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Registered Qualification: Master of Laws (LLM) Degree in Human Rights

Dissertation Title: An Analysis of the Compliance by the Lesotho Defence Force with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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Research dissertation for the approval of Senate in fulfillment of part of the requirements for the Master of Laws (LLM) Degree in approved courses and a minor dissertation. The other part of the requirement for the qualification was the completion of a programme of courses.

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(Bulane Andrew Sechele)

DEDICATION

To my beloved wife, Ntli – 'Masechele Lekhotsa – Sechele,
and daughter, Amohelang Sechele, for providing me with inextinguishable
inspiration

And

To my honourable supervisor, Professor DM Chirwa, for his unwearied supervision.

LIST OF ABBREVIATIONS

CaT	Committee against Torture
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984
CP & E	Criminal Procedure and Evidence Act 9 of 1981
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
Inter-Am CPPT	Inter-American Convention to Prevent and Punish Torture
Inter-Am Ct.H.R	Inter-American Court of Human Rights
LDF	Lesotho Defence Force
LDF Act	Lesotho Defence Force Act 4 of 1996
NCO	Non-Commissioned Officer
UDHR	Universal Declaration of Human Rights
UN	United Nations

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CHAPTER 1

INTRODUCTION

1.1 Introduction to the Study

This study analyses the compliance by Lesotho, especially the Lesotho Defence Force (the LDF), with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) of 1984. It discusses the prohibition of torture in the international arena and how this is reflected in Lesotho, especially in the LDF.

1.2 Objectives

Lesotho is a party to the CAT,¹ but its laws, practices and procedures had not yet been tested against the obligations of the CAT by the Committee against Torture (the CaT).² Besides not reporting, recently the High Court of Lesotho took judicial notice of the acts of torture and other cruel, inhuman or degrading treatment or punishment being committed by some members of the LDF.³ Thus, this study intends to scrutinise the laws, practices, and procedures in Lesotho and answer whether they comply with the CAT.

¹ Lesotho acceded to the CAT on 12 November 2001, available at <http://www2.ohchr.org/english/bodies/ratification/> [accessed on 20 January 2009].

² Lesotho has not yet submitted the obligatory report to the CaT, available at <http://www.unhchr.ch/tbs/doc.nsf/> [accessed on 20 January 2009].

³ *Mamalebanye Lerothali v. the Commander LDF & Others* CIV/APN/270/2007, Judgment of 2 July 2007. This was a *habeas corpus* application in which the High Court of Lesotho said [at 19]: 'One must hasten to observe and take judicial notice of the fact that it has since come to the attention of this Court that for some time now, the Basotho people have since the month of June been kidnapped, brutally assaulted and subjected to unlawful harassment and **tortured** by members of the army.'

1.3 Significance of the Study

Generally, the study intends to contribute to the development of the law on torture. Specifically, its main focus is to supplement the existing and future statutory law regarding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in Lesotho. Lastly, it will also raise awareness on the right to freedom from inhuman treatment.

1.4 Literature Review

There are some academic writings on the issue of torture in Lesotho. For instance, 'Are Suspects and Detainees protected by Law against Torture by Police? Effects of Police Complaints Authority – A Plea for Reform'⁴ is a dissertation on the effectiveness of the Police Complaints Authority towards combating acts of torture committed by the members of Lesotho Mounted Police Service (LMPS). It did not examine the general law intended to prohibit torture and other cruel, inhuman or degrading treatment or punishment in Lesotho, including the LDF. Similarly, 'The Impact of Torture in Crime Investigation: Case of Lesotho'⁵ concentrated on the crime investigation vis-à-vis torture in Lesotho. It focused on the degree of tainting caused by acts of torture during crime investigations, but not the issue of compliance. Lastly, 'The Fundamental Human Right against Torture and Confessions in Lesotho Legal System'⁶ focused on the procedural part of the law of Lesotho, especially on the

⁴ M Mothobi *Are Suspects and Detainees Protected by Law against Torture by Police? Effects of Police Complaints Authority – A Plea for Reform* (2007) Unpublished LLB Dissertation, National University of Lesotho, Roma.

⁵ B Makututsa *The Impact of Torture in Crime Investigation: Case of Lesotho* (2006) Unpublished LLB Dissertation, National University of Lesotho, Roma.

⁶ M Tso'eunyane *The Fundamental Human Right against Torture and Confessions in Lesotho Legal System* (2006) Unpublished LLB Dissertation, National University of Lesotho, Roma.

issue of confessions obtained as a result of torture. The concern was whether such confessions are practically held inadmissible, as required by the provisions of the CAT,⁷ by the courts of law in Lesotho.

1.5 Methodology

The study analyses domestic legal documents and materials in Lesotho to determine their compliance with the CAT. A qualitative method is employed to achieve this goal. The study will also reflect the author's personal experience in the LDF, where he has worked for 12 years.

1.6 Chapter Outline

This study comprises of five chapters. Chapter one is the introduction. Chapter two examines the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law. It gives an overview of the development of such prohibition by analysing both international and regional instruments. Chapter three considers the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in Lesotho by analysing the relevant laws, practices and procedures. The analysis is made against the backdrop of Lesotho's international and regional obligations, especially the ones enshrined in the CAT. Chapter four considers the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in the LDF by analysing some relevant decisions of the High Court of Lesotho and the Courts-Martial, the pieces of legislation governing the LDF members particularly the prisoners, and procedures. The analysis is meant to determine how such measures relate to Lesotho's international and regional obligations, specifically the ones preserved in the CAT. Chapter five concludes the study and, makes some recommendations.

⁷ Art 15 of the CAT.

CHAPTER 2

THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

2.1 Introduction

The previous Chapter served as an introduction to this study. This Chapter examines the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law by giving an overview of the development of such prohibition through the analysis of both international and regional instruments.

2.2 An Overview of some International Instruments in place to combat Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The struggle to combat such acts was mainly experienced after the Second World War atrocities.⁸ The UN pledged to promote, *inter alia*, 'universal respect for, and observance of, human rights and fundamental freedoms for all'⁹ Then, several documents were adopted by the UN to enhance this struggle.

(a) The Universal Declaration of Human Rights of 1948

This Declaration urges the international community to ensure that the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is communicated thoroughly to the law enforcement personnel and/or other public officials through the general rules and instructions governing their duties and functions.¹⁰

⁸ C Gane *et al* *Human Rights and Administration of Justice: International Instruments* (1997) at 507.

⁹ Art 55 (c) of the United Nations (UN) Charter of 1945.

¹⁰ Art 5 of the Universal Declaration of Human Rights (UDHR) of 1948.

(b) The United Nations Code of Conduct for Law Enforcement Officials of 1979

The Code provides that law enforcement officials must not 'instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment' under any circumstances.¹¹ In accordance with article 1 of this Code, the term 'law enforcement officials' includes all officers of law especially those with powers of arrest and detention.

(c) The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1982

These Principles provide that medical ethics do not permit the physicians to 'engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.'¹² Importantly, the physicians are part of the officials who most often come in contact with the victims of torture and other cruel, inhuman or degrading treatment or punishment.

(d) The Standard Minimum Rules for the Treatment of Prisoners of 1957

These Rules provide that prison officials must not invoke any cruel, inhuman or degrading punishment for disciplinary offences.¹³ Besides, the Body of Principles

¹¹ Art 5 of the United Nations Code of Conduct for Law Enforcement Officials Adopted by GA Resolution 34/169 of 17 Dec 1979.

¹² Principle 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res.37/194, annex, 37 U.N. GAOR Supp. (No.51) at 211, U.N. Doc. A/37/51 (1982).

¹³ Rule 31: 'Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary

also provides that, 'no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'¹⁴ Later, the term 'torture' was defined.

(e) The Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975

This Declaration defines torture, for its own purposes, as the intentional infliction of severe pain or suffering by or at the instigation of a public official and for specific purpose, such as gaining information or confession, punishment or intimidation.¹⁵ Though the above shown instruments do have some legal force they are not binding. Then, the UN adopted the treaties.

(f) The International Covenant on Civil and Political Rights of 1966

This Covenant was adopted by the UN on 16 December 1966.¹⁶ It is monitored by the Human Rights Committee (the HRC). The HRC publishes its interpretation of the content of the human rights provisions enshrined in the ICCPR in the form

offences' of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁴ Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly Resolution 43/173 of 9 December 1988.

¹⁵ Art 1 (1) of the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel or Degrading Treatment or Punishment.

¹⁶ The International Covenant on Civil and Political Rights (ICCPR) entered into force on 23 March 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm> [accessed on 20 January 2009].

of General Comments. The ICCPR provides, *inter alia*, that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'¹⁷ The ICCPR does not provide the content of this right. Nonetheless, it states that this right can never be suspended, even during the state of emergency.¹⁸ The HRC has confirmed that 'the text of article 7 allows of no limitation. ...even in situations of public emergency ...'¹⁹ This right does not only originate from the ICCPR.

This right is one of the peremptory norms in international law.²⁰ Peremptory norms are '... norm[s] accepted and recognised by the international community ... as norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm[s] of general international law having the same character.'²¹ Thus, the duty to prohibit torture emanates from the rules of customary international law. Hence, 'if a state is bound by the terms of the treaty, it is legally bound to act in a certain way and, in a particular sense; it has created law for itself.'²² Besides, 'every treaty in force is binding in good faith upon parties to it and must be performed by them in good faith.'²³ National laws cannot be invoked as justification for the failure to perform a treaty obligation.²⁴

¹⁷ Art 7 of the ICCPR.

¹⁸ Art 4 (2) of the ICCPR.

¹⁹ The HRC General Comment No.20 on art 7 of the ICCPR (Forty-fourth session, 1992) at para [3], available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)) [accessed on 20 January 2009].

²⁰ J Dugard *International Law A South African Perspective* 2ed (2000) at 40.

²¹ Art 53 of the Vienna Convention on the Law of Treaties of 1969.

²² M Dixon *International Law* 6ed (2007) at 30.

²³ Art 26 of the Vienna Convention.

²⁴ Art 27 of the Vienna Convention.

That is, failure to perform a treaty obligation involves international responsibility even if the act in breach is consistent with, or even required by, national law.²⁵ Finally, a legally binding definition of torture was adopted by the UN.

(g) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984

The UN General Assembly adopted the CAT on 10 December 1984.²⁶ It is monitored by the CaT. The CAT has a quiet number of States Parties.²⁷ It is mainly intended to supplement the effectiveness of struggle against torture and other cruel, inhuman, or degrading treatment or punishment globally.²⁸ Though it provides a binding definition of torture it does not define the 'other cruel, inhuman or degrading treatment or punishment.'

(g) (i) The Definitional Distinction between Torture per se and Other Cruel, Inhuman or Degrading Treatment or Punishment

The CAT defines torture as the intentional infliction of severe, mental or physical, pain or suffering by or with the instigation, consent or acquiescence of the state authorities or anyone acting in such capacity and for specific purpose, such as obtaining information or confession, for punishment, for intimidation, for coercion, or for any reason based on discrimination of any kind.²⁹ The distinction

²⁵ *Interpretation of Peace Treaty Case* [1950] ICJ Rep at 65.

²⁶ The CAT entered in force on 26 June 1987, available at <http://www2.ohchr.org/english/bodies/treaties/9.htm> [accessed on 20 January 2009].

²⁷ There are 76 Signatories and 146 States Parties (including 41 African States Parties) to the CAT, available at <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last update is 17 December 2008) [accessed on 20 January 2009].

²⁸ Para [6] of the preamble of the CAT.

