractured in several places, and he had severe ear pain resulting in loss of hearing – he also contracted meningitis. He was suing the Minister of Safety and Security as a result of his experience.<sup>79</sup>

There were several media reports dealing with allegations of rape and sexual abuse by police officers of female detainees when in their cells. For example, one woman had been sprayed with mace and subsequently raped by a policeman in the Montagu holding cells. A police investigation was launched, but there were concerns that the police failed to collect the proper forensic evidence after the rape.<sup>80</sup> Other cases reported included the following:

- A young woman in custody for 15 months in Smithfield claimed she was raped twice by a policeman, but that she also had consensual sex with him. Although DNA tests proved that he had fathered her child, the criminal trial collapsed as a result of contradictory statements from the woman. She also claimed to have had sex with three policemen at the station, and once had sex with her boyfriend in her house, while she was still in custody. The policeman was dismissed and disciplinary charges were pending against the other two suspects.<sup>81</sup>

This case illustrates the almost casual attitude towards easy sex with inmates that emerged in some of the media stories. In another example, one of the policemen accused of raping a woman twice in Grahamstown claimed that the woman has become his “girlfriend” and they both wanted to sleep together.<sup>82</sup> It is almost impossible to consider any element of consensual relationship in a situation where one of the parties is in the official custody of another, who works for the State.<sup>83</sup> Although this can’t be categorised as torture, this was clearly an abuse of power and would constitute ill-treatment.

Not all sexual abuse cases involved women. One case also dealt with the sexual abuse of two street children in Durban who were picked up by the police for being on a train without a ticket, and later abused in the trauma room at the police station.<sup>84</sup> The boys, being in the custody of the police would fall within the ambit of the UNCAT. Although the abuse might have been for the personal gratification of the policemen, they were abusing their power as agents of the State.

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77 ‘Authorities stall over cell death’, *Cape Argus*, 12 January 2006.

78 A Dissel and K Ngubeni (1999). ‘A lonely way to die: an examination of deaths in police custody’. Centre for the Study of Violence and Reconciliation. See [http://www.csvr.org.za/index.php?option=com\\_content&task=view&id=648](http://www.csvr.org.za/index.php?option=com_content&task=view&id=648).

79 ‘Man sues ‘negligent cops’ for R1m’, *Pretoria News*, 17 June 2006.

80 ‘Montagu cop probed over ‘rape in cell’’, *Cape Argus*, 10 April 2006.

81 ‘Rape claim cop falls apart in court’, *Sunday Times*, 29 April 2006.

82 ‘Woman claims cop raped her in police cell’, *Daily Dispatch*, 14 March 2006.

83 Apart from the obvious power differential between warders and inmates, these cases also illustrate another feature of prison life, which is the often intimate entanglement between warders and inmates who to some extent share life worlds. Jefferson (2008) talks of these relationships as the entanglements between inmates and warders as a prominent feature of prison across many developing countries.

84 ‘Witness found to ‘rape’ of street child’, *Witness*, 13 November 2006.

Considering that almost as many people pass through police stations on an annual basis as through prisons, there were proportionately very few articles dealing with conditions in police custody. Perhaps due to the short time periods that people spend in police cells, an experience in an overcrowded, dirty or uncomfortable cell is not considered as a "serious rights violation" when compared to long term incarceration in similar conditions in a prison. One article did report on the poor facilities, overcrowded conditions, and lack of seats or benches in the holding cells, while at the same time reporting on the un-conducive working environment at the Lamontville Police Station in Durban.<sup>85</sup> Notably police holding facilities and cell conditions are not reported on in the SAPS' Annual Report and there is no regulated system of oversight such as the Judicial Inspectorate of Prisons. Furthermore, custodial issues are seldom, if ever, discussed by the parliamentary portfolio committee on Safety and Security. Even the reports that there were did not deal with the core issues of conditions of detention. For example, one case concerned a woman arrested by the Durban Metropolitan Police as a result of an unpaid traffic fine and who was detained together with men for several hours in a cell at Old Fort Road police station. The metro police denied that they held her in a cell, as theoretically metro police have no jurisdiction to keep holding facilities, and must hand over all people they arrest to the police.<sup>86</sup>

Another case reported concerned a man who had been left handcuffed in the back of a police van in the blazing sun for several hours while the driver went off for lunch. A further report told of the shocking conditions in the Klerksdorp Magistrates' Court holding cells.<sup>87</sup> These cases would both qualify as CIDT.

## Police crime

There were a number of cases detailing allegations against members of the police who had committed acts of violence, murder and rape in what appeared to be off-duty time or in their "private" capacity. Many of these dealt with domestic violence against intimate partners and family members. In most instances, though the acts might constitute cruel, inhuman and degrading treatment or punishment, we excluded these from our analysis as they appeared not to fall within our understanding of the requirement that torture or ill-treatment be committed by an official or person acting in an official capacity. However, one should not disregard the easy segue from the normative use of violence in the working lives of police officers to the violence displayed in private relationships, as well as the apparent tolerance of violence and criminality by the police. The ICD noted reluctance on the part of the police to charge or take action against off-duty police for misconduct, drunkenness, assaults and domestic violence. It also appeared that no police disciplinary action ensued, particularly if no criminal action was followed (ICD, 2008, p.33), and the media frequently reported on charges that were not made, investigations not followed up, or information becoming lost. Nevertheless, there were also many cases where police were charged, and even convicted of these crimes.

The ICD also noted 60 deaths at the hands of off-duty police officers during the 2007/2008 year. An ICD research project revealed that the number of femicide cases by male police officers was increasing with each financial year, with 24 cases being reported in 2006/2007. The majority of women were married to the perpetrator (53 percent), and 90 percent were killed by shooting. In 80 percent of cases the victim was shot with a police service firearm (ICD, 2008, p. 44).

However, the media-reported cases we cover here are those where police officials were often purporting to act in their official capacity, or where the crime was committed while they were on duty. For example, the case of four police officers who tear-gassed, assaulted and robbed a businessman and his wife of R800 at their home. To gain entry to the house, the police banged on the door shouting, "We are policemen". They pointed a firearm at the couple and ransacked the house.<sup>88</sup>

There were several cases reported where policemen raped women while in police uniform. A young beautician was raped by two policemen in uniform. They stopped her late at night, dragged her from the car to the back of the police flats in Germiston, tied her wrists with wire and raped her. Although she reported the case, a year later she had not been given a case number, nor had the rape kit been collected by the police.<sup>89</sup> In another case, the Bolebedu Captain Crime Stop (a police officer appointed to do public outreach and crime prevention work with children) was asked to drive two young girls home after participating in a radio interview. Along the way, the policeman, accompanied by a police reservist, dragged the elder 13-year old girl from the police van, raped her, and then proceeded to drive the two girls home, before returning to the station.<sup>90</sup> The policeman was later dismissed and charged with the offence.<sup>91</sup> A third case reported concerned Natasha Kern who was suing the Minister of Safety and Security after the Constitutional

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85 'We can't carry on like this', *Independent on Saturday*, 25 February 2006.

86 'Council still denying "illegal holding cell" a year later', *Independent on Saturday*, 11 November 2006.

87 'Hofsake ontwig oor riool in selle', *Beeld*, 1 July 2006 and 'Suspect fries in hot van as cop eats lunch', *City Press*, 22 October 2006.

88 'Cops tear gassed and assaulted us', *The Herald* (EP), 5 September 2006.

89 'The trauma of living with scars of sexual assault', *The Star*, 16 October 2006..

90 'Captain Crime Stop rape cry', *Citizen*, 16 March 2006.

91 'Cop charged for rape fired', *Sowetan*, 19 October 2006.



Court recognised that the police had the legal duty to protect her, but instead had raped her. The three policemen were in uniform at the time of the rape, and were driving her home after she became stranded.<sup>92</sup> In terms of purpose these rapes don't fall under the UNCAT definition of torture, but could be seen as CIDT. Certainly the details of these cases, such as the police officers taking the girl home after the rape, suggest either absolute impunity or a belief on the part of the police officers that their actions were somehow legitimate.

Sex workers are generally regarded as a group who are vulnerable to the police's abuse of power. There were several reports dealing with allegations against the police of harassment, sexual abuse and rape, physical assault, and police insisting on having sex with sex workers in exchange for charging them with an offence or locking them in a police cell.<sup>93</sup> This kind of treatment is inhuman, degrading and cruel, and would probably be considered as such by the UNCAT.

There were several cases of alleged abuse by police officers against their colleagues, some of which have been reported elsewhere in this section. One case that received much press attention was that of a sergeant who was an instructor at a police college and who forced a female student to lower her panties in front of the class in order to prove she was menstruating and needed to go to the toilet.<sup>94</sup> This case meets all the requirements for CIDT.

## Prison conditions

Any discussion of allegations of torture and ill-treatment must be situated within an understanding of the context of prisons. Prisons in South Africa are overcrowded and under-resourced.<sup>95</sup> At the time of writing up this report there were 165,987 prisoners held in space designed for 114,737 (169 percent full) – though some prisons are more overcrowded than others with one at least at 429 percent full.<sup>96</sup> Due in part to these conditions, there is a high level of violence among inmates, and between inmates and staff. Throughout 2006 there were articles in the media covering general conditions in prison and treatment of prisoners. These were often pegged on the release of a report to the media, such as the Annual Report of the Judicial Inspectorate of Prisons; a visit to a prison by the Portfolio Committee on Correctional Services; or the release of the report of the Jali Commission of Inquiry into Corruption and Maladministration in Correctional Services. There were also articles where the journalists attempted to gather together a number of stories that together presented a picture of poor conditions in prisons.

For example, one article reported on overcrowding compared with other countries with high rates of incarceration, and remarked that South Africa had the highest rate of incarceration in Africa. One of the factors contributing to overcrowding in South Africa is the large number of awaiting trial prisoners (28 percent of the prison population) who are held for long periods. The article also criticises the lack of rehabilitation programmes, training and education facilities, and lack of access to recreational facilities. In terms of sentenced prisoners, overcrowding is exacerbated by minimum sentencing legislation that sees people serving longer and longer sentences.<sup>97</sup> Articles refer to shortages of clothes, poor food and eating conditions, as well as poorly maintained and insufficient ablution and toilet facilities.<sup>98</sup> One journalist raised concerns about the psychosocial consequences of poor conditions, violence and lack of developmental opportunities for prisoners and urged the Correctional Services to ensure that prisoners be effectively rehabilitated.<sup>99</sup> One of the articles critically commented on the number of children who had to be accommodated in prisons due to the lack of more child-appropriate care in reform schools where they could benefit from rehabilitation.<sup>100</sup>

A number of articles addressed issues such as prison gang violence (including the risk to officials working in the prison)<sup>101</sup> and sexual violence and coercion in male and female prisons.<sup>102</sup> There was also an article reporting on attempts by male warders to prevent female warders from working in male prisons. The major complaint was that female warders had sexual relationships with male prisoners, sometimes coercing the prisoners, but at other times being seduced by powerful gang members.<sup>103</sup>

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92 'Vrou wat deur polisie verkrag is, uiteindelik in hof vir eis', *Beeld*, 22 June 2006; and 'Vrou kry kans in hof nadat 3 van polisie haar verkrag', *Beeld*, 5 September 2006.

