



A study into the torture legislative
framework in Zimbabwe:
Gaps and opportunities

© 2012, Zimbabwe Human Rights NGO Forum
Published by the Zimbabwe Human Rights NGO Forum
P. O. Box 9077, Harare

8th Floor Bluebridge North, Eastgate Harare

Telephone: +263 4-250511; Fax: +263 4-250294;
Email: admin@hrforum.co.zw Website: www.hrforumzim.com

International liason Officer, Achway Resource Centre, Islington, London N19 5JN
Email: Intlo@hrforumzim.com

Printed by: Sable Press

Contents

Introduction	3
Background	3
The Constitution	4
Laws that limit freedoms to assemble and associate	5
Public Order and Security Act	5
Criminal Law (Codification and Reform Act)	7
Statutes of Limitation	8
Prescription Act	8
Police Act	9
State Liabilities Act.....	10
Amnesty Laws	11
Prerogative of Mercy.....	12
Laws regulating security officers	12
Prisons Act.....	12
Police Act	12
Procedural laws	13
Extradition Act.....	13
Criminal Procedure and Evidence Act	14
Recommendations	15

1. INTRODUCTION

The United Nations Convention Against Torture (UNCAT) is the most notable international agreement prohibiting torture. The UNCAT¹ has been ratified by over 140 member states of the United Nations and the prohibition of torture has become accepted as a principle of customary international law. Zimbabwe is one of the few countries that are yet to ratify the Convention. By not voluntarily assuming the obligations set out in the UNCAT Zimbabwe may nevertheless have those obligations imposed upon it by the application of international customary law. *“It is the position now that certain human rights may be regarded, by their content and universal acceptance, as having entered into the realm of customary law and thus become applicable to nations that may not have assented to the particular instruments protecting these rights by virtue of the superiority of international customary law over all other laws. These rights include the prohibition of slavery, genocide and torture”*².

A central objective of UNCAT is to criminalize all instances of torture. UNCAT article 4 requires State Parties to ensure that all acts of torture, attempts to commit such acts and acts which constitute complicity or participation are made criminal offences, subject to *“appropriate penalties which take into account their grave nature.”*

“Torture” is defined by UNCAT as follows:

*“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”*³.

2. BACKGROUND

Since its inception, the Zimbabwe Human Rights NGO Forum (the Forum) has been documenting and litigating cases of Organized Violence and Torture (OVT). In Zimbabwe, torture is routinely

¹Formally known as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²Mann v Republic of Equatorial Guinea 2008 (1) ZLR 49 (H)

³Article 1.1.

resorted to by police officers and has become a common method of interrogation, particularly the method of *falanga* or *bastinado* (popularly referred to in the local language as *kurohwa pasi petsoka*, a term which is now colloquially used to mean ill-treatment where the victim is unable to retaliate). The challenge is that torture is hidden from the public eye and is generally not considered to be a burning issue that represents a gross human rights violation. Some sectors of society actually believe that the use of torture is a necessary evil. Because of its far-reaching physical and psychological effects, the harm inflicted by torture on the victim cannot be undone. Therefore, prevention is of primary importance.

Article 2, para. 1, of the UNCAT obliges each State Party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture”. Although the current Constitution of Zimbabwe provides for freedom from torture, cruel and inhuman and degrading treatment, there is no specific provision in the Constitution itself or in other legislation in Zimbabwe criminalizing torture as such. Instead, there are a number of laws which indirectly encourage torture through creating an enabling environment for the use and practice of torture. This report aims to analyse such legislation and recommend, for the consideration by the Government of Zimbabwe, the repeal or significant amendment of such legislation in conformity with provisions, requirements and essential principles of UNCAT and other guidelines such as the Robben Island Guidelines⁴.

3. THE CONSTITUTION

The Constitution of Zimbabwe (currently undergoing reform) is the only piece of Zimbabwean legislation that specifically mentions torture. Section 15(1) of its Declaration of Rights provides that “*No person shall be subjected to torture or to inhuman or degrading treatment or other such treatment*”. However, the Constitution does not define “torture”. The section then proceeds to provide derogations from the protection given in subsection (1). Section 15(3), which exempts moderate corporal punishment on young persons (when inflicted by a parent or a person acting in loco parentis) or on young male offenders, is one such derogation.