²⁹ Art 1 (1) of the CAT.

between acts of torture *per se* and other cruel, inhuman or degrading treatment or punishment 'depend on the nature, purpose and severity of the treatment applied.'³⁰ The CaT confirmed that '... in comparison to torture, ill-treatment differs in the severity of pain and suffering and may not require proof of impermissible purposes.'³¹ Similarly, the jurisprudence of the European Court of Human Rights (the ECtHR) as revealed in the judgment of *Jalloh v. Germany* stipulates that:

'Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.'³²

(g) (ii) **The Interpretation of the CAT's Obligations**

Primarily, the parties are obliged to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction.'³³ States Parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.³⁴ Besides, the parties must ensure that torture

³⁰ The HRC General Comment No.20 (note 19) at para [4].

³¹ The CaT General Comment No.2 on the implementation of article 2 by States Parties (CAT/C/GC/2 of 24 January 2008) at para [10], available at <http://daccessdds.un.org/doc/UNDOC/GEN/> [accessed on 20 January 2009].

³² *Jalloh v. Germany* [GC] No.54810/00 at 67, Judgment of 11 July 2006.

³³ Art 2 (1) of the CAT.

³⁴ The CaT General Comment No.2 at para [4].

remains a non-derogable right.³⁵ The CaT has confirmed that article 2 (2) 'provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction.'³⁶ In regard to superior orders, the CaT has concluded that:

'...subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority -including public officials -cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures.'³⁷

Equally, in the case of *Ireland v. the United Kingdom*, the ECtHR reaffirmed that the right to freedom from torture has no exceptions 'even in the event of a public emergency threatening the life of the nation.'³⁸ Recently, in the case of *Gafgen v. Germany*, the ECtHR held that the prohibition of torture is absolute,

³⁵ Art 2 (2) & (3) of the CAT respectively. This principle was also enshrined in the Charter of the Nuremberg and Tokyo Tribunals 1946, and subsequently reaffirmed by the UN General Assembly. It can also be found in the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia respectively and, with minor modification, in the Statute of the International Criminal Court.

³⁶ The CaT General Comment No.2 (note 31) at para [5].

³⁷ The CaT General Comment No.2 at para [10].

³⁸ *Ireland v. the United Kingdom*, Series A No.25 at 163, Judgment of 8 January 1978.

'irrespective of the victim's conduct.'³⁹ The nature of the offence allegedly committed by the victim is irrelevant for the purposes of article 2.⁴⁰

Furthermore, the parties must not 'expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that such person would be in danger of being subjected to torture.'⁴¹ The CaT has confirmed that 'article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.'⁴² Recently, in *E.R.K. and Y.K. v. Sweden* the CaT concluded that the burden to prove existence of 'substantial grounds for believing that [one] would be in danger of being subjected to torture' if expelled, returned, extradited or deported rests on the applicant.⁴³ In *Hilal v. the United Kingdom*, the ECtHR held that in order to determine the existence of 'substantial grounds' for belief of real, foreseeable and personal risk of being subjected to torture, it would 'take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*.'⁴⁴ But the 'mere possibility of ill-treatment on account of an unsettled situation in the receiving

³⁹ *Gafgen v. Germany*, No.22978/05, Judgment of 20 May 2008.

⁴⁰ *Indelicato v. Italy*, No.31143/96 at 30, Judgment of 18 October 2001 and, *Ramirez Sanchez v. France* [GC], No.59450/00 at 115-116, Judgment of 4 July 2006; but the focus was on article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴¹ Art 3 (1) of the CAT.

⁴² The CaT General Comment No.1 on the implementation of article 3 of the CAT (21 November 1997) at para [1], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/) [accessed on 20 January 2009].

⁴³ *E.R.K and Y.K v. Sweden*, Judgment of 30 April – 18 May 2008.

⁴⁴ *Hilal v. the United Kingdom*, No.45276/99 at 60, ECtHR 2001-II.

country does not in itself give rise to a breach of Article 3 of the Convention.⁴⁵ Similarly in *Venkadajalasarma v. the Netherlands*, the ECtHR held that:

'The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court.'⁴⁶

Moreover, the parties must criminalise torture in their domestic criminal law and, subject it to appropriate penalties because of its grave nature.⁴⁷ The CaT has reaffirmed this obligation in its Concluding Observation to Kenya thus: '[Kenya must] ensure that all acts of torture are punishable by appropriate penalties which take into account their grave nature.'⁴⁸ The HRC has also recommended that 'States Parties should indicate when presenting their reports the provisions of their criminal law which penalise torture and cruel, inhuman or degrading treatment or punishment, specifying the penalties applicable to such acts.'⁴⁹ The parties must also criminalise 'an attempt to commit torture and ... an act by any person which constitutes complicity or participation in torture.'⁵⁰ The Inter-American Convention to Prevent and Punish Torture (the Inter-Am CPPT) succinctly states that, 'the States Parties shall ensure that all acts of torture and

⁴⁵ *Vilvarajah and Others v. the United Kingdom*, Series A No.215 at 111, Judgment of 30 October 1991.

⁴⁶ *Venkadajalasarma v. the Netherlands*, No.58510/00 at 63, Judgment of 17 February 2004.

⁴⁷ Art 4 (2) of the CAT.

⁴⁸ The CaT Concluding Observation to Kenya from 3 to 21 November 2008, available at <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-IDN-CO-2.pdf> [accessed on 20 January 2009].

⁴⁹ The HRC General Comment No.20 (note 19) at para [13].

⁵⁰ Art 4 (1) of the CAT.

attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.⁵¹ In addition:

'A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so, will be held guilty of the crime of torture. A person who, at the instigation of a public servant or employee, orders, instigates, or induces the use of torture, directly commits it or is an accomplice to such acts will also be held guilty of the crime.'⁵²

Clearly, a 'defence of superior orders is not available to the accused who should have known that such orders were palpably illegal and was therefore under no duty to obey them.'⁵³

Besides, the parties must establish universal jurisdiction over the CAT's article 4 offences.⁵⁴ Briefly, '... the essence of universal jurisdiction ... is that any state may exercise jurisdiction over those offences that are so serious as to qualify as crimes under international law. These include genocide, torture, war crimes, piracy crimes against humanity and, less certainly, hostage-taking and hijacking.'⁵⁵ The CAT's universal jurisdiction, however, is not a *pure* one; it requires a *tie* of some sort to the State Party exercising it. That is, the offences of article 4 of the CAT must have occurred in the territory of the State Party exercising the jurisdiction, or the suspect must be the national of that state, or the victim must be the national of that state.⁵⁶ Similarly, if the suspect of article 4 offences is present in

⁵¹ Art 6 of the Inter-Am CPPT of 1985.

⁵² Art 3 of the Inter-Am CPPT.

⁵³ *Rex v. Sekhobe Letsie* 1993-1994 LLR-LB 1.

⁵⁴ Art 5 (1) of CAT.

⁵⁵ Dixon (note 22) at 148.

⁵⁶ Art 5 (1) of CAT.

the State Party's territory, the state must exercise its jurisdiction on him, especially in a case where it does not extradite him.⁵⁷ Generally, international law *permits* states to either prosecute or extradite (*aut dedere aut judicare*) any person who commits international law offence. By contrast, the CAT *mandates* the parties to prosecute or extradite. Even the Inter-Am CPPT obliges its parties to try or extradite people found 'within the area under its jurisdiction,' regardless of where the crime was committed or the nationality of victim and alleged perpetrator.⁵⁸ Lastly, the parties to the CAT are not barred from exercising their criminal jurisdiction in accordance with their domestic law.⁵⁹ But, no immunities, amnesties and/or statutory limitation must be invoked to protect the suspects. The HRC has observed that:

'... some states have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'⁶⁰

In the Concluding Observations to Argentina, the HRC has stated that, 'these types of amnesty help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law.'⁶¹ Similarly, the Vienna Declaration invited states to 'abrogate legislation leading to impunity for those responsible for grave

⁵⁷ Art 5 (2) of the CAT.

⁵⁸ Art 12 of the Inter-Am CPPT.

⁵⁹ Art 5 (3) of the CAT.

⁶⁰ The HRC General Comment No.20 (note 19) para [15].

⁶¹ The HRC Concluding Observations to Argentina of 5 April 1995 at para [146], available at <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-IDN-CO-2.pdf> [accessed on 20 January 2009].

violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.⁶² Likewise, in *Barrios Altos (Chumbipuma Aguirre and others v. Peru)*, the Inter-American Court of Human Rights (the Inter-Am Ct.H.R) held that:

'it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law.'⁶³

In *R v. Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No.3)*, the House of Lords denied the former head of state of Chile a sovereign immunity and said:

'While a head of state was entitled to absolute immunity by reason of his office (*ratione personae*), a former head of state was only entitled to immunity in respect of acts performed by him in the exercise of his functions as head of state (*ratione materiae*). Torture was not an act falling within the functions of a head of state and is an international crime with the status of *jus cogens*.'⁶⁴

Clearly, any law which seeks to protect the law enforcement officials from the charge of torture must be declared *null and void abinitio* because it contravenes *jus cogens*.

⁶² The Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at para [60].

⁶³ *Case of Barrios Altos (Chumbipuma Aguirre and others v. Peru)*, Inter-Am Ct.H.R, Judgment of 4 March 2001.

⁶⁴ *R v. Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No.3)* [1999] 2 ALL ER 97 (HL).

Furthermore, the parties are obliged to arrest and put into custody the suspects of article 4 offences.⁶⁵ Subsequently, the party has to make a preliminary inquiry into the fact and, in the mean time the detainee must be assisted with the communication with his national or residential state.⁶⁶ In essence, the CAT also protects the rights of the suspects. The parties must prosecute the suspect of article 4 offences in the case of non-extradition.⁶⁷ Article 7 ensures that the suspect does not go scot-free; he must be tried *fairly* and be acquitted or convicted accordingly.⁶⁸ The offences of article 4 must 'be included as extraditable offences in any extradition treaty existing between the States Parties.'⁶⁹ In some cases, like where the other State Party has no extradition treaty, the CAT may be considered 'as the legal basis for extradition of such offences.'⁷⁰ Where the other party does not make an extradition treaty a condition, such party shall be regarded to have recognised 'such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.'⁷¹ For purposes of extradition, such offences would be regarded as having been committed in the jurisdiction of both the 'requesting' and 'receiving' states.⁷² Besides, the parties must offer each other greatest measure of mutual judicial assistance in relation to the criminal

⁶⁵ Art 6 (1) of the CAT.

⁶⁶ Art 6 (2), (3) & (4) of the CAT.

⁶⁷ Art 7 (1) of the CAT.

⁶⁸ Art 7 (2) & (3) of the CAT.

⁶⁹ Art 8 (1) of the CAT.

⁷⁰ Art 8 (2) of the CAT.

⁷¹ Art 8 (3) of the CAT.

⁷² Art 8 (4) of the CAT.

proceedings brought in respect of article 4 offences.⁷³ This is because the 'torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.'⁷⁴ The law enforcement personnel must be fully educated and informed about the prohibition of torture.⁷⁵ Importantly, the general population must be educated on the history, scope, and necessity of this right.⁷⁶ Furthermore, parties must systematically review their methods, practices and measures of arrest, detention or imprisonment and interrogation.⁷⁷ Moreover, they must promptly and impartially investigate allegations of acts of torture within their territories.⁷⁸ In this regard, the CaT has observed that:

'... it is essential that the responsibility of any superior officials whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein - be fully investigated through competent, independent and impartial prosecutorial and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.'⁷⁹

In *E Blanco Abad v. Spain*, the CaT held that the prompt and impartial investigation must be conducted 'ex officio, whenever there are reasonable

⁷³ Art 9 of the CAT.

⁷⁴ *Filartiga v. Pena-Irala* 630 F 2d 876 at 890 (2nd Cir 1980).

⁷⁵ Art 10 of the CAT; such personnel include '... civil or military, medical ..., public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

⁷⁶ The CaT General Comment No.2 (note 31) at para [25].

⁷⁷ Art 11 of the CAT.

⁷⁸ Art 12 of the CAT.