93 'Lack of Legislation leaves sex workers open to abuse', *Weekend Post*, 4 March 2006, and 'Why do the cops harass us? Sex workers are people too', *Cape Argus*, 21 April 2006.

94 'Cop's sex shame shock', *City Press*, 1 October 2006.

95 According to the latest report of the Judicial Inspectorate, about 12 percent of prisoners do not have beds and have to sleep on the floors; many do not have eating utensils; there is a shortage of dining facilities with inmates having to eat in their cells; and there is a lack of facilities such as workshops and classroom (JIOP, 2008, p 7, <http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%202007-2008.pdf>).

96 Umtata maximum prison is the most overcrowded with occupation levels at 429 percent. Ibid at p. 21.

97 'SA's prisons filled to bursting point', *Business Day*, 4 January 2006.

98 'The crisis behind our prison walls', *Daily Dispatch*, 12 January 2006.

99 'Giving prisoners the key to open the gates to future', *Cape Times*, 16 May 2006.

100 'No reform schools in Eastern Cape, so kids go to prison', *Weekend Post*, 28 October 2006.

101 'Jail Gangs attack warders', *Cape Argus*, 30 October 2006.

102 See for instance 'Rape Crisis for jailed women', *The Star*, 3 March 2006 and 'Male Victims 'ridiculed'', *Sunday Times*, 13 August 2006.

103 'Warders don't want any females in male prisons', *The Star*, 16 August 2006; 'Two female officials in hot waters over alleged affairs with prisoners', *The Star*, 22 March 2006.

Articles also commented on the difficulties in implementing the Department of Correctional Service's policies around rehabilitation due to the long lock-up times prisoners experience, without the opportunity for education or learning useful skills.<sup>104</sup> Some articles focused on what needs to be done to address some of the problems, for example, to reduce the number of awaiting trial prisoners and the duration for which they are held.<sup>105</sup>

The Jali Commission of Inquiry received much coverage during 2006 after the public release of its report (though it had concluded its business in 2005). The report implicated "inmates and warders in crime ranging from intimidation and assault, to smuggling, corruption and even murder. Intimidation and violent attacks were found to be daily occurrences".<sup>106</sup> As a general comment it would seem that while much of what has been detailed in this report thus far would constitute cruel, inhuman and degrading treatment or punishment, some of the violence occurring in prisons, at least in terms of its severity if not the intent, falls more towards the torture side of the continuum. The sale of young prisoners by warders to older prisoners for sex, certainly speaks of a gross violation of human rights. Other abuses recorded by the Commission included denying prisoners family visits unless bribes were paid; extensive use of solitary confinement; giving support to prison gangs (including the smuggling in of guns and other items); and the stealing of prisoners' food resulting in some prisoners not being fed. This treatment, according to Judge Jali, was indicative of a mentality that held that prisoners could be treated in any manner by warders without fear of sanction.<sup>107</sup> The Jali Commission exposed extensive corruption by prison warders, and a plot by the Police and Civil Rights Union (Popcru) to gain control of the management of the prisons and undermine the establishment of what was perceived to be a white-led administration through fast tracking affirmative action. This process had, according to the Commission's report, resulted in the appointment of inept, unqualified people, even in top senior management positions, leading to violence and systematic incompetence. Whether the actions of Popcru and its members could be considered as State-sanctioned or actions that the State acquiesced to, is unclear, yet it also emerged that allegations of abuse and corruption had seldom been investigated by the Department of Correctional Services and few members had been held responsible for their actions.

Despite the conclusions of the Jali Commission of Inquiry referring to abuses in previous years, the newspapers continued to report violence and abuse by warders following industrial action during the 2006 year. For instance, in October Popcru embarked on a go-slow in Kimberly Prison protesting the allocation of staff housing, resulting in prisoners failing to get their meals.<sup>108</sup> A strike by warders in the private Kutuma Sinthumule Correctional Centre in Makhado, Limpopo, led to a riot in which allegedly some warders participated, and which resulted in the death of two prisoners. Limpopo farmers were called upon to help prevent prisoners from escaping from the facility.<sup>109</sup> Although the prison is privatised, it functions under strict contractual obligations to the Department of Correctional Services and under the auspices of the Correctional Services Act, operating with State-sanctioned authority. Should the Limpopo farmers also have been implicated in some of the violence perpetrated on the prisoners it is likely that these actions would have fallen under the Convention, as they were acting with the consent or acquiescence of the State.

At the extreme end of the continuum there were several cases of deaths in prison. In the 2006/2007 year, the DCS reported 62 "unnatural" deaths in prison – deaths through violence and suicide. Some of these deaths were also reported in the media reports under review:<sup>110</sup>

- Robin Brown committed suicide in Pollsmoor prison in the Western Cape after being sentenced. Johannes Adams allegedly hung himself from the bars of his cell door in the hospital section of Pollsmoor.<sup>111</sup>

Many articles were dedicated to reporting on the death of 19-year old Marlyne Syfers, also in Pollsmoor:

- Syfers apparently set herself alight while she was handcuffed to her cell door and restrained in leg irons. She had been segregated and put into a single cell after threatening to stab inmates and staff. Syfers had been shackled without authority from the Head of Prison or someone delegated by him, this in breach of the Correctional Services Act. The shackles had been removed after her death presumably to hide evidence of this. However, a warder was later disciplined and given a final written warning for his negligence. In addition to the un-procedural shackling, it was alleged that although Syfers displayed violent behaviour and refused to eat after two days of segregation, she was not offered psychological counselling, and was

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104 'Inmates tell of hardships and lack of rehabilitation programmes', *Cape Argus*, 4 January 2006.

105 'Call to Hasten Prison Reform', *Saturday Star*, 4 March 2006.

106 'Pollsmoor "best of a bad bunch"', *Cape Argus*, 8 November 2006.

107 'How gangsters, staff screwed jail system', *Sunday Tribune*, 29 October 2006.

108 'Prisoners go hungry as warders protest housing', *Diamond Fields Advertiser*, 31 October 2006.

109 'Farmers guard jail during strike', *Sunday Times*, 5 March 2008.

110 Department of Correctional Services Annual Report for the 2006/07 financial year, p.39.

111 'Tronkdood was selfmoord', *Die Burger*, 24 August 2006; 'Man 'hang hom' in Pollsmoor', *Die Burger*, 18 August 2006.

later passed a tightly rolled bit of paper commonly used to light cigarettes, which she used to set herself alight. It was some time after smelling the smoke that the staff found the key to open her cell door, by which time it was too late.<sup>112</sup>

The suicides in prisons generally spoke of neglect on the part of the authorities and failure to protect inmates against violence, albeit self harm. However, Marilyn Syfers' case raises other pressing concerns around cruel and inhuman treatment, in this case shackling someone in the cell without authority and failing to respond to clear warnings about her mental state of health. It also raises questions around the pervasiveness of the unauthorised use of shackles in single cells.

There were cases reported where prisoners were assaulted and killed by fellow inmates – much of it gang-related.

- A prisoner was stabbed to death by an inmate in the kitchen of the Sevontein prison in Elandskop with a table knife. The victim and perpetrator apparently belonged to rival prison gangs.<sup>113</sup>
- Percy Teke was killed in a brutal fashion in 2004 by six of his cell mates in the privately run Mangaung Correctional Centre in Bloemfontein. Teke was apparently tied to his bed, stabbed, and then thrown from the third to the first floor of the cell block where his intestines were then cut from his body with shards from a broken toilet bowl.<sup>114</sup> The six prisoners were later charged with his murder, and the court case was heard in 2006. During the trial, one of the accused alleged that Teke had been killed as an expression of their unhappiness with prison conditions.

This is again an example of the State's failure to protect individuals when they are placed in its care. Section 12(1)(c) of the Constitution grants the right to be free from all forms of violence from either public or private sources. This draws on Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>115</sup> which imposes duties on States Parties to protect people from violence and bodily harm whether inflicted by government officials or by any individual, group or institution. The Convention also refers to obligations to prohibit, punish and discourage violence. Because Teke's murder probably did not occur with the acquiescence of the State, it would not be construed as torture within our definition, though it certainly qualifies under a more colloquial understanding. It would, however, constitute a failure on the part of the State to safeguard against violence and torture, and could thus amount to acquiescence to cruel and inhuman and degrading treatment or punishment.

There were several cases that further illustrated instances of the State's failure to protect prisoners against violence by fellow inmates, most of it again gang-related. Though the Department of Correctional Services acknowledges the problems of prison gangs, it has yet to develop a viable strategy to deal with them. The problem also becomes intractable in the grossly overcrowded and understaffed prisons that exist throughout the country.<sup>116</sup> The violence is often targeted towards warders. Eleven warders were reportedly attacked by gang members in a period of six months in different prisons.<sup>117</sup> Attacking warders is, according to Steinberg (2004), a part of the initiation rites of the prison gangs.

While gang warfare might often be the explanation for violence, one report communicated a prisoner's fear of being a minority ethnic group targeted by majority groups, and his request for a transfer to another prison.<sup>118</sup> In another case, Isabel Colyn, one of the suspects in the notorious 'Laundry murder case', was threatened and assaulted by female inmates as retribution for killing their "black sisters".<sup>119</sup>

Sexual violence and coercion is another endemic form of prison violence, and it too is often associated with gang activity. Though this issue was often discussed in the more analytical articles we studied, there were only two articles reporting on the rape of specific individuals.

- A 20-year old man was arrested on suspicion of stealing a firearm (that was later recovered), and raped by a group of older men in the awaiting trial section of a prison. Though he had been put into a cell with juvenile prisoners, he was accosted while the prisoners were walking to breakfast. He had been too afraid to call for help or to report the case to the prison authorities.<sup>120</sup> Although the prison had attempted to fulfil its obligation to protect young prisoners through holding them in

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112 'Six face charges over death in cell fire at Pollsmoor jail', *Cape Argus*, 12 June 2006; 'Warning given to warden not enough, say prisoner's kin', *Cape Times*, 6 October 2006.

113 'Prisoner dies in gang rivalry', *Natal Witness*, 10 March 2006.

114 'Gevangenis met belt in toom gehou', *Die Beeld*, 7 June 2006; 'Beskuldigdes was 'uiters ongtervrede', *Volksblad*, 7 June 2006.

115 CERD adopted by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969, and ratified by South Africa on 9 January 1999.

116 See for example Jonny Steinberg (2004). Nongoloza's Children: Western Cape prison gangs during and after apartheid. Centre for the Study of Violence and Reconciliation.

117 'Jail gangs attack warders', *Cape Argus*, 30 October 2006.

118 'Gevangene wil na ander trunk gaan', *Volksblad*, 13 July 2006.

119 'Isabel vertel hoe sy in trunk geslaan en met kookwater gegooi is', *Rapport*, 30 April 2006.

120 'I was raped in jail', says young prisoner', *Sunday Tribune*, 5 February 2006.

separate cells, it had failed to maintain oversight once the prisoner was released into the general prison community during recreation or meal times.