Article 1(1) of UNCAT states that torture “*does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*”. This provision has given rise to much controversy, notably as regards which legal framework (domestic and/or international) does the term “lawful” refer to. An interpretation in accordance with the purpose of the Convention would, however,

⁴Formally known as Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment in Africa.

advocate for a reference to both domestic and international law. In that regard, it is worth adding that corporal punishment as a form of a penal practice by the State is frowned upon under international law and therefore cannot be justified under article 1(1) of UNCAT. This is because lawful sanctions refer only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards. The United Nations Commission on Human Rights now the Human Rights Council, held in Resolution 1998/38 that corporal punishment “*can amount to cruel, inhuman or degrading punishment or even torture*”. This position is echoed by the Committee on the Rights of the Child which views corporal punishment as inhuman and degrading treatment. The Committee on the Rights of the Child provides its authoritative interpretation of the provisions of the United Nations Convention on the Rights of the Child and Zimbabwe is a state party to that Convention. The Committee notes that in a minority of states, corporal punishment using canes or whips is still authorized as a sentence of the courts for child offenders. In its General Comment No. 8 on the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, the Committee highlights states’ obligation to prohibit and eliminate all corporal punishment in all settings, including juvenile justice systems⁵ .

The proposed new Constitution⁶ also provides for the freedom from torture. It provides under Clause 4.10 “*No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.*” It however omits all the derogations that are found in the current constitution. This means that the new constitution conforms to the non-derogability of prohibition of torture under international law, a principle honoured by the UNCAT even during times of emergency and political instability. This is a positive move and will need to be reinforced by an enabling Act.

4. LEGISLATION THAT LIMIT THE FREEDOMS TO ASSEMBLE AND ASSOCIATE:

4.1. Public Order and Security Act Chapter 11:17

In 2002 the Parliament passed the Public Order and Security Act [Chapter 11:17] (POSA) which made great inroads into the rights of individuals and groups. In addition to maintaining public order and security, POSA gives government wide powers to curtail the enjoyment of freedoms and civil liberties by citizens. Political parties, prodemocracy and human rights activists have been the major victims of this repressive piece of legislation. One of the greatest weaknesses

⁵<http://www2.ohchr.org/english/bodies/crc/comments.htm>

⁶Draft circulated by Veritas on 19 July 2012

of POSA is that it is susceptible to misinterpretation by the regulating authorities, who have constantly used the provisions to deliberately curtail and suppress activities by human rights defenders and prodemocracy activists.

POSA provides for the notification of the regulating authority of any intentions to hold a procession, public demonstration or public meeting⁷. It also requires the organisers of any public meeting to inform the local police of a meeting five days in advance and seven days before a procession or public demonstration. While on the face of it the provisions of POSA may not seem exceedingly unreasonable it is the selective and partisan application of the law which in turn makes it a repressive piece of legislation. Another key feature of POSA is that it allows police officers to issue a “prohibition notice” which prevents the public from holding meetings or processions if such prohibition is to maintain peace and order. This provision has been used to harass and arrest human rights defenders and pro-democracy activists. The Act also allows police to use force to disperse the public during an “unlawful gathering”- a provision routinely resorted to by the police without regard to the provisions of the Act which gives warning on the degree of force to be used⁸ or the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) whose articles 4 and 5 provides that law enforcement agents shall, as far as possible, apply non-violent means before resorting to the use of force and firearms and they may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

The selective application of POSA and Criminal Code provisions against political party activists from MDC T and some CSOs resulted in 363 human rights defenders and citizens being arrested between March 2007- March 2011⁹. In all cases where the matters have proceeded with full trials no one has been convicted. In a handful of cases where convictions were secured these rulings have been overturned by the higher courts. It is worrisome that POSA allows the police to effectively usurp the powers of the court to decide the legality or otherwise of a public meeting. The courts should become the custodians of POSA instead of police; meaning that a convener of a meeting, for example, will merely give police notice but the regulating police officer will have no power to stop the meeting. The courts should therefore reserve the authority to stop a meeting if

⁷Section 25 of the Public Order and Security Act Cap 11:17

⁸Section 29 POSA cap 11:17

⁹Statistics compiled by 28 human rights organizations working in Zimbabwe for submission to the Human Rights Council for the Universal Periodic Review.

there is a perceived threat to peace. Human rights defenders and citizens arrested under POSA are susceptible to torture as most of the torture crimes that take place in Zimbabwe often happen in pre-trial detention.