⁷⁹ The CaT General Comment No.2 (note 31) at para [26].

grounds to believe that acts of torture have occurred.⁸⁰ The right to complain of torture must be ensured and such allegations must be examined, promptly and impartially.⁸¹ Likewise, the complainants and witnesses must be protected against ill-treatment or intimidation as a consequence of their complaints or any evidence given. The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

'Alleged victims of torture, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.'⁸²

In *Halimi-Nedzibi v. Austria*, the CaT has concluded that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention.⁸³ Equally, in *E Blanco Abad v Spain* the CaT has established that, '... article 13 does not require a formal lodging of a complaint of torture and that it is enough for the victim to simply bring the facts to the attention of an authority of the

⁸⁰ *E Blanco Abad v. Spain*, No.59/1996, Judgment of 14 May 1998.

⁸¹ Art 13 of the CAT.

⁸² Principle 3 (b) of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999) produced by a coalition of experts representing 40 organizations or institutions. In Resolution 55/89, to which the Principles are annexed, the General Assembly strongly encouraged Governments [at para 3] to 'reflect upon the Principles as a useful tool in efforts to combat torture.'

⁸³ *Halimi-Nedzibi v. Austria*, Communication No.8/1991, U.N. Doc. A/49/44 at 40 (1993).

State for the latter to be obliged to partially and promptly investigate such allegation.'⁸⁴

Furthermore, the victims of torture must be compensated fairly and adequately and, this must be an enforceable right.⁸⁵ The test for 'fair and adequate compensation' would depend on the national compensation standards of each party when applying its national law.⁸⁶ Equally, there must be full rehabilitation as possible for the victims. Any statement founded on acts of torture must not be invoked as evidence in any proceedings, except against a person of torture as evidence that the statement was made.⁸⁷ Just like acts of torture, the acts of cruel, inhuman or degrading treatment or punishment must also be prohibited when they are committed in any territory under the parties' jurisdiction and colour of law.⁸⁸ Both acts are indivisible, interdependent and interrelated and that the obligation to prevent the latter in practice overlaps with and is largely congruent with the obligation to prevent torture.⁸⁹ Thus, '... articles 3-15 are likewise obligatory as applied to both torture and ill-treatment.'⁹⁰ Accordingly, the prohibition of ill-treatment is, likewise, non-derogable under the Convention and its prevention requires an effective and non-derogable measure.⁹¹

⁸⁴ *E Blanco Abad v. Spain* (note 80).

⁸⁵ Art 14 (1) of the CAT.

⁸⁶ Art 14 (2) of the CAT.

⁸⁷ Art 15 of the CAT.

⁸⁸ Art 16 of the CAT.

⁸⁹ The CaT General Comment No.2 (note 31) at para [3].

⁹⁰ The CaT General Comment No.2 (note 31) at para [6].

⁹¹ The CaT General Comment No.2 at [3].

Lastly, the parties must submit state reports to the CaT.⁹² This is important because:

'Reporting ... is aimed at facilitating both introspection and inspection. "Introspection" refers to the process when the State, in writing its report, measures itself against the norms of the [ICAT]. "Inspection" refers to the process when the [CAT] measures the performance of the State in question against the [ICAT]. The objective is to facilitate a "constructive dialogue" between the [CAT] and the States.'⁹³

Apart from the international instruments, there are regional instruments used to combat the acts in question.

2.3 Regional Instruments

(a) Europe

In Europe, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Specifically, article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987 establishes the Committee, which will visit and examine the treatment of persons deprived of their liberty. The enforcement machinery for the European system is the ECtHR.

(b) America

In the American system, article 5 (2) of the American Convention on Human Rights of 1969 stipulates that, 'No one shall be subjected to torture or to cruel,

⁹² Art 19 (1) of the CAT: initial reports to be submitted 'within one year after the entry into force of this convention for state party concerned' and, subsequent submission of periodic reports, 'every four years'

⁹³ C Heyns 'African Regional Human Rights System: The African Charter' (2003 – 2004) *Penn State Law Review* vol.108:3 at 696.

inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human persons.' In particular, article 2 of the Inter-Am CPPT of 1985 provides the definition of torture. Article 3 lists the persons who may be found guilty of the crime of torture. In terms of article 4, superior orders cannot exempt an accused from the criminal liability for torture. Article 5 states that existence of circumstances like state of emergency cannot justify torture. These are enforced by the Inter-American Commission of Human Rights, the Inter-Am Ct.H.R and the General Assembly of the Organisation of American States.

(c) Africa

In Africa, article 5 of the African Charter on Human and Peoples Rights of 1981 guarantees the right to the respect of dignity for everybody and that 'all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' It is monitored by the African Commission on Human and Peoples Rights. The African Court on Human Rights is an independent judicial body for the promotion and protection of human rights and fundamental freedoms in Africa.

2.4 Conclusion

International community has pledged to respect, promote and protect human rights and fundamental freedoms. The law enforcement personnel must respect the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Indisputably, the prohibition of torture is a non-derogable right recognised in international law. The CAT has plainly defined the term 'torture' and the obligations to be undertaken by the parties. Though it did not define 'other cruel, inhuman or degrading treatment or punishment,' the jurisprudence of the competent human rights bodies revealed that these acts are inseparable. Eventually, these international and regional standards need to be

nationalised. The domestic laws of each party must be tested against these standards to determine their compliance. Thus, Lesotho laws, practices and procedures will be examined against the provisions of the CAT to determine whether they comply with them.

CHAPTER 3

THE PROHIBITION OF TORTURE IN LESOTHO

3.1 Introduction

The previous chapter has examined the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law by analysing both international and regional instruments. This chapter considers such prohibition in Lesotho by analysing the relevant provisions of the Constitution and the Human Rights Act as well as the practices and procedures. The analysis is made against the backdrop of Lesotho's international and regional obligations, especially the ones enshrined in the CAT.

3.2 The Position of the CAT in Lesotho

Lesotho is a party to several treaties,⁹⁴ and this may serve as evidence of formal commitment to the respect, promotion and protection of human rights and fundamental freedoms. Nonetheless, such treaties do not apply directly in the municipal law of Lesotho. The Constitution of Lesotho, unlike the Constitution of

⁹⁴ Lesotho is party to the following conventions and protocols: The CAT – Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the CCPR – International Covenant on Civil and Political Rights; the CEDAW – Convention on the Elimination of All Forms of Discrimination against Women; the CERD – International Convention on the Elimination of All Forms of Racial Discrimination; the CESCR – International Covenant on Economic, Social and Cultural Rights; the CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the CRC – Convention on the Rights of the Child; the CRC-OP-AC – Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and the CRC-OP-SC – Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography, available at <http://www.unhchr.ch/tbs/doc.nsf/> [accessed on 14 January 2009].

the Republic of South Africa,⁹⁵ does not make any reference to the status of international law in Lesotho. However, based on the decisions of the courts, Lesotho follows the dualist theory on the application of international law.

In *Director of Public Prosecution v. Mohollo Ts'oenyane & Others*, the High Court held that, '... international agreements, whether bilateral or multilateral require adoption by domestic legislatures to make them justiciable by the local courts.'⁹⁶ Similarly, in *Director of Public Prosecution v. Isaac Joseph*, the High Court held that in the absence of an enactment incorporating the treaty into domestic law, it has no force of law and could not affect the rights of the subjects.⁹⁷ In *Thabane Sesinyi & Another v. Director of Public Prosecution* the High Court held that:

'There are 3 principal methods by which Parliament may transform a treaty into municipal law, namely: the provisions of a treaty may be embodied in the text of an Act of Parliament. The treaty may be included as a schedule to a statute of Parliament. An enabling Act of Parliament may give the Executive the power to bring a treaty into effect in municipal law by means of a proclamation or Government Gazette.'⁹⁸

The transformation requirement may sound to be a bar to the application of international treaties in municipal law but, this is not the case. Since the CAT codifies the rule of customary international law prohibiting torture and other cruel, inhuman or degrading treatment or punishment, this rule is applicable in the municipal law of Lesotho through customary international law. In *Minister of*

⁹⁵ Ss 231 and 232 of the Constitution of the Republic of South Africa Act 108 of 1996 make reference to the status of international law within the Republic's domestic jurisdiction.

⁹⁶ *Director of Public Prosecution v. Mohollo Ts'oenyane & Others* CR/299/99 at 6, Judgment of 25 February 2000.

⁹⁷ *Director of Public Prosecution v. Isaac Joseph*, Extradition No.1/06 at 2, Judgment of 7 January 2008.

⁹⁸ *Thabane Sesinyi & Another v. DPP* CRI/A/18/2008 at 4-5, Judgment of 19 and 25 August 2008.

the Interior v. Bechler Bier; Bier v. Ministry of Interior, the South African Appellate Division Court held that 'where an unincorporated treaty provides evidence of a rule of customary international law it may be applied as a customary rule – but not as a treaty.'⁹⁹ Recently, in *Makotoko Lerotholi & Others v. Director of Public Prosecution (DPP)*, the High Court reiterated that:

'Even the police [and soldiers] are mandated by the law as well as by the provisions of international laws and Conventions regarding the rights of suspects to which this country is signatory, to treat suspects humanely and in accordance with the law. ...the suspects ... are equally entitled to a fair, human and just treatment in keeping with domestic and international law.'¹⁰⁰ [Italics added].

These decisions prove that, with or without transformation, the provisions of international law and conventions regarding the rights of suspects to which Lesotho is signatory may be applicable in domestic law. Similarly, as in other jurisdictions, courts may resort to international instruments to interpret municipal law. For example, the Supreme Court of Namibia in *Namunjepo & Others v. the Commanding Officer, Windhoek Prison & Another*¹⁰¹ had to determine the violation of the right to freedom from torture of five prisoners. This Court drew attention to several international instruments and standards including the Standard Minimum Rules for the Treatment of Prisoners, the Revised European Standard Minimum Rules for the Treatment of Prisoners, the ICCPR and the CAT. Finally, it found for the prisoners and held, *inter alia*, that:

'Whatever the circumstances, the practice to use chains and leg-irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited

⁹⁹ *Minister of the Interior v. Bechler Bier; Bier v. Ministry of Interior* 1948 (3) SA 409 (A) at 447.

¹⁰⁰ *Makotoko Lerotholi & Others v. DPP* CRI/A/23/2007 at 6, Judgment of 7 July 2007.

¹⁰¹ *Namunjepo & Others v. the Commanding Officer, Windhoek Prison & Another* [2000] 3 LRC 360.

so that it cannot stray. It is furthermore still a strong reminder of days gone by when people of this continent were carted away in bondage to be sold like chattels. To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow human beings and is in itself a humiliating and undignified experience.¹⁰²

Thus, notwithstanding the fact that the CAT has not yet been transformed by parliament into municipal law, the courts of Lesotho may apply and uphold the CAT obligations. Lesotho is obliged to uphold the rules of customary international law in any territory under its jurisdiction.

3.3 The Prohibition of Torture in Lesotho

Despite the fact that Lesotho has not yet transformed the CAT into its municipal law, there are some laws which relate to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

3.3.1 The Constitution of Lesotho of 1993

The Constitution of Lesotho (the Constitution) 'is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'¹⁰³ In *Khathang Tema Baitsooli & Another v. Maseru City Council & Others*, the High Court reiterated that 'the Constitution of Lesotho of 1993 is the supreme law of the Kingdom and any law or executive or administrative action which violates or is inconsistent with the Constitution is liable to be declared *null and void*.'¹⁰⁴

¹⁰² Ibid.

¹⁰³ S 2 of the Constitution.

¹⁰⁴ *Khathang Tema Baitsooli & Another v. Maseru City Council* Const/C/1/2004 at 7, Judgment of 26 Jan 2005.