- A 38-year old man sentenced to five years imprisonment for cheque fraud had been put into a communal cell in the maximum-security section together with members of the rival 26s and 28s gangs. He had requested a transfer to another cell after fearing for his safety, but this was ignored. He was subsequently severely assaulted and raped by gang members resulting in serious injuries and hospitalisation. He then initiated a civil claim against the Minister of Correctional Services for failing in his duty to care and protect him.<sup>121</sup>

There were several articles that implicated correctional officials in assaults on prisoners. Some of these abuses appeared to take place in the context of 'crack downs' or reprisal action against inmates after the warders had been attacked. One such incident occurred when Correctional Services task team members were brought into a prison after a warder had been attacked and stabbed in his chest and shoulder. The task team members allegedly rounded up 300 prisoners, stripped them naked, forced them to lie down in rows of 10 and warders beat them with batons. Several prisoners were seriously injured, leaving at least three with broken arms and legs.<sup>122</sup> It was also claimed that some inmates were bitten when dogs were set upon them.<sup>123</sup> In a similar incident, 11 awaiting-trial prisoners in Grahamstown's prison were forced to strip naked and were then assaulted by task team members for between 30 and 40 minutes while a police officer looked on.<sup>124</sup> Another article reports of male prisoners in Westville Prison who were strip searched in front of female warders and assaulted following a raid on their cells.<sup>125</sup> This treatment in all three incidents would qualify as CIDT, though in the first case where the assault and injuries were more severe, it may also qualify as torture.

The Department of Correctional Services clearly has the authority and responsibility to maintain discipline and "safe custody" of inmates, through the use of reasonable force and searches of inmates, their belongings and their cells.<sup>126</sup> According to the Correctional Services Act, a prisoner may be subjected to a visual search of the naked body, but this should "be conducted in such a manner that it invades the privacy and undermines the dignity of the prisoner as little as possible"(S 27(3)(a)). The search must be conducted by a person of the same gender as the prisoner and not in the presence of someone from the other gender, and must be conducted in private. In addition, any search of a naked person must be authorised by the Head of Prison. Clearly then, the strip searches described above violate not only the Correctional Services Act itself, but also principles of dignity, and would constitute degrading treatment.

There were also complaints of other forms of 'mistreatment', such as the case of Siyanda Mapahsa who complained that he and other inmates at St Albans Correctional Centre had enrolled for university study and were subjected to constant harassment by prison warders. Furthermore, they were accommodated in communal cells which made it necessary for them to study and write tests in the toilets – and therefore they were regularly disturbed by other prisoners using those facilities.<sup>127</sup> This clearly goes against the Department of Correctional Services' (DCS) commitment to promote the rehabilitation of prisoners and provide support for their developmental activities – it also occurs in a context of severe overcrowding and a lack of proper facilities for study in the prison. It may be considered inhumane or degrading to require prisoners to study in a toilet, which in most prisons are considered unhygienic.

The final category of issues considered by media reports during the year 2006 was that of medical treatment, or lack thereof. Prisoners have the right to access medical treatment and health care in terms of the Constitution and Correctional Services Act. There was the case of Alan Izatt who was diagnosed with Hodgkin's disease and claimed that he received inadequate treatment in the prison hospital, and then later in Baragwaneth hospital where he received poor treatment – he was held in poor conditions and was shackled to the hospital bed causing constant pain. He also claimed that his requests to receive private medical treatment were ignored or refused; a violation of section 12(3) of the Correctional Services Act.<sup>128</sup> There were also cases dealing with lack of treatment and referral for psychological treatment or assessments. One prisoner claimed that he was subject to cruel and inhuman treatment as a result of being detained in C-max prison where he was detained in solitary confinement for 23 hours a day, which he believed contributed to him lapsing into a psychosis from time to time, for which he was not treated. Another case dealt with a prisoner who was convicted and sentenced for raping and mutilating a young girl and committed to Valkenburg hospital, an institution for

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121 'Inmate files R300,000 claim for assault, sodomy at Goodwood prison', *Cape Times*, 29 December 2006.

122 Again, this might relate to the gangs' initiation rites. By attacking warders, gang members attract reprisal from the prison system. The ability to withstand, stoically, violent reprisal forms part of prison gang identity. As Steinberg notes, the prison gangs have transformed the violence from a tool of mortification into a form of nourishment for masculine assertion. (2004a: 25).

123 'Warders beat naked inmates at Pollsmoor', *Cape Argus*, 23 October, 2006. 'Jail gangs attack warders', *Cape Argus*, 30 October 2006.

124 'Probe into alleged assault of 11 men at G'town prison', *The Herald*, 14 July 2006.

125 'Prisoners claim assault and abuse after raid', *Daily News*, 22 December 2006.

126 Correctional Services Act No. 111 of 1998 as amended, S 26 and S27.

127 'Inmates pursuing degrees 'mistreated' at St Albans', *The Herald*, 25 May 2006.

128 'Prisoner appeals to court', *Citizen*, 8 November 2006.

psychiatric patients. While in Valkenburg he had attacked nurses, sodomised fellow patients and tried to escape. He was transferred to prison, and after 10 years he appeared before a magistrate to have his sentence reviewed. The newspaper article dealt with the failure of the DCS to compile an assessment report on his progress and behaviour for the court.<sup>129</sup> Another report exposed the distribution of expired, illegal and smuggled medicine within prisons. The Committee against Torture has commented that denial of medical treatment, as well as long terms of solitary confinement, would constitute ill-treatment (Nowak & McArthur, 2008), and that these actions may also violate other constitutional rights.

However, by far the most reported case of 2006 dealt with the Treatment Action Campaign (TAC) case brought on behalf of 15 prisoners from Durban Westville Correctional Centre against the Department of Correctional Services and the Health Department for HIV and Aids related treatment.<sup>130</sup> The story begun with a report in the February that 15 inmates had died in a single month amidst claims that they were denied anti-retroviral (ARV) treatment because they did not have official identity documents which were a prerequisite to receiving treatment (a R35 fee was required to procure the books which many prisoners did not have). It was also alleged that there was a reluctance to take prisoners to accredited hospitals that could provide prisoners with treatment due to security concerns. It was estimated that 30 percent of the prisoners in Westville were HIV positive, and an increasing number of "natural" deaths in prison were HIV-related.

Despite various statements from the DCS assuring that they were attending to the matter, in March about 200 HIV positive prisoners embarked on a hunger strike as they were still not receiving their ARV treatment, adequate diet or medical treatment. The TAC brought an urgent application to order the government to ensure that ARV treatment was made available at accredited public health facilities for affected prisoners. The court handed down a structural interdict ordering the respondents to remove any impediments to prisoners receiving access to health care and ordered that they provide anti-retroviral treatment. Furthermore, they were given a week within which to deliver a plan of action as to how they would implement their treatment plan. Judge Pillay, in handing down the judgment, noted a "singular lack of commitment [on the part of the respondents] to appreciate the seriousness and urgency of the situation".<sup>131</sup> The State appealed against the order, but also sought to appeal against the interim application of the order pending the appeal. The DCS argued that they were unable to implement the interim order immediately due to a lack of facilities and expressed the need for a comprehensive programme covering all prisoners. The Durban High Court granted the State the right to appeal against its main finding, but refused the second appeal against the order to comply with the interim order indicating that it was a matter of life or death for prisoners affected by HIV/Aids.<sup>132</sup> Despite this, the DCS still refused to implement the court order and provide treatment, leading to the TAC intensifying its protest action.

In the interim, one of the prisoner applicants died and an investigation into his death was undertaken by the Judicial Inspectorate of Prisons in accordance with its policy. The health of the others continued to deteriorate with nine becoming bedridden by August, and even requests that prisoners be treated by private doctors was refused by the DCS.<sup>133</sup> The treatment plan provided by government in September was criticised by TAC and its lawyers as being inadequate. The appeal hearing against the interim order took place in the Natal Provincial Division before a different judge where Judge Nicholson ordered that the government immediately provide ARV treatment to prisoners, and found them in contempt of court for failing to implement the interim order.<sup>134</sup> He stated that the government's failure to implement the order displayed a serious constitutional crisis.

Reading through the press articles and the court cases it was clear that the government's actions were in violation of constitutional principles, particularly in violation of providing access to health care. However, the court did not consider whether these actions also comprised ill-treatment. Denial of medical treatment certainly falls within the broad ambit of cruel, inhuman and degrading treatment considered by the UNCAT committee (as discussed in our introduction), and the contemptuous and continued denial to provide treatment should situate it even more firmly.<sup>135</sup>

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129 'Prison official lashed over rapist report', *Cape Argus*, 6 February 2006.

130 This accounted for 26 newspaper articles in our sample.

131 'Lawyers back in court to press for prisoners' Aids treatment', *The Star*, 10 July 2006. See also *EN & Others v The Government of the Republic of South Africa and Others* DLD, case number 4576/2006.

132 See also the judgement of the leave to appeal 25 July 2006, *EN & Others v The Government of the Republic of South Africa and Others* DLD, case number 4576/2006.

133 'TAC call: let private doctors see prisoners', *Cape Argus*, 22 August 2006.

134 *EN & Others v The Government of the Republic of South Africa and Others* DLD, case number 4576/2006, judgment granted 28 August 2006.

135 As mentioned earlier in Chapter 3, the case illustrates how media reporting is influenced by the strength of different actors vis-a-vis the media. TAC has through the years proven itself very capable of exposing its campaigns in the media. This is not a criticism of TAC. Rather it illustrates the biases of media reporting.

## Children

The fate of children is a popular issue in the media. During 2006 there were many stories of murder, rape, assault and a dangerous lack of ability to protect children against harm. Although negligence of children on the part of society is not sufficient to bring it within the scope of the UNCAT, according to our classification, where an agent of the State is involved in the victimisation of children then it could amount to torture or ill-treatment, depending on the circumstances. Though children are less likely than adults to end up in prisons or detention centers, there are nevertheless significant numbers of children so detained.<sup>136</sup> However, the power differential grows when adults (who are not necessarily State Officials) have some level of power over children. This situation can be found in places of safety, children's homes and schools as well as secure care facilities for children charged or convicted of crimes. Although many of these institutions are State-run, there are also others that are run by private organisations or individuals, though they are carrying out State functions. Police stations are clearly also potential locations of cruel, inhuman and degrading treatment of children. In 2006 a number of newspaper articles, often based on reports from child-rights organisations, featured articles about how children were mistreated in schools, places of safety, police stations and hospitals. At the end of this report we discuss one case of disciplining which we argue potentially crosses the boundary to become torture.

- Corporal punishment: Several reports throughout the year described incidents of brutal violence against learners at the hands of teachers. In one case a Grade 7 teacher had beaten a student so violently that the student's condition was only stable eleven months after the attack.<sup>137</sup> Another report from the Eastern Cape detailed that despite being banned caning was still the order of the day.<sup>138</sup> Yet other articles reported more generally about the practices of caning in schools.<sup>139</sup>

In most cases, teachers' caning of children appeared to be part of the perceived need to retain ways of disciplining that were banned with the outlawing of corporal punishment of learners. For many teachers, as well as many other South Africans, the ban is an example of how the country's constitutional ideas have gone too far.<sup>140</sup> However, caning of learners by a teacher or person in a similar position of authority is a clear violation of the prohibition of torture and CIDT, and in its concluding remarks regarding South Africa's submission to the CAT, the Committee expressed concern at the frequent use of corporal punishment in some schools and other public institutions and the absence or oversight over them (Cat, 2006, para 25). The caning of students does not seem to fall within the ambit of the definition of torture, but would constitute cruel, inhuman and degrading treatment or punishment.<sup>141</sup>

- Rape: A few cases reported in 2006 concerned the rape of students by their respective teachers. Teacher Vumile Tshayimbi was alleged to have raped a 14-year old student. The student was kidnapped by Tshayimbi and repeatedly raped in an isolated spot.<sup>142</sup> In another case, a 33 three-year old teacher was said to have raped and impregnated a 16-year old student at the school premises.<sup>143</sup>

Without comparing the severity of rape and caning, rape is arguably more brutal, but it also raises questions around the ambit of the Convention. The Convention is clear that States Parties have a duty to prevent State Actors or people acting under the colour of law from engaging in acts of torture or ill-treatment. It is not clear whether it could be said that these teachers were acting "under colour" of the law or in their official capacity as "teachers", but their access to school students and the power differential between student and teacher creates a particular obligation on the State to prevent these acts from happening, and to punish the perpetrators.