4.2. Criminal Law (Codification and Reform) Act Chapter 9.23

Some sections of POSA which further suppress the freedom of association and assembly were transferred to the Criminal Law (Codification and Reform) Act (the Criminal Law Code). For example, section 37 of the Code provides penalties for persons “*Participating in gathering with intent to promote public violence, breaches of the peace or bigotry*”¹⁰ . When human rights defenders are arrested under such provisions they are then susceptible to torture, with the police attempting to extract information about what they believe are the underhand nature of their organizations.

The section itself is meant to punish conduct which is an abuse of the right to freedom of expression and assembly, but in practice it has been used to suppress most activity that in essence is the enjoyment of those rights. An apt example of the application of such legislation to suppress freedom of association and assembly is the case of Munyaradzi Gwisai and 5 others. The accused and others were arrested in February 2011 at the Zimbabwe Labour Centre in Harare where they gathered to watch and discuss video footage of anti-government protests in Egypt and Tunisia which had led to changes of government in both countries. While the discussion was still in progress a large group of police officers and CIO operatives arrived on the scene and arrested and detained 46 people, among them Munyaradzi Gwisai, law lecturer at the University of Zimbabwe [UZ], labour activist, coordinator of the International Socialist Organisation’s Zimbabwe chapter, and former Member of Parliament. While in detention, the six activists underwent torture sessions, with assaults all over the bodies, under their feet and buttocks through the use of broomsticks, metal rods, pieces of timber, open palms and some blunt objects. According to *Williams & Anor v Msipha NO & Others*¹¹ the Supreme Court held that only those acts are proscribed which have as their direct and obvious consequence serious disturbance of the peace, security or order of the public or any section of the public prevailing immediately before the occurrence of the conduct. This means that the POSA itself is not the challenge, but its abuse by the State is what increases the risk of a person being exposed to torture. According to a study done by Institute of Justice and Reconciliation and Solidarity Peace

¹⁰The MMPZ officers above were also charged under the same

¹¹S-22-10

Trust in 2006¹² , out of 1029 arrests under POSA analysed in the report, not a single conviction had been obtained by the end of 2005 for those sections of POSA that relate to public order or public gatherings – yet these are the sections most commonly charged. This clearly demonstrates that POSA is not being used to achieve the intention of the legislature but to quash the voices of mainly human rights defenders, trade unionists, prodemocracy activists and opposition political party supporters.

In order to address the issues raised above there is need to amend POSA, in order to ensure more flexibility for citizens to enjoy their freedoms of expression and assembly. In addition, there should be a more thorough training of the police force in the correct interpretation of the law, particularly with a focus on respecting human rights and ensuring freedom from torture.

5. STATUTES OF LIMITATIONS

5.1. Prescription Act [Chapter 8:11]

The Prescription Act provides for among other things, the acquisition of ownership of things by prescription and the extinction of debts by prescription. It provides for the extinction of a debt arising as a result of a delict by prescription after 3 years, this means that you cannot claim for that delict through civil proceedings once the three years have elapsed¹³ .

Zimbabwe might not be unique in putting in place a provision limiting the time period for bringing a delictual claim, but the provision compounds the challenges of access to justice that Zimbabwe already faces which includes lack of adequate infrastructure for provision of legal aid to people who require justice but cannot afford it. This is because a significant percentage of the population lives in rural Zimbabwe where access to the courts is difficult because of financial and geographical constraints. Even those who live in urban setting close to the courts, find it difficult to access the courts because of the high costs of legal processes, whether it is the cost of hiring a legal representative or simply the costs incidental to litigation like Deputy Sheriff's costs. In addition, by their very nature, torture cases, particularly where the torture is perpetrated by the police, instill a sense of fear in the average citizen, as the person who is supposed to protect them becomes the assailant. This results in a reluctance to report such matters or seek legal assistance until the victims have either gathered enough courage or have received information on how to get assistance, by which time the matter might have prescribed.