Generally, the Constitution has listed the entrenched fundamental human rights and freedoms.¹⁰⁵ The right to 'freedom from inhuman treatment' is also included.¹⁰⁶ Thus, it is justiciable and must be jealously respected and protected by the Government. The Constitution states that 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'¹⁰⁷ Noticeably, the wording of this section is approximately similar to that one of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁸ Both the Constitution and this European Convention do not specifically mention the word 'cruel' in their prohibitive clauses. Comparatively, the ICCPR,¹⁰⁹ the American Convention on Human Rights,¹¹⁰ and the African Charter¹¹¹ included the word 'cruel' in their respective clauses. Notwithstanding the wording disparities, the intention is the same – to prohibit torture and other cruel, inhuman or degrading treatment or punishment.

The Constitution does not provide the content of the right to freedom from inhuman treatment. Thus, for purposes of interpreting this right, the national courts have to resort to the judgments and recommendations of the competent international and regional human rights bodies. Such bodies may include the HRC, the CaT, the African Commission on Human and Peoples Rights, the ECtHR and, the Inter-Am Ct.H.R.

¹⁰⁵ Chap II of the Constitution.

¹⁰⁶ S 4 (1) (d) of the Constitution.

¹⁰⁷ S 8 (1) of the Constitution.

¹⁰⁸ Chap 2 herein at para [2.3. (a)].

¹⁰⁹ Chap2 herein at para [2.2 (f)].

¹¹⁰ Chap 2 herein at para [2.3 (b)].

¹¹¹ Chap 2 herein at para [2.3 (c)].

It must be noted that, the Constitution has a blanket limitation clause, which provides that:

'... the provisions of this Chapter shall have effect for the purpose of affording protection of those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.'¹¹²

This limitation clause seeks to achieve a balance between the general interest and the interest of the individual. Nevertheless, in practice, if such limitation may not be carefully checked it might be invoked to negate the essential content of the right to freedom from inhuman treatment, which should not be the case.¹¹³ This right is specifically limited by the Constitution in the following words:

'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Lesotho immediately before the coming into operation of this Constitution.'¹¹⁴

Plainly, this provision deviates from international as well as regional human rights instruments. For instance, the ICCPR clearly shows that the right to freedom from torture is a non-derogable right.¹¹⁵ The HRC in its General Comment has reiterated that 'the rights enshrined in these provisions [art 4 (2)] are non-

¹¹² S 4 (1) last paragraph of the Constitution.

¹¹³ *S v. Makwanyane* 1995 (3) SA 391 (CC) at para [103].

¹¹⁴ S 8 (2) of the Constitution.

¹¹⁵ The ICCPR (note 21).

derogable'¹¹⁶ In 1999, the HRC considered the initial report of Lesotho and '... recommend[ed] that the State Party [should] take measures to bring all its laws into full conformity with the Covenant.'¹¹⁷ Furthermore, the CAT provides the same obligation of non-derogability of torture.¹¹⁸ Moreover, Lesotho being party to the CRC is unexceptionally bound by the provisions of article 37 thereof, which obliges States Parties to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹¹⁹ Lastly, the African Charter does not provide any limitation to this right. Obviously, the totality of these instruments suggests that the above constitutional limitation cannot be justified. Thus, the Constitution in this respect is not in *full* conformity with the provisions of these conventions of which Lesotho is a party.

Effectively, the limitation in question may be invoked to justify the imposition of corporal punishment by the national courts. Actually, corporal punishment is still one of the forms of sentence in Lesotho provided under the Criminal Procedure and Evidence (the CP & E) Act of 1981.¹²⁰ Such sentence has been regarded by most countries as a cruel, inhuman or degrading punishment hence abandoned. The HRC had advised Lesotho to abolish corporal punishment both in law and in practice.¹²¹

¹¹⁶ The HRC General Comment No.29 on the implementation of art 4 of the ICCPR (adopted on 24 July 2001) at para [7], available at <http://www.unhcr.ch/tbs/doc.nsf> [accessed on 20 January 2009].

¹¹⁷ The HRC Concluding Observation to Lesotho (CCPR/C/81/Add.14), (CCPR/C/SR.1743-1744), on 1 April 1999, available at <http://www.unhcr.ch/tbs/doc.nsf> [accessed on 20 January 2009].

¹¹⁸ Art 2 of the CAT (note 35).

¹¹⁹ Art 37 (a) of the CRC (note 94).

¹²⁰ Ss 307 – 310 of the CP & E Act 9 of 1981.

¹²¹ The HRC (note 117).

The above limitation may also be invoked to justify the imposition of the death sentence in Lesotho. The Constitution authorises the imposition of the death sentence under section 5, which reads as thus: 'Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.'¹²² This section has approximately followed the wording of article 6 (1) of the ICCPR.¹²³ The ICCPR allows the retentionists states to impose death penalty only 'for the most serious crimes.'¹²⁴ In *Judge v. Canada*, the HRC provided an interpretation of paragraphs 6 (1) and 6 (2) of the ICCPR as follows:

'Paragraph 1 of article 6, which states that "Every human being has the inherent right to life..." is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. ...For countries that have not abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.'¹²⁵

In Lesotho, there is no arbitrary deprivation of life if death ensues 'as a result of ... execution of the sentence of death imposed by a court in respect of criminal offence under the law of Lesotho of which [one] has been convicted.'¹²⁶ The CP & E preserves this sentence in sections 297 and 298. The offences which attract it

¹²² S 5 (1) of the Constitution.

¹²³ Art 6 (1) of the ICCPR provides that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

¹²⁴ Art 6 (2) of the ICCPR states: 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.'

¹²⁵ *Judge v. Canada* (2003) UN Doc CCPR/C/78/D/829/1998.

¹²⁶ S 5 (2) of the Constitution.

include murder, treason or rape.¹²⁷ But, the Second Optional Protocol to the ICCPR abolishes the death penalty.¹²⁸ However, Lesotho is not a Party to this Protocol. Nonetheless, many states have realised that there is a bond between torture and the death penalty resulting from the growing consciousness and increase of human rights standards and law in the international field. In *S v. Makwanyane* the South African Constitutional Court held that:

'Death is the most extreme form of punishment to which a convicted criminal can be subjected. Death is a cruel penalty and the legal processes, which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also inhuman punishment for it "... involves, by its nature, a denial of the executed person's humanity", and it is degrading because it strips the convicted persons of all dignity and treats him or her as an object to be eliminated by the State'.¹²⁹

Similarly, in *Kindler v. Canada* the Supreme Court of Canada has considered death penalty as:

'... the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and absolute and irrevocable castration. (It is) the ultimate desecration of human dignity... there is strong ground for believing, having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it endangers, that the death penalty

¹²⁷ S 297 (1) (a) & (b) of the CP & E.

¹²⁸ The Second Optional Protocol to ICCPR aiming at the abolition of the death penalty of 1990; its article 1 provides as follows:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

¹²⁹ *S v. Makwanyane* (note 113) at para [26].

cannot, except in exceptional circumstances, be justified in this country.¹³⁰

In Lesotho, practice reveals that the death sentence is no longer executed. In many criminal appeal cases, the Court of Appeal has commuted it to other forms of punishment. For example, in *Rex v. Sekhobe Letsie*, the death sentence was commuted to life imprisonment in respect of the second accused.¹³¹ Likewise, in *Phumo v. Rex*, the death sentence was substituted with seven years imprisonment.¹³² Similarly, in *Rex v. Sosolo*, the death sentence was commuted to 15 years imprisonment.¹³³ Recently, in *R v. Molise*, it was commuted to 17 years of imprisonment.¹³⁴ But, as the HRC has advised, this sentence must be totally abolished both in law and in practice.

3.3.2 The Human Rights Act of 1983

In addition to the Constitution, Lesotho prohibits torture through the Human Rights Act (the Human Rights Act). The purpose of this Act was stated in *Attorney-General & Another v. Swissbourgh Diamond Mines (Pty) Ltd & Others (No.2)* as follows:

'... is enacted to express in a codified form the fundamental premises and parameters of a civilised society based on the rule of law: it enacts a form of statutory discipline against which executive and legislative action has to be measured. It is an Act fundamental to the discipline of law-making in the Kingdom ... in the approach

¹³⁰ *Kindler v. Canada* (1992) 6 CRR (2d) 193 (SC) at 202 & 241.

¹³¹ *Rex v. Sekhobe Letsie* (note 53).

¹³² *Phumo v. Rex* CA/CRI/7/90.

¹³³ *Rex v. Sosolo* CRI/T/13/90.

¹³⁴ *R v. Molise*, 4 April 07, available at <http://www.saflii.org/ls/cases/LSCA/2007/6.html> [accessed on 18 Jan 2009].

to its interpretation and application there should be a purposive and generous temper¹³⁵

The Human Rights Act must be given a purposive and generous interpretation in order to accord with its rationale: to 'guarantee and safeguard the rights of individuals and to ensure that conduct of persons administering the laws of the country conform with the provisions of the Act and for connected purposes.'¹³⁶ Like the Constitution, it expressly lists down the rights and freedoms recognised and guaranteed therein.¹³⁷ However, the right to freedom from inhuman treatment is not included in that list. Nevertheless, it is guaranteed in section 11. Its wording is exactly the same as that in section 8 (1) of the Constitution and, states that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'¹³⁸ Similar to the Constitution, the Human Rights Act does not provide any definition of this right. Likewise, it has subjected this right to the limitation that: 'Punishment otherwise authorised by law shall not be held to be inconsistent with or in contravention of this section.'¹³⁹ Thus, the Human Rights Act, just like the Constitution, does not fully comply with the prerequisites of the ICCPR, the CAT, the CRC and, the African Charter. The effects of this limitation are exactly similar to the ones of the Constitution discussed above.

¹³⁵ *Attorney-General v. Swissbrough Diamond Mines (Pty) Ltd (No.2)* LAC (1995-1999) 214 at 227-228.

¹³⁶ The preamble of the Human Rights Act 24 of 1983.

¹³⁷ S 2 of the Human Rights Act.

¹³⁸ S 11 (1) of the Human Rights Act.

¹³⁹ S 11 (2) of the Human Rights Act.

3.4 The Position of Lesotho in Respect for the CAT in Practice

Torture is not yet an offence in Lesotho. However, the Constitution and the Human Rights Act do provide for the right to freedom from inhuman treatment. However, their *effectiveness* is open to doubt. Noticeably, Lesotho has not expelled, returned, extradited or deported any suspect of torture purely because torture is not one of the extraditable offences in Lesotho. There is bilateral Extradition Agreement between the Government of the Kingdom of Lesotho and the Republic of South Africa.¹⁴⁰ Nevertheless, this Agreement does not make any mention of torture, as one of the extraditable offences between these two states. Similarly, Lesotho has not arrested and kept any suspects of torture in custody, or even to prosecute such suspects.

Lesotho offers education to law enforcement personnel regarding human rights, especially the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. This is one of the principal positive aspects, which was observed by the HRC, *at least in 1999*, where it noted that 'the State Party has started courses for training of police officers, prison officers and magistrates in human rights.'¹⁴¹ Nevertheless, there is no clear evidence regarding the inclusion of this prohibition in the rules or instructions of their duties and functions. There is also no clear evidence regarding the interrogation rules and instruments. If they are available at all, one cannot safely conclude that they are being enforced having regard to the continuing occurrences of acts of torture and other cruel, inhuman or degrading treatment or punishment in Lesotho, especially in the LDF. Generally, investigations are conducted, promptly and impartially, in Lesotho save that there is no clear evidence in respect of investigations relating torture

¹⁴⁰ This Extradition Agreement was entered into on 20 June 1995.

¹⁴¹ The HRC (note 117).

and other cruel, inhuman or degrading treatment or punishment committed in any territory under its jurisdiction.

Victims of these acts in issue have the right to complain, *inter alia*, to the police and/or office of the Ombudsman. However, there are no established procedures for protecting complainants and witnesses from ill-treatment or intimidation as a consequence of their complaints or any evidence given. Recently, the author testified in a Court-Martial torture case on behalf of the accused in *Rex v. No.9769 Pvt Theko Lerotholi*,¹⁴² and nothing was done to ensure his protection against the intimidation resulting from his testimony.