- Places of safety/children's homes: In one report, an autistic boy without the ability to speak suffered several blows and had bite marks on his arms and back. As he couldn't speak, nobody knew who had inflicted the wounds on him.<sup>144</sup> In another case, an executive management member of a children's home in Chatsworth allegedly assaulted a 15-year old girl after she had removed keys from a safe.<sup>145</sup>

In the first case, it is unknown whether staff members of the home abused the autistic boy. Regardless, staff members entrusted

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136 On 7 March 2006 there were 1,556 children being held awaiting trial in secure care facilities, and 1,173 in prison. The numbers of children being detained in police custody was unavailable. There were also 1,138 sentenced children in prison (Dissel, 2006, pp 112 & 117).

137 'Leave no stone unturned', *Daily Dispatch*, 2 February 2006.

138 'Caning still popular at E Cape schools, despite ban', *Weekend Post*, 27 May 2006.

139 'Stronger punishment for abusive teachers', *Pretoria News*, 25 July; 'Corporal punishment maybe be outlawed, but it's still not out', *Daily Dispatch*, 17 February 2006.

140 'Teachers cannot beat values into people', *Sunday Times*, 2 April, 2006.

141 In the Constitutional Court case of *S v Williams & others* 1995 (2) SACR 251(CC) corporal punishment as a sentence for convicted juveniles was held to be unconstitutional on the grounds that it violates dignity and the right not to be treated in a cruel, inhuman and degrading manner.

142 'Teacher on school girl rape charge denied bail', *Daily Dispatch*, 27 February 2006.

143 'Girl's mum angry over rape probe of teacher', *Natal Witness*, 2 April 2006.

144 'Gestremde kry erg seer by sentrum', *Beeld*, 7 July 2006.

145 'Man suspended over assault of girl', *Daily News*, 17 May 2006.

with the care of children had a special responsibility to protect the child in much the same way as prison guards are responsible for protecting prisoners from rape. In the second case, the man clearly saw his actions as disciplining the girl. However, such disciplining brings him into conflict with the prohibition of torture and CIDT. It is a further complication that many children's homes are run privately. The privatisation of child-care potentially renders invisible the responsibility to protect. However, the Children's Act, as well as the Convention would hold the State accountable and responsible for ensuring proper conditions for children as well as exercising oversight. Hence both cases should be considered CIDT.

- Hospital: A four-year old child bled profusely after having been raped. She was taken to hospital but was left unattended for hours in the Far East Rand hospital. One doctor, who examined the girl after two and half hours, remarked that he would take no action as the next doctor on call was more experienced in dealing with rape cases.<sup>146</sup>

Given the information available, this case is also difficult to determine in relation to the UNCAT. The treatment is shocking but would this negligence be enough to warrant being termed CIDT? Again, the gravity of the situation, the fact that the hospital had to be responsible for the girl, her age and dependence on others to make decisions regarding her treatment, the severity of the case led to us categorising the case as CIDT – it constituted a denial of medical treatment.

The last case we have included in this section on children seems to fulfil the requirements of the Convention.

- A young boy from northern KwaZulu-Natal was reportedly severely beaten and strangled by a school principal, a senior police officer and a member of the community policing forum, leading to his hospitalisation. This was done to discipline him after he was accused of stealing other pupils' lunch boxes. His mother later complained about the treatment of her son.<sup>147</sup>

Several issues make this particular case interesting for our purposes. First and foremost, it fulfilled the criteria laid out in the Convention: there was severe physical pain and suffering; there was the purpose of punishment and there were State Officials involved with a vast power-differential to the boy. In this sense it is arguably a case of torture. However, the case illustrates the gap between the legal norms and the practices of violence that, although not acceptable in terms of the Convention, are shared by large segments of the population. The school principal, police officer and the member of the community probably saw their actions as necessary in order to collectively discipline a child. Although the perpetrators had warned the boy's mother against taking him to hospital or reporting the matter to the police, indicating an awareness of their unlawful behaviour, they also appeared to legitimise their behaviour within a disciplinary framework. The overwhelming force employed may suggest that the beating wasn't random, but rather planned by the three perpetrators. In similar cases from the Cape Flats, Jensen (2008) showed how misbehaving boys are taken to the police station to be beaten up, sometimes by their parents who cannot control their children and sometimes by the schoolteacher. In these instances, Jensen argued, the police assume the role of the absent father in the disciplining of unruly children. Hence, the violence is not only normalised but also legitimised, and it is quite likely that the principal, the police officer and the community policing member felt that they had done nothing wrong. This again points to the normalisation of the social practices of State violence in South Africa.

One final point might be relevant and that is should we be considering at all the abuses against children in the light of the Convention against Torture or would the Convention on the Rights of the Child (CRC) be a better instrument? Given its peremptory status, we suggest that by employing the standards of the UNCAT children are better protected than they are by the CRC. Furthermore, the enforcement mechanisms under the UNCAT are better developed than those of the CRC for the purpose of dealing with torture and CIDT.

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146 'Raped child 'untreated for hours', *Citizen*, 5 May 2006.

147 'Beaten pupil fights for life', *Sunday Tribune*, 5 February 2006.

## War on terror in South Africa

With the establishment of the camp at Guantanamo Bay and the prison in Abu Ghraib, the world came to see how the global war on terror has produced high levels of torture and CIDT across the globe.<sup>148</sup> The war on terror has included such incidents as the torture at Abu Ghraib; prisoner transport across the world in search of States ready to torture outside the purview of international media and monitoring groups; and a range of other practices that qualify within the UNCAT as torture, or at the very least as CIDT.<sup>149</sup> In the course of the war, the US government has tried to redefine the definition of torture to avoid the international criticism of its use of torture.<sup>150</sup> It is not the aim of this report to discuss such practices. Rather we wish to draw attention to some of the incidents reported in the South African media, where the South African State has been (made) complicit in torture and CIDT. In 2006 we found three cases that qualify under this heading: the Khalid Rashid case; the Charles Makgati case; and the Mohammed Hendi case. Of these the Khalid Rashid case attracted most attention.

- Khalid Rashid: The Khalid Rashid case spiralled to the centre of attention as he, a Pakistani national, apparently had been kidnapped from his home in November 2005, together with a friend Mohammed Jeebhai, and brought to a Pretoria police station. The operation was allegedly carried out by 10 heavily armed men, some of whom had foreign accents. After the arrest Jeebhai had been taken to Lindela and threatened with deportation, while Rashid was driven to Waterkloof Air Base from where he disappeared.<sup>151</sup> Reports in relation to Rashid's disappearance point to larger problems, as Arab nationals were reported to have been detained and illegally refouled to countries that use torture.<sup>152</sup>

As many of the media reports explicitly stated, by deporting suspected terrorists to countries that employ torture, the South African State directly trampled on the Constitution and also on Article 2 and 3 of the UNCAT which prohibits a State Party from refouling or expediting a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture. Although South Africa did not directly torture Rashid, it failed in its duty to protect people from torture and possible death. As such, we argue that the act clearly falls within the parameters of the Convention. However, the Rashid case also illustrates the difficulties of classifying individual cases inside or outside the mandate of the Convention. Against our argument a full bench of the High Court of the Transvaal Provincial Division later rejected an application to have the deportation of Rashid declared unlawful, unconstitutional and a crime against humanity, rejecting the argument that the Department of Home Affairs knew that Rashid was being sought in connection with terrorist activities, and that the Department should have obtained a guarantee from the Pakistani government that it would not execute him.<sup>153</sup> This judgment was overturned later on appeal in 2009 and a finding declared that Rashid's deportation was unlawful because it did not follow the procedural requirements of the Immigration Act (No. 13 of 2002). Regarding allegations that South Africa illegally deported Rashid because he was wanted in Pakistan due to his alleged links with international terrorism and thus this constituted disguised extradition – the court found there was no evidence to support this claim.<sup>154</sup>

The Rashid case was an important and much publicised case. However, the war on terror also brought smaller cases in its wake where police arrested alleged terrorists.

- Charles Makgati: In a rather bizarre case, Charles Makgati was allegedly arrested for wearing a Muslim *kufi* (hat) and looking like a foreigner and a terrorist. As it was established that he was South African he was released on bail.<sup>155</sup>
- Mohammed Hendi: Hendi, a Jordanian by birth, was arrested in 2004 with four other men, isolated and finally taken to Johannesburg Airport to be deported. He escaped deportation because the police could not provide the necessary deportation documents. After another 21 days in prison he was finally released without further charges being made. During his ordeal,

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148 See for example Duffield 2007; Paglen and Thompson 2008; Rejali 2008.

149 See for example the International Committee of the Red Cross (ICRC). (2007). *ICRC Report on the Treatment of fourteen "High Value" Detainees in CIA Custody*. Geneva: ICRC (confidential report leaked to the press, and available on <http://www.nybooks.com/icrc-report.pdf> - accessed 30 April 2009.

150 On 1 August 2002 the US Department of Justice issued a memorandum signed by Jay Bybee to the effect that, "severe pain was limited to pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death". US Department of Justice, *Standards of Conduct for Interrogation under 18 U.S.C. ss 2340 – 2340A*, Memorandum of 1 August 2002. One of the more controversial provisions of this memorandum was an assertion that the President's executive powers were sufficient to permit tolerance of torturous acts in extraordinary circumstances. On 30 December 2004 the US Department of Justice published a revised and more expansive definition of torture and repudiated the controversial statement made in the 2002 memorandum. Acting Assistant Attorney General Daniel Levin stated that torture may consist of acts that fall short of provoking excruciating and agonising pain and this may include mere physical suffering or lasting mental anguish, see US department of Justice, 30 December 2003, Memorandum for James B Comey, Deputy Attorney General, <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/doj/torture123004mem.pdf>, accessed on 28 January 2008.

151 'War of terror waged in SA?' *Saturday Star*, 4 March 2006; 'Rashid deportation tramples on the law and constitution', *Cape Times*, 28 June 2006.

152 'Govt ill-treats Arab nationals – claim', *Sunday Tribune*, 18 June 2006.

153 'Rashid Deportation Legal', *News 24*, 16 February 2007. [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2070591,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2070591,00.html)

154 *Jeebhai v Minister of Home Affairs*. (139/2008)[2009] ZASCA 35 (31 March 2009).

155 'I was held for being a terrorist because of my Muslim hat', *The Star*, 2 October 2006.