¹²Policing the State- A study of 1981 political arrests in Zimbabwe: 2000-2005, 14 December 2006

¹³Section 15 (d)

In terms of UN CAT, no defence whatsoever can be deemed admissible for cases of torture. This stems from the absolute nature and non-derogable character of the prohibition of torture as enunciated under Article 2 (2) of UNCAT as well as under Articles 4 (2) and 7 of the International Covenant on Civil and Political Rights (ICCPR). This means that no circumstances can justify the use of torture. “On the general level this means that no circumstances can justify the use of torture be it a state or threat of war, political instability etc. At the individual level, and in particular at the criminal justice level, the absolute prohibition of torture entails that no defence can be invoked, neither as a justification to torture, such as superior orders, self-defence or state of necessity, nor as a procedural obstacle to prosecution, such as statutes of limitation or prescription”¹⁴. The State is obligated under international law¹⁵ that victims of torture or other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social, psychological, medical and other relevant specialized rehabilitation. This principle is further enunciated in Article 4 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which provides that “victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered”.

5.2. The Police Act [Chapter 11:10]

The Police Act in addition to providing for the “establishment, organization and control of the Police Force; the functions of the Police Service and the conditions of service of its members; and matters connected with or incidental to it”, also provides for the period within which claims against the police or a member of the police force should be brought up. Section 70 provided that “*Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of such proceedings and the grounds thereof shall be given in terms of the provisions under the State Liabilities Act*”

Considering the nature and extent of its effects on the person, a period of eight months is too short for a victim to heal and gather composure to pursue for redress against his or her assailants. This particular provision is restrictive particularly considering that, in Zimbabwe, most

¹⁴Association for the Prevention of Torture- The criminalisation of torture under the UNCAT- An overview for the compilation of torture laws, August 2009-www.ap.t.ch/tld/Overview.pdf

¹⁵See for example Article 14(1) of the UNCAT

of the torture is perpetrated by police officers. The nuances of the law are so removed from the public that the effect of this section is to prevent many victims from initiating proceedings against police officers responsible for torture. The situation becomes worse when the section is read with section 6 of the State Liabilities Act [Chapter 8:14] which requires 60 days' notice in writing before proceedings can be instituted against the state and its members. For actions against the police it effectively leaves a victim with only six months within which to make a claim against the state. This is a challenge in a country like Zimbabwe where access to justice remains a big challenge, particularly for the rural population. Such strong limitations encourage impunity for perpetrators of torture.

The logic of the limitation by prescription is clear: it is to ensure timeous prosecution before the events become stale and the evidence is lost¹⁶, as well as the fact that it would be “*contrary to public policy generally to oblige the State or a member of the police to answer an action for unlawful arrest or detention if there was no limit of time in which it had been brought*”¹⁷. However the circumstances and conditions under which torture is committed often do not permit reports to be made immediately, particularly if the torture is perpetrated by the police. Often the victims' physical injuries heal and, by the time they get the confidence to report, the matters would have prescribed. Further, because freedom from torture is a non-derogable right, there should be an exception to matters involving torture so that they are not affected by prescription.¹⁸ This would ensure that victims of torture have the full and adequate recourse to the law in light with their right under the Constitution to protection of the law¹⁹.