Essentially, Lesotho has ensured in its legal system that the victims of such acts obtain redress and has an enforceable right to fair and adequate compensation.¹⁴³ However, one cannot safely hold that there are means for the full rehabilitation for victims. The state (public prosecutors) often rely on statements extracted by use of torture as evidence during criminal proceedings, but fortunately the courts have repeatedly declared such statements as inadmissible. In *Rex v. Majake Molupe*, the High Court held that: '... a confession will be admitted if it is proved to have been "freely and voluntarily" made by such a person in his "sound and sober senses" and without having been "unduly influenced."' ¹⁴⁴ Lesotho has a Constitution and a Human Rights Act which proscribe acts of torture and other cruel, inhuman or degrading treatment or punishment, but such laws have some grave deficiencies as observed.

Notwithstanding, these deficiencies the next section will examine the remedial options available in Lesotho for the victims of such acts.

¹⁴² *Rex v. No.9769 Pvt Theko Lerotholi* CM/T/15/06, Judgment of 7 November 2008. The author testified on behalf of the accused on 20 June 2008.

¹⁴³ S 22 of the Constitution.

¹⁴⁴ *Rex v. Majake Molupe* 1980 (1) LLR 112 at 113.

3.5 Remedial Options

In Lesotho, there are some remedies which may be claimed by the victims of torture and other cruel, inhuman or degrading treatment or punishment. Such remedies may be classified into three categories: civil, criminal and, procedural remedies.

3.5.1 Civil Remedies

(a) *Habeas Corpus*

The applicant, being a dependant or anyone with a substantial interest in the matter, may file an urgent *habeas corpus* (produce the body) application with the High of Lesotho requesting it to order the production of the body of the victim and an interdict against the respondents. The applicant must show in his/her papers that if the court does not grant such relief the victim might eventually die in detention due to the infliction of acts of torture and other cruel, inhuman or degrading treatment or punishment. A *Habeas corpus* application inherently also raises allegations of unlawful detention.¹⁴⁵

(b) Damages

The victim may claim damages for any mental or physical pain sustained while in the hands of the state authorities. In *Sebete Mohlaba & Others v. the Commander Royal LDF & Another*,¹⁴⁶ the appellants after a successful *habeas corpus* application, filed a civil case in the High Court against the respondents for damages for unlawful arrest, detention, pain, suffering and contumelia. *Mohlaba* claimed M250, 000 but was awarded M35, 000; *Phiri* and *Ts'epe*

¹⁴⁵ *Masefatsana Moloi v. the Commissioner of Police & Another* 1982-1984 LLR 58.

¹⁴⁶ *Sebete Mohlaba & Others v. the Commander Royal LDF & Another* 1995-1996 LLR 235.

claimed M120, 000, but were awarded M8, 000 and M20, 000 respectively. The Court of Appeal upheld their appeal against the award of damages and thus:

'... the plaintiff *Mohlaba* should have been awarded the sum of M75, 000, the plaintiff *Phiri* the sum of M25, 000 and the plaintiff *Ts'epe* the sum of M50, 000 the appeal must be upheld with costs and the award of damages by the Court *a quo* must be set aside and substituted by the amount's referred to in the previous paragraph.'¹⁴⁷

3.5.2 Criminal Remedies

Lesotho has not yet codified its criminal law; there is no Penal Code, therefore most criminal offences are defined by the Roman-Dutch Law, which is the common law of Lesotho. The common law of Lesotho provides some offences which may be invoked by the victims of torture and other cruel, inhuman or degrading treatment or punishment. The victim may go to the police station and open a criminal case of assault common. *Molefi Sekoto v. Rex* defined assault common as 'an intentional and unlawful application of force to the person of another or inspiration of a belief in that other person that force is immediately (not in future time) to be applied to him.'¹⁴⁸ Similarly, the victim may open a case of assault with intent to do grievous bodily (assault GBH). This offence is intended to cover excessive harm and, 'the court looks at the degree of force used, the part of the body assaulted, and the injuries sustained.'¹⁴⁹ *R v. Polaki* stated the elements of this offence as:

'(a) unlawful and intentional application of force directly or indirectly to the person of another, or (b) inspiring a belief in another person that force is immediately to be applied upon him or her, (c) either of these actions

¹⁴⁷ *Sebete Mohlaba & Others v. the Commander Royal LDF & Another* (note 146) at 242-243.

¹⁴⁸ *Molefi Sekoto v. R* CRI/APP/N0.6/82.

¹⁴⁹ GWKL Kasozi *Introduction to the Law of Lesotho: A Basic Text on Law and Aspects of Judicial Conduct and Practice* (1999) Vol.1 at 81.

must in addition be done with a specific intent to do grievous bodily harm.'¹⁵⁰

Sometimes the private parts of a female victim might have been interfered with during the ordeal. In such circumstances, such victim may open case of rape or indecent assault. For the former offence, it must be proved that the woman was sexually violated, that it is the accused who did it intentionally, and that he did it without the consent of the victim.¹⁵¹ By contrast, the latter consists in unlawfully and intentionally assaulting another with the object of committing an indecency.¹⁵² In 1992, the Special Rapporteur on Torture stated that since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they constituted an act of torture.¹⁵³

If the actual victim dies in detention due to such acts, the dependants may open case of murder or culpable homicide. *R v. Moupo* defined murder as an 'unlawful and intentional causing of death of another human being.'¹⁵⁴ By contrast, the common law, as stated by Kasozi, defined culpable homicide as 'the unlawful and negligent killing of another person.'¹⁵⁵ These criminal offences

¹⁵⁰ *R v. Polaki*, 28 Feb 2006, available at <http://www.saflii.org/ls/cases/LSHC/2006/14.html> [access on 18 Jan 09].

¹⁵¹ *Jankane Pitikoe v. Rex* CRI/A/15/79.

¹⁵² CR Snyman *Criminal Law* 3ed (1995) at 419.

¹⁵³ Summary record of the twenty-first meeting, United Nations document E/CN.4/1992/SR.21 at para [35], available at <http://www.unhchr.ch/tbs/doc.nsf/> [accessed on 20 January 2009].

¹⁵⁴ *R v. Moupo*, Judgment of 17 August 2006, available at <http://www.saflii.org/ls/cases/LSHC/2006/14.html> [accessed on 18 January 2009].

¹⁵⁵ Kasozi (note 149) at 78.

may be invoked to prohibit torture and other cruel, inhuman or degrading treatment or punishment. However, they may not adequately do so. Their elements show that they are intended mainly to combat other offences. Similarly, they attract punishment which does not reflect the gravity of the offence of torture.

3.5.3 Procedural Remedies

The Constitution as well as the CP & E provide for the procedural remedies in cases of a violation of the right to freedom from inhuman treatment. Such remedies relate to the right of access to courts and admissibility of confessions.

(a) Right of Access to Courts

In *Mandela v. Minister of Prisons*, the South African Appellate Division Court has observed that '...the right of access to the courts, is a basic or fundamental common law right.'¹⁵⁶ The Constitution guarantees the right of access to court by providing for the enforcement of protective provisions in cases of allegations of contravention of fundamental rights and freedoms. Section 22 of the Constitution states that:

'if any person alleges that any of the provision of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.'¹⁵⁷

¹⁵⁶ *Mandela v. Minister of Prisons* 1983 (1) SA 938 (A) at 957.

¹⁵⁷ S 22 (1) of the Constitution.

It was on the basis of this section that the applicants in *Sebete Mohlaba & Others v. the Commander Royal LDF & Another* discussed above managed to file a *habeas corpus* application and sought damages for personal injuries.

(b) Admissibility of Confessions

Any victim of torture and other cruel, inhuman or degrading treatment or punishment, who has been coerced to make a confession, may claim some procedural remedy guaranteed in CP & E. Section 228 of the CP & E provides, *inter alia*, that the confession is only admissible in evidence against its maker 'provided ... [it] is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.'¹⁵⁸ Hence, the accused in *Rex v. Majake Molupe* was acquitted because the High Court found that his confession was made contrary to the provisions of this section; the accused was tortured prior to the making of the confession.¹⁵⁹ With these elaborative remedies, the victims of the acts in issue are moderately protected.

3.6 Conclusion

Although the CAT has not yet been transformed into municipal law of Lesotho, its obligations are applicable and binding through the rules of customary international law. The Constitution and the Human Rights Act provide human rights and fundamental freedoms aimed at prohibiting torture and other cruel, inhuman or degrading treatment or punishment in Lesotho. However, the limitation clause in both Acts is too broad and may thus sanction certain forms of torture and other cruel, inhuman or degrading treatment or punishment. Despite the above shown deficiencies, the victims of such acts have some

¹⁵⁸ S 228 (1) of the CP & E.

¹⁵⁹ *Rex v. Majake Molupe* (note 144).

remedial options. Practically, some of these remedial options contribute towards promotion and protection of the right to freedom from inhuman treatment. Dependant may apply for the production of the victim's body; likewise the victim may apply for the exclusion of evidence given under compulsion in criminal proceedings, claim damages, or lodge criminal charges against the alleged perpetrators.

It has also been argued that in practice state authorities, especially in the LDF do not always respect the CAT and its equivalent provisions in the Constitution.

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CHAPTER 4

THE PROHIBITION OF TORTURE IN THE LESOTHO DEFENCE FORCE

4.1 Introduction

The previous chapter has considered the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in Lesotho by analysing the relevant provisions of the Constitution and the Human Rights Act against the backdrop of Lesotho's international and regional obligations. This chapter examines such prohibition in the LDF by analysing the relevant provisions of the LDF Act,¹⁶⁰ the LDF (Imprisonment and Detention) Regulations,¹⁶¹ and the LDF (Discipline) Regulations.¹⁶² The rationale is to determine their relationship with Lesotho's international and regional obligations, specifically the ones embodied in the CAT.

4.2 The Context in which Torture is committed in the LDF

The acts of torture and other cruel, inhuman or degrading treatment or punishment were previously perpetrated predominately during the recruit training. However, cruel training methods have been condemned by the command since 2004. Nonetheless, such acts continue to occur in the military detention areas. The information pertaining to these acts in issue is not easy to find in the LDF, but there are High Court and Courts-Martial decisions which provide such information.

¹⁶⁰ LDF Act 4 of 1996.

¹⁶¹ LDF (Imprisonment & Detention) Regulations 213 of 2000 (the Imprisonment and Detention Regulations).

¹⁶² LDF (Discipline) Regulations 29 of 1998 (the Discipline Regulations).

In *Mathabeng Lechalaba v. the Commander LDF & Others*,¹⁶³ the applicant was arrested and detained at Ratjomose Barracks military detention centre on 14 September 2000 on allegations of having stolen rifles from Ratjomose Barracks armoury in September 2000. He was subjected to acts of torture until his release on 19 September 2000. The matter was settled out of court on 8 December 2006 with an amount of M57, 468.35. In *Theko Lerotholi v. the Right Honourable Prime Minister Mr Pakalitha B Mosisili & Others*,¹⁶⁴ the applicant was arrested and detained at Ratjomose Barracks military detention centre on 10 December 2004 on allegations of having stolen rifles at Makoanyane Barracks armoury. He was subjected to acts of torture until he escaped on 12 December 2004. On 7 September 2005, the High Court ordered respondents not to assault applicant through use of whatever methods of torture.¹⁶⁵

In *Tihoriso Letsie v. the Commander LDF & Others*,¹⁶⁶ the applicant was arrested and detained at Ratjomose Barracks military detention centre on 12 December 2004 on allegations of having assisted *Theko Lerotholi* to escape from the detention. He was subjected to acts of torture until released by the High Court through a *habeas corpus* and interdict application on 27 December 2004.¹⁶⁷ In

¹⁶³ *Mathabeng Lechalaba v. the Commander LDF & Others* CIV/T/142/2001, settled out of court on 8 Dec 2006.