National Police Commissioner Selebi alleged that the arrested men were terrorists aiming to destabilise the South African elections.<sup>156</sup>

In both cases, the police seemed to have made assumptions based on profiling and nationality, and in both cases the police transgressed their mandates and came dangerously close to contravening the Convention against Torture and CIDT. Less so in Makgati's case, but Mohammed Hendi's ordeal involved isolation, being tied up, imprisonment without legal representation and the threat of deportation to a country that might torture him. All of this brings this case within the purview of the Convention as at least cruel, inhuman and degrading treatment. We finally decided that the Makgati case did not fall under the purview of the Convention. He was released as soon as the mistaken identity was cleared up. However, had he been a foreigner things might not have ended so smoothly. In this way, the Makgati case illustrates the extent to which Arabs or Muslims are being vilified exactly because Makgati was released.

## Harassment, arrest and deportations of migrants

Since the fall of apartheid, questions of migration, refugees and undocumented people have taken centre stage in public debate and within policy circles. It is not the purpose of this report to contribute to this vast debate.<sup>157</sup> We restrict ourselves to considering the stories that emerged in the media with a few references to academic work and NGO reports that describe and analyse incidents that may fall under the purview of the Convention against Torture.

Given the number of discussions about migration in many circles and the reports and academic work focusing on the maltreatment of migrants by State Officials, there were surprisingly few reports in the media. The subject didn't seem to be a priority, or if it was, its focus was instead on South Africans being badly treated. For instance, one story was an account of how a South African national managed to get damages for illegal deportation as an illegal migrant.<sup>158</sup> This suggests, and this is corroborated by NGO reports (CoRMSA, 2008), that the media is unsympathetic to the treatment dished out to the real "illegal aliens", and that the media consequently did not prioritise stories involving migrants during 2006. Another reason might be that undocumented people feared publicity from both State Agencies and the broader populace (Madsen, 2004). These factors presumably contributed to the low number of media reports, and the subsequent invisibility, of State violence towards migrants. Finally, it must be stipulated that not all State violence towards migrants is in contravention of laws and conventions. Hence, it is often not the fact of arresting and deporting migrants that constitutes the offence, but the way arrests and deportations are carried out.

The media reports that did surface in 2006 and made it into our sample can be roughly divided into two categories – police harassment of migrants on the streets and in police stations; and stories relating to the repatriation camps, Lindela and Musina. We begin with the attacks on the streets and in police stations.

- The case of Majila Jonas: As Jonas, a Congolese national, was on his way home from his job in Salt River, Cape Town, he was stopped by a car and ordered to come along. As he refused and pushed the woman away, she drew a gun and identified herself as a police officer. The officers took Jonas along to the Woodstock police station where the two female police officers beat him, while the men watched. After a while, they demanded that he stripped and sprayed his entire body with pepper spray, notably the genitals. He was subsequently thrown into jail, where he spent another fifteen hours, most of the time naked. The officers did not bother to ask his name, charge him or to take down an affidavit. As he was released, another police officer noticed his bruising and helped him lay a charge against the police colleagues.<sup>159</sup>

This case clearly constituted a severe form of attack as well as abuse. The intent and purpose of the attack seemed more ambiguous but appeared to have been motivated by discrimination on the basis of nationality and his status as a foreign migrant. The act could constitute torture or a rather extreme form of cruel, inhumane and degrading treatment. The positive angle to the story is, of course, that another police officer recognised the severity and assisted Jonas in laying a charge. This indicates that although the attack appeared driven by impunity, the impunity was not shared by the entire police force.

Jonas' experiences were not unique, except that many stories invariably reported on the relationship between harassment and extortion.<sup>160</sup> The fact that police officers often use violent corruption has been discussed in academic literature. Hornberger (2008) for

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156 'Wrongly accused', *Mail and Guardian*, 24 August 2006.

157 For elaboration, see for example Crush and McDonald, 2001; SAHRC 2000; CoRMSA, 2007; Human Rights Watch (2008).

158 'R40.600 damages for SA man deported as "illegal alien"', *Pretoria News*, 14 January 2006.

159 'Refugee say police beat him up', *Cape Argus*, 10 November 2006.

160 See for example 'Jailed over missing receipt', *Daily News*, 13 March 2006; 'Police late-night raid on refugees investigated', *City Press*, 20 August 2006; 'Report slams harsh treatment of migrants', *Sunday Tribune*, 13 August 2006.

example describes how a group of police officers went to a building in downtown Johannesburg occupied by Bangladeshis, and stole all their money, stock and documentation. In her analysis, she showed how the Bangladeshis were too afraid to report the case to the police but opted for connecting with one special police officer, and how this one police officer tried his best to make the victims lay a charge. In an analysis of Mozambican street vendors, Madsen (2004) documents how the police talked of going to “the ATM” when they went out to shake down undocumented or vulnerable migrants. NGO reports also substantiate the nature of the relationship between migrants and police. For example the Consortium for Refugees and Migrants in South Africa (CoRMSA 2008) details many such cases in their Annual Report. That such attacks can be violent is illustrated by the case of asylum seeker Primrose Moyo:

- Moyo was picked up by the police in Alexandra. The police took her to the police station where they beat her and kicked her in the stomach. This caused her to miscarry four days after her release.<sup>161</sup>

Moyo’s case was clearly one of abuse occurring while in detention, and the severe pain and suffering that resulted could qualify it as torture. Many of the police’s practices border on the Convention against Torture, however we have included the few there are as CIDT because the extortion always relies on the threat of arrest and deportation, and because the power differential between police and migrants is significant. These actions could well constitute violations of other legislation or constitutional provisions. Furthermore, given the alternative reporting, we argue that the scope of the harassment during this period was much larger than indicated in the few media reports in our sample. This brings us to the very few stories on Lindela.

- In July a group of Congolese refugees or migrants were alleged to have protested against being detained for extended periods at Lindela. During the unrest, the Congolese were alleged to have suffered a number of injuries at the hands of officials who “tried to calm down” the Congolese. How much damage they suffered is unclear and they were either deported or released subsequent to which the investigation ended.<sup>162</sup>

In our sample this was the only story that appeared in 2006. The story also described deaths due to illness and the inference was that the inmates died because of lack of medical treatment. However, the title of the story – “Leaked photographs could reveal truth of brutality at Lindela” – is indicative of the secrecy enshrouding the repatriation camp. Lindela has been shrouded in controversy from its inception and has been the subject of several reports from the South African Human Rights Commission (1999; 2000) and repeatedly from Human Rights Watch (e.g. 2008). Human Rights Watch details a number of violations at Lindela; unlawful detention of asylum seekers by police officers beyond the maximum 48-hour period; unnecessary detention of asylum seekers; and instances, confirmed by UNHCR, of refoulement of asylum seekers and refugees (Human Rights Watch, 2008).

Human Rights Watch (2008) views the practices at the Musina Detention facility as even more problematic. Musina Detention facility is operated by the South African Police Services from an old army camp. From here, Zimbabweans in particular are often deported without due process within hours of their arrival and with no verification process at all. CoRMSA (2008) raises the concern that perhaps the Musina Detention facility was in breach of the law, as it might not be legal for the police to run a detention centre. CoRMSA also reports on sub-standard conditions and lack of legal representation.

Human Rights Watch also notes how impenetrable Musina was and how difficult it was to gain access, making it difficult to obtain accurate information on treatment or conditions of detention. Several NGOs were reported to have visited the facility on an ad hoc basis, but there was no consistent oversight. As a result of constant allegations of torture and ill-treatment, along with bad conditions, the Department of Home Affairs announced the imminent closure of the Musina detention facility in 2008.<sup>163</sup>

## Revisiting forms of torture and CIDT: Conventions and legal practice

In this chapter, we have explored the nature and modality of torture and CIDT based on media reports using the definition of torture in the UNCAT. In the next chapter, we compare the emerging picture with academic work and NGO-reporting to elucidate the blind spots in media reporting and hence the limitations of the methodology. Nevertheless, despite the limitations of the methodology, the media provided important insights into the nature and modality of torture and CIDT. Analytically, we used the Convention as a legal yard stick to differentiate between violent practices that fell outside the Convention, those that fell under the Convention’s definition of CIDT but did not meet the criteria for being labelled torture, and finally those violent practices, which did in fact meet these criteria. In principle, this exercise should be relatively easy, but as we have demonstrated throughout the report – also by reflecting on the

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161 ‘Asylum-seeker sues after beating’, *The Star*, 5 May 2006.

162 ‘Leaked photographs could reveal truth of brutality at Lindela’, *The Star*, 25 August 2006.

163 ‘Notorious detention facility closes’, *Pretoria News*, 22 November 2008.

problem of categorisation –comparing the definitions contained within international instruments with social practices of State violence is a far from simple task. In the absence of South African jurisprudence regarding the understanding and definition of torture, this task becomes even more difficult. We have tried to distinguish torture from CIDT in our analysis, but – and this is one of the important recommendations of this report – only by deliberating over the issue in a court of law would it be possible to reach legitimate case by case decisions. This suggests that more active steps must be taken to prevent torture and CIDT in South African, and legislation needs to be introduced to criminalise torture. While it may be important to distinguish between torture and CIDT to maintain the absolute prohibition on torture, as well as ensure greater moral censure and harsher sanctions for acts of torture, it is less important when viewing these issues through a preventative lens. The State has the obligation to prevent and protect against both torture and ill-treatment, and to punish the perpetrators of both. In this way, it is more important to be able to distinguish between CIDT and other forms of State violence.

To the extent that we have correctly interpreted the legal instruments, the report shows that officers of the South African State still employ violence that falls within the Convention’s definition of torture and CIDT. Leaving to one side the invisible, unreported cases that we return to in the next section, the media reports would indicate that the most spectacular forms of torture are often likely to happen in relation to police interrogation, and maybe particularly in relation to high-profile cases, where the police are under pressure to deliver. In these cases a range of torturing techniques have been used, from the use of electric shocks, severe beatings, suffocation, positional torture and mock executions. We can only speculate, but it would seem likely that the police officers in question must have known that they had transgressed the line of torture, not least given the history of apartheid policing, where torture was widely used.

However, in this bleak picture there were also some positive stories. Indicative of the low tolerance of torture in some quarters, fellow State Officials (a judge in the airport heist case and a fellow police officer in the case of a brutalised Congolese man) criticised in words and in deeds their State Official colleagues.<sup>164</sup>

However, this low tolerance seemed to be suspended in most cases –particularly in less spectacular and visible situations. The report followed a trail of State violence throughout South Africa geographically and in terms of institutions. A striking feature was the impunity with which State Officials practiced violence, for example, when a police officer drove a girl home after having raped her. The same tolerance of violent practice seemed to be at stake when a Cape Town police officer locked up a girl in a cell with her attacker, after she came to press charges against the attacker, because the police officer wanted information on her partner. The tolerance of the State’s need to use violence appeared to be shared by many South Africans to the extent that this violence was, and drawing on more recent reports still seems to be, normalised, rendered legitimate and therefore often remains unseen. Nevertheless, fairly often, in the course of the everyday practices of the police or prison staff, a line seems to get crossed and the State Official finds him or herself in contravention of the prohibition of torture and CIDT. The line might be crossed due to the technique used to respond to a particular situation; it might be crossed because otherwise potentially legitimate violence is employed excessively (as in some eviction cases); or finally, the line is crossed in relation to what we have termed the power differential in given incidents (as when children are involved or if the violence takes place in prisons or detention centres where the state official holds absolute power over the victim).