5.3. State Liabilities Act [Chapter 8:14]

The State Liabilities Act in itself was enacted to impose “*liabilities upon the State for the acts of its employees*”. In Section 5 (2) it prohibits the attachment of state property in the satisfaction of a debt or execution of a judgment. Instead the complainant should be paid through the Consolidated Revenue fund whose coffers are perennially empty. This means that the State does not pay compensation to victims of torture by its agent. This has posed a challenge for all creditors who win a judgment against the State, which includes victims of torture. There is no way to force the State to pay its debt, unlike a normal debtor whose property can be attached in satisfaction of a

¹⁶Masenga v Minister of Home Affairs 1998 (2) ZLR 183 (H),

¹⁷Stambolie v Comr of Police 1989 (3) ZLR 287 (S)

¹⁸The Ugandan Prevention of torture Bill has a clause that ensures that torture does not prescribe. http://apt.ch/region/africa/FinalEdited_PreventionofTortureBill.pdf

¹⁹Section 18 Constitution of Zimbabwe.

debt²⁰. This is the premise upon which the Forum brought a case before the SADC Tribunal on behalf of torture victims in 2008, whose matters had received favourable judgments before the High Court of Zimbabwe but the State had refused to pay the judgment debts. The Tribunal held that section 5 (2) of the State Liabilities Act was in contravention of the fundamental rights to an effective remedy, to a fair hearing, to equality before the law and to protection of the law²¹. This provision flouts the principles of rule of law in that it presupposes that there are some elements that are above the law.

Although victims can avoid this challenge by going after the perpetrators in their personal capacity, this is not always possible as sometimes the perpetrators are only identified by the uniform or office (e.g. where torture takes place at a police station) but not by name. In such a case therefore the victim has no option but to proceed against the responsible ministry. It is recommended therefore that section 5(2) of the State Liabilities Act be repealed as it infringes upon fundamental constitutional rights.

6. AMNESTY LAWS

5.3 Prerogative of mercy

In terms of section 311 of the Constitution, the President has a right to grant a pardon, amnesty or clemency to convicted persons. There are no set criteria upon which this power is exercised, and in the absence of such, abuse has been inevitable²².

In fact concerns have been raised over most of the cases where this prerogative has been issued. A disturbing trend has also been noted in that majority of these cases were politically motivated and torture was also alleged. Notable incidences were the 1998 Clemency Order pardoning perpetrators of the Gukurahundi atrocities, the 2000 Clemency Order in favor of the perpetrators of the 2000 presidential election violations which resulted in the death of two MDC activists Talent Mabika and Chiminya. It is evident that pardons can be an incentive for impunity because persons who commit offences, including acts of political violence, may do so in expectation of receiving mercy from the person holding presidential office. On 6 October 2000, President Mugabe, using his presidential powers, issued an amnesty for politically motivated crimes committed between

²⁰Nyathi v MEC for Dept of Health, Gauteng, & Anor 2008 (5) SA 94 (CC), where the Constitutional Court upheld the contention that a judgment creditor who won against the State did not enjoy the same protection of the law as a “normal” judgment creditor.

²¹Gondo and Ors v Government of Zimbabwe Case no. 5/2008 (SADC (T))

²²See, for example, S v Shava 1989 (2) ZLR 107 (H), where a minister who had been convicted of perjury and subornation of perjury and sentenced to a term of imprisonment was granted a free pardon, having served less than 24 hours in prison. Other than the fact that the minister was a political ally, there were no good reasons for granting a pardon.

1 January 2000 and 31 July 2000, the period of the campaign for the February 2000 referendum and the June 2000 parliamentary elections. The amnesty did not cover murder, rape, and robbery. Some victims of violence who had returned home during the period of relative calm that followed the June elections were again assaulted by people who had been arrested and were then released following the amnesty²³.

People take responsibility when they fully appreciate the consequences of the actions that they take. In addition, when pardons are granted, it means that any complaints against persons receiving amnesty and a presidential pardon become meaningless, as the issue that was meant to be brought before the court is sacrificed for expediency and to protect supporters of the ruling party. If amnesties can be used to erode the rule of law, the danger is that they can be used to perpetuate torture. It is clear that amnesty laws should exclude torture from their reach as its effect is to entrench impunity.

7. LAWS REGULATING SECURITY OFFICERS

7.1. Prisons Act Chapter [7:11]

The Prison Act provides the management and control of prisons and prisoners. Sections 3 and 4 of the Act provide for the establishment of prisons and temporary prisons respectively. The challenge that has been faced by Zimbabwe is the issue of inhuman and degrading places of detention. The Optional Protocol to the UNCAT (OPCAT)'s purpose is to *“establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment”*²⁴. This means that there must as much transparency as possible in the establishment of places of detention in order to prevent torture occurring in secret places.