¹⁶⁴ *Theko Lerotholi v. the Right Honourable Prime Minister Mr Pakalitha B Mosisili & Others* CIV/APN/625/2004, Final Court Order of 7 September 2005.

¹⁶⁵ This was the first prayer in that Final Order; third and fourth respondents were the Commander of the LDF and the Commissioner of Police (COMPOL) respectively. The particularized respondents were some members of LDF and LMPS respectively.

¹⁶⁶ *Tihoriso Letsie v. the Commander LDF & Others* CIV/APN/635/2004.

¹⁶⁷ The *habeas corpus* application was filed by the brother of *Tihoriso Letsie* in *Tlali Letsie v. the Commander LDF & Others* CIV/APN/631/2004, Final Court Order of 27 December 2004.

'Makhosi Thants'i v. the Commander LDF & Others,'¹⁶⁸ the applicant's husband was kidnapped and detained at Makoanyane Barracks military detention centre on 22 June 2007 on allegations of having snatched the LDF rifles from some members of the LDF with intent to commit treason. The husband was subjected to acts of torture until he escaped on the same month while in admission at Makoanyane Military Hospital. Though he was still at large, on 29 June 2007, the High Court ordered the respondents to refrain from physically, mentally and/ or psychologically assaulting and *torturing* Thabo Thants'i.

In '*Mamalebanye Lerotholi v. the Commander LDF & Others*,'¹⁶⁹ the applicant's husband (Makotoko Lerotholi) was kidnapped by the members of the LDF and detained at Makoanyane Barracks military detention centre on 22 June 2007 on allegations of having snatched the LDF rifles from some members of the LDF with intent to commit treason. He was subjected to acts of torture until he appeared before the High Court, straight from Makoanyane Military Hospital, on 2 July 2007 through a *habeas corpus* and interdict application. The Court observed that 'he was so seriously injured and bruised that he could not eat, he could barely swallow water; and lastly that he was unable to walk on his own and that he had to be supported by his captors.'¹⁷⁰ The Court ruled in favour of the applicant and held that, 'no matter what, not even one peace officer has the right of whatever nature to treat any suspect in the way in which the detainee in this application has been treated. Every person's fundamental human rights and

¹⁶⁸ '*Makhosi Thantsi v. the Commander LDF & Others* CIV/APN/83/245/2007, Interim Court Order of 29 June 2007.

¹⁶⁹ '*Mamalebanye Lerotholi v. the Commander LDF & Others* (note 3).

¹⁷⁰ '*Mamalebanye Lerotholi v. the Commander LDF & Others* at 13.

freedom have and are safe-guarded by our Constitution – vide Sections 4 and 8 [of] Chapter II.¹⁷¹

In *Makotoko Lerotholi, Major Ramabele Mokhants'o, Captain Lehloa Ramots'o, Corporal Paul Majalle and, Elias Motlomelo v. DPP*,¹⁷² accused contended before the High Court that they were unlawfully brought before the remanding court because they were arrested by unqualified people, detained beyond the forty-eight (48) hours,¹⁷³ and tortured by some soldiers of the LDF, and therefore the remanding court had no legal powers to remand them. The High Court ruled in their favour and found that 'all suspects save for *Motlomelo*, had sustained injuries during their detentions and consequently admitted at the Makoanyane Military Hospital.'¹⁷⁴ In *Rex v. No. 11499 Pvt Mohale*,¹⁷⁵ the accused appeared

¹⁷¹ *Mamalebanye Lerotholi v. the Commander LDF & Others* at 22-23.

¹⁷² *Makotoko Lerotholi, Major Ramabele Mokhants'o, Captain Lehloa Ramots'o, Corporal Paul Majalle and, Elias Motlomelo v. DPP* (note 100), Judgment on a point of the Court's Jurisdiction to remand the accused. This case was famously known as '*Makoanyane Five*.'

¹⁷³ Forty-eight hours is the initial detention duration provided for by Section 32 (1) of the CP&E 1981 read with Section 6 (6) of the Constitution; page 15 of the Judgment reveals the following: 1st suspect was kidnapped and detained by soldiers on 22 June 2007 and only appeared before the High Court (through *habeas corpus* application) on 29 June 2007 – he was handed over to the police on 27 June 2007 but the police declined acceptance; 2nd suspect was arrested and detained on 17 June 2007 until on 5 July 2007 as he stood before the remanding Court straight from Makoanyane Military Hospital – he was never handed over to the police; 3rd suspect was arrested and detained on 17 June 2007 until when he appeared before the remanding Court on 5 July 2007 – he was handed over to the police on 28 June 2007; 4th suspect was arrested and detained on 22 June 2007 until he appeared before the remanding Court on 5 July 2007 – he was handed over to the police on 29 June 2009; and 5th suspect was arrested and detained on 24 June 2007 until he appeared before this Court on 5 July 2007 – he was handed over to the police on 29 June 2007.

¹⁷⁴ *Makotoko Lerotholi & Others v. DPP* (note 172) at 16.

before the Court-Martial on the charge of illegal possession of dagga contrary to section 81 (1) of the LDF Act. The accused was arrested and detained at Ratjomose Barracks military detention centre on 22 July 2008. His first appearance before the Court-Martial was on 15 August 2008, and was only released from the detention by the Court-Martial. During the proceedings, the Court-Martial found that the accused's confession resulted from acts of torture contrary to the CP & E.¹⁷⁶ Accordingly, he was acquitted.

Lastly, in *Rex v. No.9769 Pvt Theko Lerotholi*,¹⁷⁷ the accused appeared before the Court-Martial on the charge of escaping from lawful custody contrary to section 70 of the LDF Act. He contended that the detention was unlawful because he was tortured. Eventually, the Learned Judge Advocate advised the Court-Martial to acquit the accused. In his advice, he said:

'This evidence is corroborated by the evidence of DW2 [the author] who said accused hands had bruises or wounds as if he had been burned. DW2 stated that when he saw accused the first time accused had no injuries and he was happy, however, this second time accused was very disturbed and looked very tired. ... the report of Sgt Lefoka who was on guard of accused clearly show that he knew that accused was being tortured Accused himself, while giving his evidence, stated clearly that he reported the torture incident to Sgt Lefoka who was always guarding him. The law relating to such kind of evidence is that accused does not even have to prove his case as long as his story can be regarded as being reasonably possibly true, then it suffices.... The accused person is under no duty to prove his innocence.'¹⁷⁸

¹⁷⁵ *Rex v. No.11499 Pvt Mohale CM/T/18/07* at 11, Judgment of 29 August 2008. 'No.11499' refers to the 'Force Number' of the accused soldier while 'Pvt' refers 'Private' being the rank of the accused soldier.

¹⁷⁶ S 228 (1) of CP & E (note 158).

¹⁷⁷ *Rex v. No.9769 Pvt Theko Lerotholi* (note 142). This case resulted from the escape stated in *Theko Lerotholi v. the Right Honourable Prime Minister Mr Pakalitha B Mosisili & Others* (note 164).

¹⁷⁸ *Rex v. No.9769 Pvt Theko Lerotholi* (note 177) at page 65.

The accused was acquitted accordingly. On the basis of these decisions, it is reasonable to conclude that acts of torture and other cruel, inhuman or degrading treatment or punishment do occur in the military detention centres. It is important to mention that no investigation has been conducted to determine the extent to which torture occurs and is used in the LDF and to determine whether to charge the alleged perpetrators.

4.3 The Prohibition of Torture in the Lesotho Defence Force

Chapter three showed that torture is not recognised as a criminal offence in Lesotho and this is the same with regard to the LDF. However, there are three pieces of legislation which seek to protect and promote respect for the right to freedom from inhuman treatment in the LDF.

4.3.1 The LDF Act¹⁷⁹

The LDF is a disciplined force,¹⁸⁰ established by the Constitution for the defence of Lesotho.¹⁸¹ The LDF is also governed by the LDF Act, which is intended 'to provide for the command, control and administration of the [LDF] and to provide for incidental matters.'¹⁸² The same Act creates the military court¹⁸³ to try both military and civil offences.¹⁸⁴ The procedure that has to be applied by the Courts-Martial emanates from 'the law in force in the criminal proceedings

¹⁷⁹ LDF Act (note 6).

¹⁸⁰ S 24 (1) (a) of the Constitution.

¹⁸¹ S 145 (1) of the First Amendment to the Constitution Act 1 of 1996.

¹⁸² Preamble of the LDF Act.

¹⁸³ S 2 (1) of the LDF Act interprets 'military court' to mean either Court-Martial or Court of Summary jurisdiction.

¹⁸⁴ Ss 41 – 80 of the LDF Act provide for military offences, while s 81 covers civil offences triable by military court; but torture is none of such offences.

in the civil courts' with regard to 'the onus of proof; and the sufficiency or admissibility of evidence, and the competency, compellability, examination and cross-examination of witnesses; and any matter of procedure.'¹⁸⁵ In practice, this provision is largely observed by the Courts-Martial.¹⁸⁶

'Military offences' are offences which are 'purely' military in the sense that they may only be committed by members of the army acting in their official capacity; not by civilians. By contrast, the LDF Act defines 'civil offences' as '...any act or omission punishable by the law of Lesotho or which, if committed in Lesotho, would be punishable by the law'¹⁸⁷ Evidently, this definition excluded the offence of torture from the military jurisdiction. Nonetheless, there are some military offences which may be invoked to prohibit acts of torture and other cruel, inhuman or degrading treatment or punishment.

(a) The Military Offences in Place to Combat acts of Torture in the LDF

The LDF Act provides for the offence of insubordinate behaviour by stating that 'any person subject to this Act who strikes or otherwise uses violence to, or offers violence to, a superior officer commits an offence and shall be liable to' a term not exceeding 3 years.¹⁸⁸ The facts in *Tlhoriso Letsie v. the Commander LDF & Others*,¹⁸⁹ and *Rex v. Makotoko Lerotholi & Others*,¹⁹⁰ revealed that this military

¹⁸⁵ S 104 of the LDF Act.

¹⁸⁶ *Rex v. No.10937 Pvt Mohale* (note 175) and, *Rex v. No.9769 Pvt Theko Lerotholi* (note 177).

¹⁸⁷ S 81 (2) of the LDF Act.

¹⁸⁸ S 50 (1) (a) (i) & (ii) of the LDF Act. The term 'superior officer' in this section means an officer, warrant or non-commissioned officer of superior rank or seniority. The sentence should not exceed 3 years if offence was committed on active service; and not exceed 2 years if not committed on active service.

¹⁸⁹ *Tlhoriso Letsie v. the Commander LDF & Others* (note 166) – the applicant was the member of the LDF with the rank of Lieutenant and, was tortured and subjected to cruel, inhuman or

offence was committed by some members of the LDF. However, the alleged perpetrators have not been prosecuted before the military or civil courts in Lesotho. Notwithstanding, even if the perpetrators have been prosecuted, the elements of this offence as well as the punishment to be awarded cannot adequately measure up to the prerequisites of the offence of torture regard being had to the latter's grave nature and unique elements.¹⁹¹

Moreover, the LDF Act creates the offence of ill-treatment of officers or men of inferior ranks. It stipulates that, if an officer, warrant-officer or non-commissioned officer (NCO) 'strikes or otherwise ill-treats any officer of inferior rank or less seniority, or any soldier subject to this Act, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 2 years.'¹⁹² The cases mentioned above show that this offence was committed. Likewise, none of the officers and soldiers alleged to be involved in such acts had been prosecuted in terms of this section or under any provisions of Lesotho law. Besides, this section only mentions 'ill-treatment,' it does not expressly include 'cruel, inhuman or degrading treatment or punishment.' Thus, its elements fall short of the requirements of the offence of torture. Similarly, the period of two

degrading treatment some members of the LDF who were junior to him in both seniority and rank; also in *Ramorontsi Ntaote v. the Commander LDF & Others* CIV/T/125/2001 pending Counsel submissions on 6 to 7 August 2009 – the applicant was a member of the LDF and, in his undisputed evidence before High Court he stated the names of some members of the LDF who had tortured him and were junior to him in both seniority and rank.