Our reading is that these transgressions are seldom understood by those carrying them out, and even by victims or audiences, as transgressions of the UNCAT, and often even of contraventions of the South African Bill of Rights and policing policy. The dilemma seems to be one of reconciling social practices of State violence with legal codes and conventions. Firstly, South Africa has yet to establish mechanisms for accountability, strengthen those that do exist, and cement the rule of law. Secondly, the problem is one of knowledge – State Officials do not recognise their practices as torture or CIDT. However, it is not because the police do generally not know about torture and CIDT; it is rather because they, along with large parts of the South African population, do not seem to be making the link while they cross the line and because they consider their use of violence legitimate to enable them to do their jobs.

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164 ‘Polisiekluis: Landdros looi gesloer’, *Beeld*, 9 June 2006; ‘Refugee says police beat him up’, *Cape Argus*, 10 November 2006.



## 5 WHAT REMAINED UNSEEN BY THE NEWSPAPERS

In this section we discuss the kinds of torture and CIDT that went unnoticed, ignored or unreported by the newspapers. Clearly in part, these omissions illustrate the shortcomings of the methodology. However, by discussing the omissions based on academic and NGO reports we compensate for the lack of reporting on these issues in the media. This serves the double purpose of providing a fuller picture of torture and CIDT in South Africa and of understanding how torture and CIDT are represented within the public domain – as well as to what extent. This can be usefully employed to point out to media owners and reporters where attention might be directed in the future. As in the previous chapter, we relate the discussion of the kinds of torture and CIDT to the UNCAT. We begin with the issue of privatised policing in vigilante actions and in private security.

### Privatised policing and punishment

In the sample of articles that was considered for this report, a few articles were concerned with issues of privatised policing and punishment. In two incidents, local residents caught alleged robbers.<sup>165</sup> The residents subsequently called the police who did not show up. The lack of police intervention led, so the residents argued, to them taking the law into their own hands. In a third incident reported by the media, employees of a private security company interrogated suspects in a robbery with methods that clearly fell within the UNCAT's description of torture.<sup>166</sup> The State does have a responsibility to prevent cruel, inhuman and degrading treatment or punishment, and so even when this treatment is metered out by non-State Actors, according to our interpretation of the Convention, the State does have an obligation to respond. There is also a wider challenge to the State in terms of prevention, and that is to establish the trust of the community in the ability of law enforcement agencies to take lawful action against suspected perpetrators of violence, and to ensure that a just result is realised.

In academic and grey literature (NGO reports, etc.) we find acquiescence or consent to ill-treatment on the part of the police in cases where it would more obviously qualify within the mandate of the UNCAT. In a study from Port Elizabeth, for example, Buur (2005) shows that the local police handed over case files to a group of local, informal policing structures to investigate. Almost invariably the investigation led to rather severe forms of torture in the form of beatings and threats of beating. At times for instance, during a weekly meeting held in a local school, with the knowledge of the principal, police officers would be present. A number of cases against the group were pending but often the investigations were not carried through. To describe the relationship between the police and the local policing structures, Buur (2005) speaks suggestively of sovereignty as being outsourced. The relations between the police and the structures in this case clearly qualified as both consent and acquiescence thereby bringing it under the purview of the Convention.

In a slightly more complicated relationship between local policing initiatives under the purview of community policing structures in rural Mpumalanga, Jensen (2007, pp. 107-113) describes the policing activities of structures related to the traditional authority in one village. On the one hand, the local station commander described the good relationships the police had established with the group, while on the other hand deplored the violence they employed. The station commander reconciled the two opposing views by claiming ignorance of the latter. Meanwhile some of her officers, as community members, participated in the local policing activities, suggesting that apart from being police officers, they were also community members, and engaged in activities that blurred the line between official duties and private activities. It is possible that in this instance too, the actions of the off-duty police might also fall within the purview of the Convention, as the police, even in their off-duty capacity were not only failing to intervene in unlawful activity, but were also sanctioning and indeed, participating in it.

The two cases illustrate the complexities of local policing in South Africa. During apartheid very little crime detection and prevention was carried out in townships and homelands, and local communities had to carry out their own forms of justice and policing. On top of this, townships and former homelands are under-resourced in terms of policing. Finally, formal policing does not sufficiently address the paramount problem of theft, which is to regain the objects lost to crime, be it money, food or other items. Formal criminal justice only promises justice through the courts, prosecution and possibly punishment of the perpetrator, which is a small solace for

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165 'We take the cops to the crime', *Pretoria News*, 10 February 2006; and 'Mob killings: villagers blame the police', *Daily Dispatch*, 18 November 2006.

166 'Assault: municipal security contractor arrested', *Witness*, 17 August 2006.

people without insurance. That State Officials participate in these activities either directly or indirectly must often be ascribed to their understanding of the predicaments of the local population that they belong to and often are pressurised by.

Private security is as complex an issue. Private security companies dwarf the South African Police Service with 2 to 1 in terms of manpower. Their presence in the urban and rural landscape is often far more pervasive than anything the State could hope to achieve. After a relatively slow beginning, primarily guarding private, often white homes, the private security companies expanded during the dying years of apartheid and began to complement apartheid police and military in guarding State facilities. This trend has continued after the transition, and private security now guard substantial amounts of State property from schools and clinics to government complexes, even police stations, and it is one of the fastest growing industries in the country. Some of the functions of the private security industry, such as the provision of daily security and security-related activities (e.g. guarding, armed response, and private investigation) are akin to policing functions and responsibilities, and through their activities personnel come into contact with thousands of people annually. Yet, private security personnel are empowered only as private citizens and entitled to act within the restrictions of the Criminal Procedure Act (Berg, 2007). Though security companies conduct their legitimate functions with State sanction and support, it is not clear to what extent any act of torture or ill-treatment would ordinarily put them within the purview of the UNCAT (acting with the consent or acquiescence of a public official or as a person acting in an official capacity). However, the latest draft Combating of Torture Bill (2008) includes in its definition of public officials, "any person acting in terms of the Private Security Regulation Act, 2001 (Act 56 of 2001)". Hence, we suggest that much more attention needs to be paid to private security in all its forms in terms of the Convention.

## Policing the townships

In our sample of articles, only one article related to the often dramatic confrontations between the police and township youth, especially street gangs. The article described a shoot-out between police and a gang on the Cape Flats in which an innocent woman was caught in the crossfire. She later received compensation from the police.<sup>167</sup> However, we excluded the incident from our sample because the police had no intention to shoot the girl and because they returned fire from the gang. In this way, the principles of proportionality, legitimacy and legality were probably present in the threat the police faced and the response they opted for.

However, this one incident in no way is reflective of the violent engagements between the police, charged with strong public demands to wage a war on crime and zero tolerance policing, and the young men of the townships in major urban centres, especially Cape Town and Johannesburg. Jensen (2006, 2008) describes the unrelenting conflict on the streets, how police raids in townships on the Cape Flats often led to violent confrontation between the police and the gangs, and how the police visited revenge on arrested youth once inside police stations or in police cars in the form of beatings and severe threats. These confrontations were often about claims to territory and respect from both sides and with both sides unrelenting in their claims. Combined with the high risk associated with policing the townships, police officers may feel they have to behave quite violently and compromise professional standards in order to survive and to assert their authority. Despite the understandable problems faced by the police in the townships, many of their practices cross the boundary of the Convention at least in the sense that their actions are cruel, inhuman or degrading. The practices employed by the police in the townships are often reminders of apartheid's policing against both criminal elements and political activists (Fernandez, 1991). These contraventions of the Convention, which happen frequently, almost never make it into the public realm because the young men seldom report them to either the police or the media. This is an indication of their alienation from dominant society. That the contraventions of the Bill of Rights and the Convention are considered legitimate among both police officers and the general public should be no excuse.

## Military

In our analysis of 2006 media reports we identified only three relevant reports that featured military personnel. One was a rape case where a superior officer raped an army recruit; the second featured a South African peace-keeper in Burundi, also accused of rape.<sup>168</sup> Another case dealt with a military policeman who beat a homeless person into a coma and subsequent death at the Wynberg Military Base.<sup>169</sup> However, the army had and still is responsible for some of the border controls, which are far away from the public eye. One article reported on an incident where a soldier shot and killed a migrant close to Beit Bridge.<sup>170</sup> Furthermore, although the commandos

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167 'Vrou kry R16.600 by polisie ná skietery', *Die Burger*, 27 May 2006.

168 'Army Base rape shock', *Diamond Field Advertiser*, 7 April 2006.

169 'Military policeman 'beat vagrant to death', *Cape Argus*, 2 March 2006.

170 'Weermaglid vas oor man se dood by Beitbrug', *Beeld*, 11 January 2006.

are being phased out, they were still active in 2006 around the country. As Manby (2001) documents, commandos, old relics of apartheid's counter-insurgency structures, were often a law unto themselves and used their army affiliations in often violent settlement of disputes between farm workers and farmers. Jensen (2007) also shows that commando connections were used in local forms of policing in Mpumalanga and that army personnel took part in local policing around the base with very little police supervision. Although the army was not directly involved, they failed to protect the population against the illegitimate use of the authority. Hence, even as the commandos are being phased out, there is a clear need to focus on the military as a perpetrator of both torture and CIDT.

## Mental Health institutions

Patients at mental health institutions all over the world are at risk of human rights violations, including inadequate conditions, arbitrary detention, ill-treatment, violence from other inmates and unlawful restraints and seclusion (Streater, 2008, p.35). But mentally ill people are also frequently abused in the community and in other non-State institutions. One of the most striking absences from the media coverage in 2006 were allegations of torture and CIDT in mental health institutions. Only one case was reported, and here the reporting concerned a mentally disturbed murderer and rapist who had raped a nurse in the hospital. Hence, the incident was categorised in our analysis as failure to protect the nurse.<sup>171</sup> It seems likely that there may have been many incidences of abuses during the year which never came to the attention of the media, but the closed nature of the institutions, the mental state of those directly affected, and their lack of access to democratic institutions to make complaints, makes it very difficult for the media to report on abuses in these institutions. The psychiatric condition of the patients, as well as the specialised treatment means that oversight over these institutions and the treatment and living conditions of patients must be undertaken by skilled professionals or specially trained people (WHO, undated).

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171 'I couldn't have done it', *Citizen*, 15 March 2006.





# 6 CONCLUSION

Our analysis of the 2006 print media articles clearly demonstrates that there continues to be numerous instances of torture and cruel, inhuman and degrading treatment or punishment in post apartheid South Africa. Furthermore, like the abuses reported in the apartheid years, torture and ill-treatment continue to be characterised as occurring in the framework of law enforcement responses. This conclusion corresponds to evidence available in the CIRI index of human rights abuse. The conclusion from this data set is that in 2006, like in previous years, torture occurred frequently in South Africa. However, whereas previously torture was associated with political repression and discrimination, it now most often occurs in the course of investigating crime and in the handling, treatment and punishment of suspected offenders. Torture and CIDT are often seen as problematic by the population, but mostly in relation to the maltreatment of political detainees. There is great leniency within the South African public towards the use of quite excessive violence in relation to criminal suspects.

However, it would seem that not only are criminals and suspects at risk but victims, it would seem from our investigations, are often drawn from a much wider spectrum including the families, and friends of suspects, as well as others who appear to be in the wrong place at the wrong time. The forms of torture and ill-treatment seem to range from the more sustained and systematic torture of suspects in high-profile cases; to the callous treatment of the homeless or the vulnerable; to the use of excessive force while arresting suspects or in volatile crowd situations; to the dehumanising and degrading treatment in detention or in prison. But what also emerges from this study is how the use and abuse of force seems to have permeated the very culture and operation of the law enforcement agencies, such as the police, prison officials and the military, to the extent that it filters through to relationships with the officials' own family members, colleagues and friends. Thus, any preventative approach to torture and ill-treatment needs to go beyond legalistic approaches to looking at how to change behaviour and attitudes, and so impact on practice.