7.2. Police Act

Section 29 specifically provides for a list of actions by police officers that will amount to an offense, which acts might amount to torture. These include among others;

- a) Unnecessarily detaining any person in custody
- b) Using unnecessary violence or neglecting or in any way ill-treating any person in custody or other person with whom he may be brought into contact in the execution of his duty.

²³ Amnesty International: Zimbabwe: human rights in crisis Shadow report to the African Commission on Human and Peoples' Rights May 2007

²⁴Article 1

However, section 29 also imposes the penalty and sets the maximum sentence for all offences in the schedule as five years, a fine up to level ten, or both. This is far from being an adequate punishment for a person who has perpetrated torture. In a case handled by the Forum²⁵, the victim was subjected to falanga for a long period of time, resulting in him requiring surgery and being hospitalized for an extended period of time. He now suffers permanently from pain in his leg. The perpetrators in the case were not identified by name but they were police officers. Had they been identified, the sentence of only five years would, we believe, have been far too lenient. It is proposed therefore that the acts perpetrated by the police which fall under the definition of torture should not be dealt with exclusively under the Police Act, but should be dealt with under a specific legislation that deals with prohibition of torture in order for them to be given due consideration and proper justice for the victims.

What is also of concern is the fact that there have been reports of people who have been tortured by agents of the Central Intelligence Organisation(CIO). That organization and its operations however are not provided for in any legislation, so it is difficult to regulate them. CIO operatives usually operate secretly, detain people in secret detention places, often incommunicado, and torture their victim. It is recommended that, even though the issue of national security is a serious one, there should at least be legislation that regulates their operations and that gives an opportunity for people to seek recourse against them.

8. PROCEDURAL LAWS

8.1. Extradition Act [Chapter 9:08]

This Act provides for the procedures and any other issues related to the extradition of persons between Zimbabwe and other countries where the person has committed an offence. Under the UNCAT²⁶, *“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”*. Zimbabwe is not currently a party to the UNCAT so it does not have obligations under it to refuse to extradite a person to a country where he or she is likely to be subjected to torture. Section 15(a) of the Extradition Act prohibits extradition which would conflict with the obligations of Zimbabwe in terms of any international convention, treaty or agreement. One might argue that Zimbabwe is bound under international customary law, as indeed it was confirmed by the

²⁵Nyandoro v Minister of Home Affairs HH-196-10

²⁶Article 3(1)

High Court in *Mann v Republic of Equatorial Guinea*²⁷. While Zimbabwe sometimes takes its international obligations seriously, there are times when it leans on the side of sovereignty and its own interests. This was showcased in the High Court application that sought to have a decision of the SADC Tribunal registered in Zimbabwe²⁸. Therefore there is always the possibility that the Supreme Court can make a ruling superior to the Mann case disengaging from its obligation under international customary law if it is “against public policy” as was done in the Gramara case (supra). It is recommended therefore that, Zimbabwe ratifies and becomes party to the UNCAT, thus giving full effect to section 15(a) of the Extradition Act.

8.2. Criminal Procedure and Evidence Act [Chapter 9:07]

This Act provides for the procedures and evidence relating to criminal cases. One of the most controversial sections of this Act is section 121, which provides that once the Attorney-General expresses a wish to appeal against a decision to release a person on bail, that decision is suspended for a maximum of seven days, meaning that the suspect would then be incarcerated for a further seven days.

The conditions of detention at most police cells (which are where people are mostly detained pre-trial) are deplorable and some have already been condemned by the courts²⁹. Even where the suspect has been taken to prison custody before trial, the conditions at remand prisons are not any better than police cells. This means that the suspects will be susceptible to inhuman and degrading treatment just by virtue of them being in detention. Further, pre-trial detention is usually a fertile ground for the perpetration of torture by the police³⁰, which means that suspects are at a higher risk of being subjected to torture.