¹⁹⁰ *Makotoko Lerotholi & Others v. DPP* (note 172), where the accused of the ranks of Major, Captain and Corporal were tortured and subjected to cruel, inhuman or degrading treatment by some members of the LDF who were junior to them in both seniority and rank.

¹⁹¹ The elements of torture were stated in Chapter two (note 29).

¹⁹² S 76 (a) read with (b) of the LDF Act.

years imprisonment is a lenient sentence for purposes of combating acts of torture and other cruel, inhuman or degrading treatment or punishment.

Furthermore, the LDF Act provides for the offence of disgraceful conduct. It provides, *inter alia*, that it is an offence for any person subject to the LDF Act to conduct himself in a cruel and disgraceful manner.¹⁹³ The penalty to be awarded is the imprisonment for a term not exceeding 4 years. The decisions shown above revealed acts of cruelty to the victims. Nonetheless, like other sections, this section has not yet been invoked against the alleged perpetrators of such cruel acts in the LDF. Significantly, this section makes specific reference to 'cruel' conduct which may capture the cruel acts envisaged under the CAT. However, the section has left out other despicable acts such as 'inhuman or degrading treatment or punishment.' Thus, this military offence is still inadequate for purposes of prohibiting acts of torture and other cruel, inhuman or degrading treatment or punishment. Also the period of four years imprisonment cannot meet the gravity of the offence of torture.

In addition, the LDF Act makes it clear that it is a military offence to discredit the reputation of the LDF.¹⁹⁴ Upon conviction, the accused is 'liable to imprisonment for a term not exceeding 2 years.' The prevalence of acts of torture and other cruel, inhuman or degrading treatment or punishment has a negative impact on the reputation of the LDF. However, none of the officers and soldiers who have been alleged to have committed this military offence have been prosecuted before any Court-Martial or civil courts. The imprisonment period in this section weakens this military offence with regard to the gravity of the offence of torture.

¹⁹³ S 77 (1) of the LDF Act.

¹⁹⁴ S 77 (2) of the LDF Act.

Lastly, the LDF Act establishes the offence of conduct to the prejudice of military discipline by stating that any person subject to it, who conducts himself in a manner prejudicial to 'good order and military discipline commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 2 years.'¹⁹⁵ Definitely, any officer or soldier who infringes the right to freedom from inhuman treatment cannot be regarded as being in consonant with good order and military discipline. Nevertheless, none of the members of the LDF alleged to have committed acts of torture and other cruel, inhuman or degrading treatment or punishment in the cases discussed above have been charged under to this section. In conclusion, although the LDF Act does not recognise the offence of torture, it has some military offences which may be invoked to prevent and redress torture. However, even if such offences may be applied effectively, their elements and sentences fail to satisfy the requirements of the offence of torture. In particular, the penalties therein do not fit the gravity of such offence; thus they cannot be considered as 'appropriate penalties' in terms of the CAT.¹⁹⁶ Though such offences may not *fully* meet the fundamentals of the offence of torture, they can still contribute to the struggle against such acts if properly invoked against the alleged perpetrators. As shown above, several applications for *habeas corpus* and interdicts have alleged acts of torture and other cruel, inhuman or degrading treatment or punishment in the LDF. The alleged perpetrators had not been prosecuted under the above mentioned sections of the LDF Act. The allegations of these acts are not being investigated beyond these decisions. This, therefore, demonstrates the lack of commitment by the LDF as well as Lesotho Government to combat these forms of abuses.

¹⁹⁵ S 79 of the LDF Act.

¹⁹⁶ Art 4 (2) of the CAT (note 50).

4.3.2 The Imprisonment and Detention Regulations¹⁹⁷

The Imprisonment and Detention Regulations were enacted pursuant to the provisions of section 134 of the LDF Act. Thus, they have a legally binding force on the prisoners as well as on the members of the LDF. They provide mainly for the treatment of both tried and untried prisoners. The provisions of these Regulations intend to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in the military detention centre and/ prison.

(a) Content

Every prisoner is medically examined by the medical officer on the day of reception.¹⁹⁸ On the same day, the prisoner 'is given full information about the rules governing the treatment of prisoners of his class.'¹⁹⁹ The gaoler must interview each prisoner upon its discharge or removal to another prison.²⁰⁰ Similarly, such prisoner must be medically examined by the medical officer.²⁰¹ These procedures contribute to the prevention of torture and other cruel, inhuman or degrading treatment or punishment in the military prison.

Moreover, the Provost Officer or his officer is obliged to visit all prisons and examine, *inter alia*, the treatment of prisoners.²⁰² However, in practice, this obligation is not fulfilled considering that all the victims in the above mentioned cases were subjected to acts of torture and other cruel, inhuman or degrading

¹⁹⁷ The Imprisonment and Detention Regulations (note 161).

¹⁹⁸ Reg 16 (1) of the Imprisonment and Detention Regulations.

¹⁹⁹ Reg 18 (1) of the Imprisonment and Detention Regulations.

²⁰⁰ Reg 21 of the Imprisonment and Detention Regulations.

²⁰¹ Reg 22 (1) of the Imprisonment and Detention Regulations.

²⁰² Reg 27 (1) of the Imprisonment and Detention Regulations.

treatment or punishment while in military detention centres. The prisoner has the right to make a request to see the Provost Officer, the officer in charge, the gaoler, the medical officer, the superintendent or a member of the visiting committee.²⁰³ Any person may be allowed to view the prisons and communicate to the prisoner subject to the authorisation by the Provost Officer.²⁰⁴ But, the regulation does not provide the grounds on which the Provost Officer may deny such communication. Thus, such communication may be denied arbitrarily especially in cases where the prisoner has been subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment. Similarly, the ministers of religion are permitted to visit the prisoners of their respective denominations and, the prisoner has the right to attend religious services of his denomination subject to the discretion of the Provost Officer.²⁰⁵ Likewise, it may also be abused in practice if not carefully checked. Furthermore, the prisoner has the right to write and receive the letters.²⁰⁶ However, the prisoner is only allowed 'to write, and to receive, a letter once every calendar month; and to receive a visit once in every calendar month.'²⁰⁷ The time granted for the writing and reception of letters as well as for the visits is unreasonably prolonged. It may be possible for the prisoner to be subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment, and eventually heal without informing or being seen by his friends or relatives.

²⁰³ Reg 48 of the Imprisonment and Detention Regulations.

²⁰⁴ Reg 52 of the Imprisonment and Detention Regulations.

²⁰⁵ Reg 56 of the Imprisonment and Detention Regulations.

²⁰⁶ Reg 63 of the Imprisonment and Detention Regulations.

²⁰⁷ Reg 63 (1) (b) & (c) of the Imprisonment and Detention Regulations.

In addition, the prisoner has a right to be interviewed by his legal adviser in the sight, but not hearing of the gaoler.²⁰⁸ Every prisoner who complains of illness has the right to be attended by the medical officer.²⁰⁹ Most importantly, 'every officer who forms the opinion that the physical or mental health of a prisoner deserves special notice and care, shall report such opinion to the officer in charge or the gaoler, even if such prisoner does not complain.'²¹⁰ Evidently, officers of the LDF must not instigate or tolerate any acts of torture and other cruel, inhuman or degrading treatment or punishment taking place in the military detention centres and/ or prison. This regulation is consonant with the international standards set forth in the United Nations Code of Conduct for Law Enforcement Officials.²¹¹

The medical officer has the duty to report the prisoner's mental or physical health if he believes that is likely to be injuriously affected by any conditions of imprisonment.²¹² In practice, this reporting procedure seems to be futile, if it occurs at all. In *Tlhoriso Letsie v. the Commander LDF & Others*,²¹³ and *Makotoko Lerotholi & Others v. DPP*,²¹⁴ the victims had open wounds tripping with blood. Nonetheless, they were kept in military detention under the same torturous conditions.

²⁰⁸ Reg 71 (1) of the Imprisonment and Detention Regulations.

²⁰⁹ Reg 74 of the Imprisonment and Detention Regulations.

²¹⁰ Reg 75 (1) of the Imprisonment and Detention Regulations.

²¹¹ The United Nations Code of Conduct for Law Enforcement Officials (note 11).

²¹² Reg 77 (a) of the Imprisonment and Detention Regulations.

²¹³ *Tlhoriso Letsie v. the Commander & Others* (note 166).

²¹⁴ *Makotoko Lerotholi & Others v. DPP* (note 172).

An untried prisoner may be visited by the medical officer for purposes of preparing his defence.²¹⁵ However, such a visit may be forfeited.²¹⁶ Lastly, he is permitted to deliver confidential written instructions to his legal adviser.²¹⁷

(b) A Critique of the Imprisonment and Detention Regulations

The officer in charge is allowed to apply force to a prisoner, but 'no more force than is necessary shall be used.'²¹⁸ The regulation does not state any grounds which may warrant such application of force to a prisoner. Similarly, it does not give any yardstick to determine the 'necessary' force. All these are left in the discretion of the officer in charge. In practice, this regulation is arbitrarily invoked by the officers in charge. Hence, the prisoners are subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment under the pretext of this regulation. Furthermore, a prisoner who has been found guilty of any offence against discipline may be given, *inter alia*, a sentence of solitary confinement or spare diet.²¹⁹ Keeping a prisoner in a 'solitary confinement for a period not exceeding 28 days'²²⁰ or 'spare diet for a period not exceeding 15 days'²²¹ may reasonably be regarded as amounting to acts of torture and other cruel, inhuman or degrading treatment or punishment. Giving a prisoner 500 grams of mealie meal or bread plus unlimited water per day for a period of 15

²¹⁵ Reg 102 of the Imprisonment and Detention Regulations.

²¹⁶ Reg 104 of the Imprisonment and Detention Regulations.

²¹⁷ Reg 103 of the Imprisonment and Detention Regulations.

²¹⁸ Reg 31 (1) & (2) of the Imprisonment and Detention Regulations.

²¹⁹ Regs 41 (d) & (e), 42 (2) (b) (iv) & (v), 43 (2) and 44 (1) & (2) of the Imprisonment and Detention Regulations.

²²⁰ Reg 43 (2) of the Imprisonment and Detention Regulations.

²²¹ Reg 42 (2) (b) (v) of the Imprisonment and Detention Regulations.

days may squarely be seen as constituting such acts.²²² Such forms of sentence are the ones denounced by the Standard Minimum Rules for the Treatment of Prisoners²²³ as well as by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.²²⁴

Moreover, 'a prisoner may be placed under mechanical restraint when it appears necessary to do so in order to prevent him from ... creating a disturbance.'²²⁵ The regulation does not give examples of 'disturbance' which may attract mechanical restraint. A prisoner may often make noise by shouting at others and thus create a disturbance, which will subject him to mechanical restraint. In that way, a prisoner is not being treated like a human being. Whatever the circumstances, the practice to use chains and leg-irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray.²²⁶ Prisoners retain their right to respect for their human dignity and their humanity. In practice, this regulation may be applied capriciously.

Besides, the gaoler is obliged to read every letter to and from a prisoner, except the ones to or from his legal advisor, and such letter may be impounded by the Provost Officer 'if, in his opinion, its contents are objectionable'²²⁷ The

²²² Spare diet per day is shown in Schedule of the Imprisonment and Detention Regulations at 1145.

²²³ The Standard Minimum Rules for the Treatment of Prisoners (note 13).

²²⁴ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (n 14).

²²⁵ Reg 46 (2) of the Imprisonment and Detention Regulations.

²²⁶ *Namunjepo & Ors v. the Commanding Officer, Windhoek Prison & Another* (note 102).