Examining these cases as portrayed through the media has illustrated some of the shortcomings of media reporting on this topic. The news reports tended often to be short, lacking in detail and superficial, and rarely grounded in knowledge of the international or constitutional prohibitions against torture and ill-treatment. Most often the reports focused on the sensational aspects of the case rather than an analysis of the problem of torture or ill-treatment. Cases that received more sustained attention were those high-profile cases occupying the public attention for several months, or where reporters followed a case in trial. Over the period of the year, it was seldom that the media was able to follow a case from its beginning to a satisfactory conclusion. This is often as a result of the length of time it takes to finalise an investigation and bring a case to court. Understandably, diminishing media budgets might impact on the thoroughness of journalistic investigation and coverage instead encouraging reporting on the sensational and already popular issues. While it is also clear that the media tends to focus on cases most easily accessible within the public domain, these reports do present a more diverse picture of abuse than by looking for instance separately at reports of prisons, or of the Independent Complaints Directorate in respect of complaints of police abuse.

A study of this nature is important mainly for highlighting the problem of torture and ill-treatment, rather than for attempting to categorise, count and label these cases. Though we have attempted to do so, this is so that we can develop a picture of where and when, and to whom torture and cruel, inhuman and degrading treatment most often occurs. Most importantly, it gives us some insight into what steps could be taken to better monitor, prevent and report on torture and ill-treatment. In this context, we make the following recommendations, many of which affirm the recommendations made to South Africa by the Committee against Torture on considering South Africa's first report in 2006. We divide the recommendations into three sections: legal, policy and in relation to the media.

## Legal recommendations

### 1. Criminalise torture:

Throughout the report we have seen how State Officials or those acting in an official capacity have tortured and maltreated people across South Africa. We therefore agree with the Committee against Torture that it is crucial to pass legislation that defines and criminalises torture within our domestic law (CAT, 2006, para 13). We have seen throughout the report how difficult it is to reach final decisions on categorisation. Only through the court of law could legitimate decisions be made. The law should also state appropriate penalties for those who commit torture. The legislation must contain a clear and absolute prohibition on

the use of torture, as well as prohibiting the use of any statements obtained as a result of torture. In addition, the legislation should clearly indicate, that taking orders from a superior is not a justification for torture (CAT, 2006, para 14). Not only will this make the offence of torture more widely known, but it will also ensure that perpetrators are appropriately dealt with. South Africa has taken the step of developing draft legislation to criminalise and prohibit torture, but the six years that have passed since the first draft was circulated for comment, is indicative of its low priority for enactment. This needs to be again placed on the parliamentary agenda, and human rights activists and oversight bodies need to continue to advocate for its enactment.

**2. Ratify OPCAT:**

In several incidents in the report we have seen that despite the many problems in oversight of police and prisons, it does help to install mechanisms of oversight. The incidents are brought into the public arena and often reacted upon. This report supports the findings of the Committee against Torture who was particularly concerned about the treatment of South Africa's detainees in police cells, prisons and of children in secure care facilities and places of safety. The Committee urged government to take effective measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of those deprived of their liberty, in particular, regarding health care. The Committee recommended that detained children should be kept separate from adults in conformity with international standards (ibid, para 22). The improvement of detention conditions is an ongoing concern, but while there is some oversight over correctional centres, there is little ongoing oversight over police detention cells, secure care facilities for children, mental health institutions and repatriation centers. We therefore recommend that South Africa ratify and implement the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). This instrument aims to put in place a system of systematic independent oversight over all places where people are detained through regular visits. This would include the institutions listed above, as well as any other place where people are involuntarily detained, and might even include old age homes in certain instances. Regular monitoring, oversight and recommendations regarding detention have been shown to significantly improve detention conditions over time (Streater, 2008.)

**3. Expand oversight to other institutions than prisons and police:**

As mentioned in recommendation 2, monitoring must ensure that all allegations of torture or ill-treatment committed by law enforcement personnel, as well as all deaths in detention must be "promptly, thoroughly and impartially investigated" (para 20). For the moment, focus is mostly on prisons. There is a system to investigate deaths as a result of police abuse and deaths in police detention by the Independent Complaints Directorate, and the Judicial Inspectorate of Correctional Centres may investigate deaths in prison. But these institutions are limited to making recommendations to the police and correctional authorities and lack the capacity to conduct thorough investigations into every death. Allegations concerning torture and ill-treatment in other facilities must be reported to and investigated by the police. The police must be trained on how to conduct these investigations, and should be required to report on the number and nature, as well as outcome of their investigations. Rigorous and thorough investigation needs to occur in respect of each death. But where it is found that the system or individuals are responsible for the deaths or ill-treatment, disciplinary and if appropriate, criminal action must be taken against the perpetrators. External oversight needs to be supported by strong internal mechanisms to monitor the conduct of law enforcement agents, and to institute the necessary disciplinary and criminal actions against the offenders.

**4. Improve conditions for migrants and asylum seekers:**

The report illustrates the often callous violence and impunity against migrants and asylum seekers, where State Officials appear to feel legitimated in abusing and extorting migrants and asylum seekers. Like the Committee Against Torture, the report recommends that South Africa must take all measures to prevent and combat the ill-treatment of non-citizens detained in repatriation centres and provide people with information about their rights and legal remedies available, as well as attempt to reduce the backlog of applications for asylum (para 16). From the studies referred to in this report, the conditions and treatment in these facilities remains an ongoing concern.

**5. Focus on rights of children as victims of torture and CIDT:**

The report reflects the depth and types of abuse against children in South Africa. They are raped, beaten, killed and abused at frightening levels. Often these abuses are seen in the light of the Convention of the Rights of the Child. However, we recommend that the UNCAT is used to bring to light the abuses that State Officials visit on children in their care. We suggest this step in order to address the often huge power-differential between State Officials and teachers, and the children in their care. The Committee recommended the implementation of legislation banning corporal punishment, especially in schools and other welfare institutions for children. Corporal punishment is banned in schools though clearly it remains an issue of

contention and continues to be used. Training teachers, as well as disciplinary and criminal action, are necessary steps to deal with this abuse. As some of the articles suggest, teachers know they are not supposed to beat children. Training should focus also on reflecting on what disciplinary action entails in a torture-free environment.

Clearly, most violence against children is intra-familial or intra-communal. The Convention provides limited avenues for preventing or addressing this kind of violence. However, the Convention could work as a model for legal reform in the field of domestic violence.

## Policy recommendations

### 6. Revisit training programmes of State Officials in regard to torture and CIDT:

Ongoing training of law enforcement officials is important so as to stress the importance of upholding international and constitutional human rights obligations in their everyday work. It is likely that most law enforcement officials have a broad understanding of human rights and a general understanding on the prohibition against torture and ill-treatment. Torture prevention is part of the general human rights training that police officers receive. However, the training seems to miss its target, as Hornberger argues (2008, pp. 89-139). Hence, State Officials often lack the detailed and situated understanding that would help inform them around their actions, or lack of action. In this way, they often transgress the line that makes their actions a violation of human rights. As illustrated in the report, police and other State Officials do not seem to connect their practices with international law. Training must be designed in such a way as to illustrate to State Officials how their practice relates to international and constitutional law, as well as domestic law. This should be supported by case studies (such as those featured in this report) that illustrate the principles in practice. Training must also provide the skills and knowledge to enable them to conduct their duties in a responsible and effective manner, so that, for example, they can construct a criminal case within the boundaries of the law.

### 7. Revisit working conditions for State Officials:

Throughout the report we have witnessed how the conditions of State employees affect their treatment of those in their care. They experience a lack in recognition, are stressed to an extent that they are a danger to themselves let alone others, and are underpaid. Clearly, this is outside the scope of this report, but it seems prudent to revisit pay scales, hierarchy structures within the State, and levels of stress experienced. This should be done on a continual basis and on the basis of this report it is recommended that this effort be increased as these problems adversely affect the levels of violence perpetrated by State Officials.

### 8. Create or expand complaints structures in poor and violent areas:

In the report we noted a range of geographical areas where few complaints emanate despite evidence outside the media that police routinely transgress the lines set up by the Convention – notably in the townships. As the lack of trust in the police is very low, structures (be they judicial or political) must be strengthened so that they can channel complaints. Those already in place are often delegitimised, as in the case of many Community Policing Fora, or too far away (as the ICD).

## Media and advocacy recommendations

### 9. Train journalists to recognise torture and ill-treatment:

Journalists occupy an important place in the public arena. Their choices (and those of their editors) have important implications for what State practices are seen and which remain invisible. Their angle on particular stories and incidents determines at least to some extent how the incident enters the public arena. Through this report we have attempted to explore and render visible these choices. This points to the need to raise awareness of torture and CIDT. Furthermore, it is important that journalists are appropriately trained to investigate allegations of torture and ill-treatment, as well as other allegations of abuse and ill-practice by officers of the State. Training should properly inform journalists of South Africa's international treaty obligations as well as the domestic law and constitutional provisions. This should help to inform, thorough investigation and reporting, on allegations of abuse by the media.

### 10. Redirect the attention of journalists to other modes and places of torture:

As we have seen the media often focuses on the police and the prisons. However, torture and CIDT happens also in other places, like in the military, townships, remote villages and mental institutions. There is a wealth of stories here that journalists might tap into for the greater good.

## APPENDIX I: KEYWORDS TO IDENTIFY ARTICLES

GENERAL TERMS:	POLICE/SOUTH AFRICAN POLICE SERVICES/SAPS AND OR PRISON/S AND OR DEPARTMENT OF HOME AFFAIRS AND OR CHILDREN'S FACILITY AND OR INTELLIGENCE/NIA:	PROTESTS/UNREST/ STRIKES/MARCH/RIOT:	CUSTODY AND OR PRISONS:
<p>Torture;</p> <p>Cruel inhuman and degrading punishment;</p> <p>Cruel inhuman and degrading treatment;</p> <p>Inhuman punishment;</p> <p>Degrading punishment;</p> <p>Inhuman treatment;</p> <p>Degrading treatment;</p> <p>Corporal punishment;</p> <p>Police brutality;</p> <p>Independent Complaints Directorate (ICD).</p>	<p>Killed;</p> <p>Death;</p> <p>Executed;</p> <p>Gunned down;</p> <p>Hacked to death;</p> <p>Bled to death;</p> <p>Suicide;</p> <p>Injury;</p> <p>Medical attention;</p> <p>Electrical;</p> <p>Deprivation;</p> <p>Rape;</p> <p>Sexually assaulted;</p> <p>Forced sex;</p> <p>Attacked;</p> <p>Assaulted;</p> <p>Misbehaved;</p> <p>Molested;</p> <p>Manhandled;</p> <p>Roughed up;</p> <p>Beaten;</p> <p>Kicked, punched;</p> <p>Isolated, confined;</p> <p>Lindela;</p> <p>Judicial inspectorate of prisons (JIP);</p> <p>Independent prison visitors (IPV).</p>	<p>Dispersed;</p> <p>Went on rampage;</p> <p>Clashed with;</p> <p>Subjected to ill-treatment;</p> <p>Used their batons;</p> <p>Tear gas;</p> <p>Evicted;</p> <p>Sjambok.</p>	<p>Conditions (lack of air, lack of natural light, dirty cells, lack of protection/security);</p> <p>Death;</p> <p>Suicide;</p> <p>Injury;</p> <p>Medical attention;</p> <p>Electrical;</p> <p>Deprivation;</p> <p>Overcrowding;</p> <p>Lack/limited exercise;</p> <p>Lack of recreation;</p> <p>Limited/denial of food;</p> <p>Lack of condoms;</p> <p>Rape;</p> <p>Sexually assaulted;</p> <p>Forced sex;</p> <p>Attacked;</p> <p>Assaulted;</p> <p>Misbehaved;</p> <p>Molested;</p> <p>Manhandled;</p> <p>Roughed up;</p> <p>Beaten;</p> <p>Kicked, punched;</p> <p>Isolated, confined;</p> <p>Tear gas and dogs;</p> <p>Children;</p> <p>Psychiatric wards and:</p> <p>Beaten;</p> <p>Restrained;</p> <p>Deprivation;</p> <p>Negligence.</p>

# APPENDIX II: BRIEFING DOCUMENT

## What is torture?

UN Article 1 of the Convention against Torture defines torture as follows:

1. 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 a confession, punishing him 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, whether 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 or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which may or does contain provisions of wider application.