Related to this, although not specifically under section 121 of the Act, is the issue of the inadequacy of provisions for pretrial victims. Where torture has been alleged in pretrial detention, the law should provide for an adequate remedy for the victim. In the case of *Mukoko v Commissioner General of Police and Ors*³¹, the Supreme Court ordered a permanent stay of prosecution in the criminal charges that Mukoko was facing on the basis that she had suffered pre-trial torture.

²⁷2008 (1) ZLR 49 (H)

²⁸Gramara (Pvt) Ltd and Ors v Government of Zimbabwe and Ors 2010 (1) ZLR 59 (H)

²⁹Kachingwe and Others v Minister of Home Affairs NO and Another 2005 (2) ZLR 12 (S)

³⁰Nyandoro v Minister of Home Affairs (supra). See also Shylene Tembo v Minister of Home Affairs HC 5040/09 (not yet concluded)

³¹Judgment not yet issued, though the Court gave its order nearly 3 years ago.

Such pronouncements by the judiciary should be translated into law. Where suspects have alleged pre-trial torture and proved it, they should have their trial stayed. This will discourage the police from resorting to torture a form of investigation. It will also encourage magistrates and trial judges to take torture matters seriously and order investigations beyond just recommending that the victims get medical treatment.

9. RECOMMENDATIONS

From the analysis above it very evident that the legislative framework in Zimbabwe has a lot of gaps in terms of the protection of the freedom from torture, inhuman and degrading treatment or punishment. There are too many loopholes which facilitate the commission of the crime. It is recommended that the Government through its various arms should the following:

- a) Begin by ratifying the United Nations Convention Against Torture and its optional protocol as a matter of urgency. This will be the first step towards condemning the crime of torture and will provide a platform to introspectively look into the existing legislative framework
- b) Criminalise torture through a comprehensive piece of legislation which clearly defines torture and sets out appropriate penalties for the offenders
- c) Revise by repealing and amending all provisions in the existing legislation that create opportunities and perpetuate the commission of the crime of torture as already outlined in the analysis above.
- d) Design and implement proper training of public officers, particularly the law enforcement officers, on the need to refrain from the use of torture

ABOUT THE ZIMBABWE HUMAN RIGHTS NGO FORUM

The Zimbabwe Human Rights NGO Forum (the Forum) is a coalition of 19 human rights organisations. The Forum has been in existence since January 1998 when Non-Governmental Organisations working in the field of human rights joined together to provide legal and psychosocial assistance to the victims of the food riots of January 1998. The Forum has now expanded its objective to assist victims of organized violence and torture (OVT).

The Forum has three operational units: the Public Interest Unit, the Research and Documentation Unit and the Transitional Justice Unit.

The Forum works in close collaboration with its member organisations to provide legal and psychosocial services to victims of OVT and to document all human rights violations, particularly politically motivated violence.

Member organisations of the Zimbabwe Human Rights NGO Forum

- Amnesty International Zimbabwe
- Catholic Commission for Justice and Peace in Zimbabwe
- Gays and Lesbians of Zimbabwe
- Justice for Children Trust
- Legal Resources Foundation
- Media Institute of Southern Africa-Zimbabwe
- Media Monitoring Project of Zimbabwe of Zimbabwe
- Non-violent Action and Strategies for Social Change
- Research and Advocacy Unit
- Students Solidarity Trust
- Transparency International-Zimbabwe
- Women of Zimbabwe Arise
- Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender

- Zimbabwe Association of Doctors for Human Rights
- Zimbabwe Civic Education Trust
- Zimbabwe Human Rights Association
- Zimbabwe Lawyers for Human Rights
- Zimbabwe Peace Project
- Zimbabwe Women Lawyers Association

The Zimbabwe Human Rights NGO Forum can be contacted through:

The Executive Director, 8th Floor Blue Bridge, P.O Box 9077, Eastgate, Harare, Zimbabwe

Telephone: +263 4- 250511; Fax: +263 4-250494; E-mail: admin@hrforum.co.zw

International liason officer, London N195JN; Telephone: +442076193641

E-mail: intLO@hrforumzim.com