However, to define torture is often a subjective measure, but it is an act which causes severe mental, physical or emotional suffering.

## Cruel, inhuman or degrading treatment (CIDT)

Cruel, inhuman or degrading treatment (CIDT) is also prohibited by the CAT convention, but is not so well defined (although like torture acts of ill-treatment must be committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity). In practice, it is often difficult to distinguish acts of torture from CIDT.

CIDT does not necessary have to be committed for a specific purpose and that it involves "significant" (rather than severe) mental or physical pain or suffering. For the purposes of this research, we are looking for incidents of Torture and CIDT, hereafter referred to inclusively as 'torture'

Torture may violate the following human rights:

- The right to bodily integrity
- The right to dignity
- The right to freedom of movement
- The right to medical treatment
- The right to freedom and security of persons

## How would you recognise torture?

- An intentional action or inaction perpetrated by one or several individuals towards an individual or group.
- The action or inaction committed by one party to another causes harm, or exposes a person to a situation which one could reasonably expect would result in harm. This can include the withdrawal of protection which one might reasonably expect.
- Harm can be psychological, physical, emotional or sexual.
- The motivation behind the action is to cause pain.
- Pain may be used to reach a further goal such as extract information, to punish the victim, to recruit soldiers, etc.
- The action must lack legal or due process. In other words, if someone is imprisoned after a trial, then it does not constitute torture.
- If someone is imprisoned for more than a reasonable period without appearing before a court. Forty-eight hours is generally a reasonable time period, but may be extended in certain situations.
- If extreme conditions are experienced in detention it can constitute torture as authorities should protect inmates. This includes failure to prevent or respond to sexual violence.
- If someone is harmed during questioning, it constitutes torture.
- The perpetrator is sanctioned by an government official, even if the behaviour is not.
- Torture necessitates a loss of dignity on the part of the victim.

## What is organised violence?

- By a group or individual acting according to a belief or greed.
- Organised violence is planned.
- The violence is unacceptable by human standards.
- Large numbers are affected.
- Persons involved have no official sanction e.g. The Madrid train bombings.

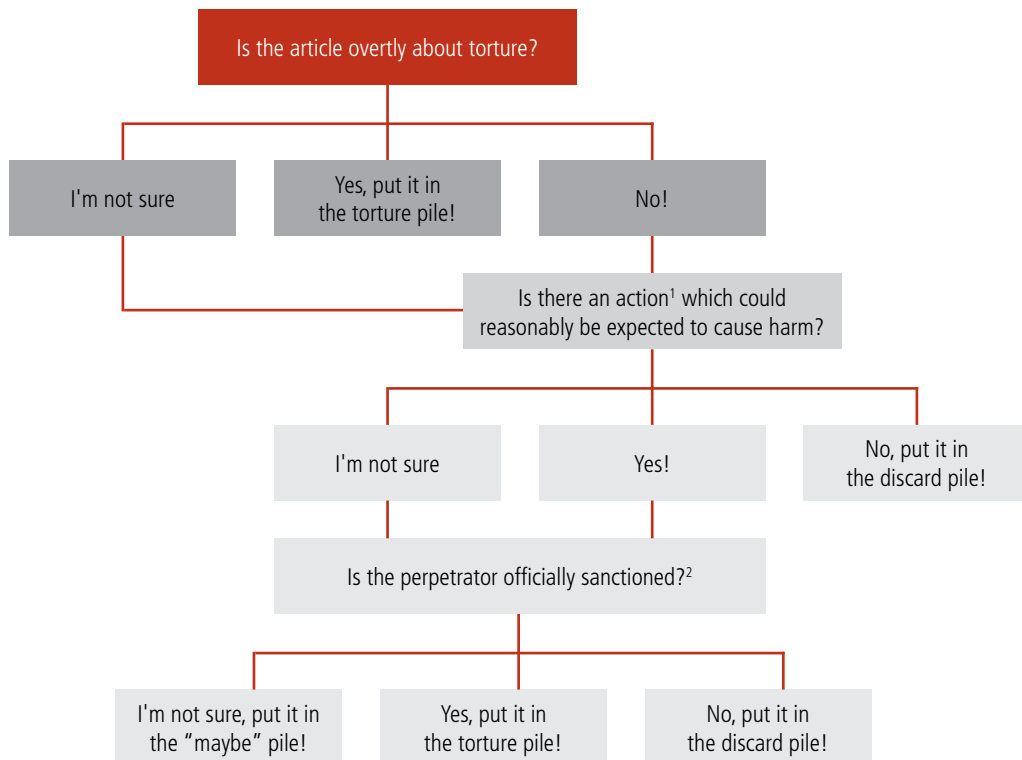
## Look at the diagram below and think about the following examples:

Remember, we are referring to torture inclusively to include cruel and inhuman treatment.

- A man rapes another man's wife to punish the man for stealing from him. Is this torture?
- A child is beaten in class by her teacher. Is this torture?
- A man puts a woman in a position where there is a very good chance that she will be raped. Is this torture?
- A policeman puts a woman in a cell full of men, she is then raped. Is this torture?
- A woman asks two policemen for help and they rape her. Is this torture?
- It's winter and a prisoner in detention isn't given a blanket. Is this torture?
- A thief is necklaced while a policeman stands by and does nothing. Is this torture?
- A asylum seeker is mistreated at the Lindela repatriation centre. Is this torture?
- A refugee is arrested and sent to Lindela, even though she has legitimate papers, she loses her job as a result. Is this torture?

## Is the article about torture?

At this stage, MMP wants to obtain articles about torture. Because of our inclusive view of torture, it is very important that you go through all these steps for every article you check. Don't assume that an action is not torture before checking these criteria. Don't assume that if it involves a woman, it's not torture.



1. The action may also include the withdrawal of protection that one might reasonably expect.
2. The person may be sanctioned but the behaviour may not be.

# APPENDIX III: TORTURE MONITORING FORM

## MMP Torture monitoring form

Capturer's Code:

Monitor's name:

Medium:  Date:  Source Page:

Headline

Origin:

Type  Ref no:

Perpetrator(s) (write down details for all potential perpetrators) How many?

Name	Position	No	Occ	Sex	Race	Nat

Victims(s) How many?

Name	Position	No	Occ	Sex	Race	Nat

Form (enter as many as possible)	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Place  Circumstances  Purpose

**Please mark boxes below with y or n for yes or no respectively**

Called torture  Called CIDT/P  Mention law/policy

Provide info for victims

- Does it draw attention to or imply wrong?
- Does it explicitly refer to human rights violations?
- Investigation launched?
- People responsible prosecuted?
- Attempt to rectify or make amends for instance? By state, courts, etc.
- Attempt to rectify systemic problem, ie launch of commission of enquiry, etc.
- Remedies successful/effective:
- Is this a follow-up story?

Yes	No	Unsure

**Fairness:**

Clearly disfavours the victim	<input type="checkbox"/>
Clearly favours the victim	<input type="checkbox"/>
Clearly favours the perpetrator	<input type="checkbox"/>
Clearly disfavours the perpetrator	<input type="checkbox"/>
Item is fair	<input type="checkbox"/>

## APPENDIX IV: FORMS OF TORTURE TOTALS

FORM	DESCRIPTION	COUNT
1	Severe Physical (where codes below do not apply)	29
2	Beating, kicking, striking with objects	140
3	Murder/Death	100
4	Rape	47
5	Suspension from a rod by hands and feet	4
6	Burning	4
7	Insertion of needles under toenails and fingernails	1
8	Being shocked repeatedly by an electrical instrument	8
9	Mutilation of genitalia	1
10	Suffocation	18
11	Near Drowning	1
12	Shooting	54
	<b>Total: Severe Physical</b>	<b>407</b>
21	Other physical (where codes below do not apply)	22
22	Starvation	5
23	Sleep deprivation	1
24	Blows to the ears	1
25	Forced standing or staying in one position	4
26	Having urine or faeces thrown at one or being made to throw urine or faeces at others	1
27	Non-therapeutic administration of medicine / drugs	2
28	Being forced to write confessions numerous times	8
29	Sexual assault	28
30	Over-exertion, hard labour	3
31	Exposure to heat, sun, strong light	4
32	Exposure to rain or cold, sustained immersion of body in water	6
33	Being placed in a sack, box, or very small space	6
34	Corporal punishment	12
	<b>Total: Other physical</b>	<b>103</b>
41	Deprivation (where codes below do not apply)	14
42	Property Damage	9
43	Theft	17
44	Arrest	52
45	Unreasonable deportation/ repatriation	11
46	Denial or unreasonable delay of fair trial or other prisoner's rights	56



<b>FORM</b>	<b>DESCRIPTION</b>	<b>COUNT</b>
47	Neglect or negligence	104
48	Unreasonable denial of official documents, such as ID or refugee papers	3
49	Denial of medical attention	55
50	Isolation or undue confinement	22
51	Denial of protection/ security	104
52	Overcrowding	21
53	Lack or limited exercise/ recreation	1
54	Denial/ lack of condoms which could lead to HIV or other infection	0
55	Unreasonable restraint	34
56	Isolation, solitary confinement	4
57	Exposure to unhygienic conditions conducive to infections and other diseases	17
58	Extortion	15
60	Incompetence	21
	<b>Total: Deprivation</b>	<b>560</b>
61	Verbal/ psychological (where codes below do not apply)	49
62	Sexual humiliation	31
63	Mock execution	5
64	Being made to see or hear others being tortured	2
65	Being made to torture others	1
66	Sustained harassment	8
	<b>Total: Verbal/ psychological</b>	<b>96</b>
71	Multiple/ other (where codes below do not apply)	2
72	More than one form of denial and/or verbal/psychological (Not Mentioned)	1
73	Multiple forms of torture/ CIDT (Not Mentioned)	10
74	Other	10
	<b>Total: Multiple</b>	<b>23</b>
	<b>Total: All forms</b>	<b>1 189</b>

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