²²⁷ Reg 64 (3) of the Imprisonment and Detention Regulations.

regulation does not define the word 'objectionable' and the Provost Officer, therefore, may exercise his discretion arbitrarily. For instance, any letter from a prisoner informing his family or friends about the acts of torture and other cruel, inhuman or degrading treatment or punishment taking place in the detention and/ prison may be regarded by the Provost Officer as containing objectionable contents. Likewise, the letter and visits of a prisoner undergoing solitary confinement may be deferred by the gaoler until such confinement has expired.²²⁸ This deferment is also left to the discretion of the gaoler, who may abuse it particularly in matters where acts of torture and other cruel, inhuman or degrading treatment or punishment have been perpetrated on a prisoner while in such a confinement.

Furthermore, a prisoner may be allowed to write and receive a reply and forgo any visit which he/she may be entitled.²²⁹ That means, in the discretion of the gaoler, a prisoner may not be seen, and his letter is also subjected to reading and impounding if found objectionable. This regulation may be invoked arbitrarily as a shield in cases of torture and other cruel, inhuman or degrading treatment or punishment committed on a prisoner. Though, an untried prisoner has a right to be attended by a registered medical practitioner of his own choice, it is subject to the discretion of the Provost Officer. The victims in the decisions discussed above were all untried prisoners, but were never attended by a registered medical practitioner of their own choice; all of them were taken to Makoanyane Military Hospital and subsequently returned to the same detention and/ prison where they were previously tortured. In *Tlhoriso Letsie v. the Commander LDF & Others*, the High Court had to order the Superintendent of Makoanyane Military Hospital to give out the medical record of the applicant

²²⁸ Reg 66 of the Imprisonment and Detention Regulations.

²²⁹ Reg 68 of the Imprisonment and Detention Regulations.

while in detention.²³⁰ This clearly shows that it is possible for the Provost Officer to connive with the Superintendent regarding the medical records of the prisoners. Thus, the discretionary power given to the Provost Officer regarding the attendance of a prisoner by a registered medical practitioner may be abused.

Lastly, 'an untried prisoner may be visited during such hours, and under restrictions, as the Provost Officer may determine.'²³¹ The author was allowed to visit *Tlhoriso Letsie* while in military custody only on 13 December 2004. From 16 December 2004, the author was denied access to visit him and, was told by the gaoler that such person can only be seen by his relatives; which was a lame excuse because the relatives had already been denied access. Hence, the relative filed an application of *habeas corpus* and interdict with the High Court in *Tlali Letsie v. the Commander LDF & Others*.²³² Eventually, the author was able to see and meet that person on 27 December 2004 at the High Court premises after he was released. This case demonstrates how the Provost Officer may abuse this regulation.

4.3.3 The Discipline Regulations²³³

These Regulations were enacted pursuant to the provisions of section 192 of the LDF Act. They are concerned with such matters as the redress of any abuse against any aggrieved member.²³⁴ They provide for a procedure to be followed by the aggrieved member.

²³⁰ *Tlhoriso Letsie v. the Commander LDF & Others* (note 166).

²³¹ Reg 101 of the Imprisonment and Detention Regulations.

²³² *Tlali Letsie v. the Commander LDF & Others* (note 162).

²³³ The Discipline Regulations (note 166)

²³⁴ Reg 28 (1) op cit defines "'aggrieved member" [as] a member who considers himself wronged in any matter by a superior officer' while a "'redressing officer" in relation to an

(a) The Procedure for Redress

The Regulations guarantee the right of an aggrieved member to complain to the 'redressing officer.'²³⁵ The grounds for the complaint and the redress sought must be clearly spelt out.²³⁶ The redressing officer must investigate the complaint and 'where he considers it proper and equitable to do so, shall grant the redress sought.'²³⁷ But where redress is not granted or the matter is not resolved to the satisfaction of the aggrieved person, the redressing officer is obliged to refer such complaint together with his comments to the officer superior to him.²³⁸ If the redressing officer is the unit commander, he must refer the complaint together with his comments to the commanding officer; commanding officer to the superior officer;²³⁹ superior authority²⁴⁰ to the Commander and, Commander to the Defence Council.²⁴¹ If the aggrieved member is not an officer, the decision of the Defence Council is final.²⁴² By contrast, if the Defence Council does not resolve the complaint of an officer to his satisfaction, it is bound to refer

aggrieved member, means the officer, other than the superior officer about whom the complaint is made'

²³⁵ Reg 28 (2) (a) & (b) of the Discipline Regulations.

²³⁶ *Ibid.*

²³⁷ Reg 28 (3) of the Discipline Regulations.

²³⁸ Reg 28 (4) of the Discipline Regulations.

²³⁹ Reg 2 of the Discipline Regulations defines 'superior officer' as an officer or NCO who is of superior rank of appointment to the member.

²⁴⁰ Reg 2 of the Discipline Regulations defines 'superior authority' as the Commander, Deputy Commander, a brigade commander or an officer appointed as such.

²⁴¹ Reg 28 (5), (6), (7) & (8) of the Discipline Regulations.

²⁴² Reg 28 (8) (b) of the Discipline Regulations.

the complaint with its comments to the King whose decision shall be final.²⁴³ Fundamentally, this procedure guarantees any aggrieved member the right to complain in the military. Nonetheless, it has some drawbacks.

(b) A Critique of the Redress Procedure

The redressing officer is expected to resolve the complaint properly and equitably. However, the procedure does not provide any guiding principles to assist the redressing officer in arriving at such proper and equitable decision. Moreover, this procedure obliges the redressing officer to refer the complaint with his comments to another officer. But it does not provide for any alternative route in cases where such redressing officer does not refer the matter accordingly. The aggrieved member may be victimised when he tries to inquire about the referral from the redressing officer. Besides, the procedure does not provide any enforcement mechanism in cases of breach. It may therefore prove to a finding of a futile exercise.

The procedure does not provide for any time periods with which the redressing officer must consider the complaint. The redressing officer may take period of a year or more in considering the complaint. Also, there is no time given between the unsatisfactory resolution and the referral. The redressing officer, after giving the aggrieved member unsatisfactory resolution may take any time up to a year or more before referring the matter. Thus, the procedure may be abused. Furthermore, the procedure does not provide for an alternative redressing officer in cases where the complainant is made directly against the Commander. The Commander cannot, therefore, preside over such complainant without undermining the principles of impartiality, independence and *nemo iudex in causa sua*. The Commander is the only officer who has the

²⁴³ Reg 28 (9) of the Discipline Regulations.

power to appoint any officer as a superior authority.²⁴⁴ Thus, no one may appoint any officer in the LDF as a superior officer for purposes of considering the complaint directed to the Commander. In such a case, it seems the complaint cannot be considered at all.

One of the elements of the offence of torture is that torture is committed by the state authorities or anyone acting in such capacity.²⁴⁵ In this regard, the procedure for redress seems to be impracticable in the cases of torture because some of the redressing officers might have instigated, consented or acquiesced to such act. Thus, such situation might compel the aggrieved member to resort to the civil remedies available in Lesotho.

It is important to mention that the investigation process in the LDF is mainly done by the members of Military Intelligence (MI) Unit while the members of Military Police (MP) Unit are empowered to effect arrest. The majority of both Units are recruited from school certificate holders. Most of them have not qualified for College or University education. Although they receive some training in the military, they do not have adequate skills to handle human rights issues especially on the right to freedom from inhuman treatment.

4.4 Conclusion

The acts of torture and other cruel, inhuman or degrading treatment or punishment occur mainly in the detention centres and/ prison in the LDF. Nevertheless, the LDF laws seek to prevent such acts through some military offences, standard regulations governing the correctional services and disciplinary procedures. The military offences play some role save that their elements and penalties are inadequate for purposes of the offence of torture.

²⁴⁴ Reg 40 (1) (a) of the Discipline Regulations.

²⁴⁵ Elements of torture (note 29).

Also, they are not being used against the alleged perpetrators. Besides, the LDF Act does not provide any remedy for the members whose right to freedom from inhuman treatment has been infringed. The Act does not provide any right to complain for such victims. There is no specific section which ensures that the complainants and witnesses of the acts in issue are protected against all ill-treatment or intimidation as a consequence of their complaints or any evidence given.

The Imprisonment and Detention Regulations allow a prisoner to have the visitors and communicate with them, but these are subject to the discretion of the Provost Officers. These Regulations do not provide any remedy or enforcement mechanism for prisoners in cases where their right to freedom from inhuman treatment has been breached. Also, the Imprisonment and Detention Regulations have much more limitations than any other pieces of legislation discussed above. Such weaknesses defeat the whole fundamental purpose of protecting prisoners from any acts of torture and other cruel, inhuman or degrading treatment or punishment.

The Discipline Regulations has the redressing procedure, which guarantees the right to complain for any aggrieved member. This procedure does not warrant such right specifically for the members whose right to freedom from inhuman treatment has been violated. Besides, the procedure does not provide for any enforcement mechanism in cases of violations.

In conclusion, it is realised that these pieces of legislation do have some clauses which may be invoked to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in the LDF. However, due to the deficiencies discussed above, these laws are not in *full* compliance with the obligations preserved in the international and regional instruments on torture and other cruel, inhuman or degrading treatment or punishment, especially the CAT.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study sought to find out whether Lesotho, especially the LDF complies with the obligations of the CAT. It analysed several international and regional instruments which prohibit torture and other cruel, inhuman or degrading treatment or punishment. Likewise, some domestic laws, practices and procedures in Lesotho were also considered.

The study has demonstrated that the acts of torture and other cruel, inhuman or degrading treatment or punishment are clearly prohibited in international law through numerous international as well as regional instruments such as the declarations, standards, principles and treaties. It showed that the CAT is the primary international convention which provides a binding definition of torture and defines the obligations of states in relation to the prohibition in question. It has demonstrated that international law regards the right to freedom from torture as a peremptory norm; the norm which is binding on every state irrespective of not being a party to the CAT. The CAT, therefore, preserves the norms of customary international law. The states are mainly obliged to prevent the acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under their jurisdictions. The obligation to prohibit includes criminalisation of torture and awarding of appropriate penalties for it. The states must ensure an enforceable right to complain as well as fair and adequate compensation for the victims of the acts in issue. The victims and witnesses must be protected against ill-treatment or intimidation resulting from their complaints or any evidence given. Many states, including Lesotho have ratified the CAT.

The study established that Lesotho has not yet transformed the CAT into its domestic laws. Thus, the provisions of the CAT cannot be applied directly in Lesotho because it is a dualist state. However, it has been argued that the provisions of the CAT may be applied in Lesotho through the rules of customary international law. The analysis of the Constitution and the common law in Lesotho revealed that there is no explicit provision in the local law which legislates against the acts of torture as strongly as does the CAT. The study has considered the provisions of both the Constitution and the Human Rights Act regarding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. It has found that both Acts guarantee the right to freedom from inhuman treatment. However, they both unduly limit this right. To this extent, they are not in *full* compliance with the provisions of the CAT and other international and regional treaties.

The study revealed that Lesotho criminal laws do not explicitly criminalise the acts of torture. The criminalisation of these acts is the foundation for full compliance with the states' obligations under the CAT and other international and regional treaties. Notwithstanding the lack of explicit prohibition, the study considered whether there are any avenues for victims of torture and other cruel, inhuman or degrading treatment or punishment. It has been shown that the victims or their dependants may approach the courts of law for purposes of redressing the infringed right to freedom from inhuman treatment. They may pray for civil remedies such as the *habeas corpus* order, an interdict, and even damages. These remedies have yielded positive results for such victims. Furthermore, there are some procedural remedies for victims of inhuman treatment in Lesotho. The study showed that, in Lesotho, the courts do not admit evidence obtained illegally through the violation of the right to freedom from inhuman treatment. Lastly, there is a range of crimes recognised in Lesotho which may be used to prevent the acts in issue. However, these crimes do not

adequately cater for the offence of torture because they require different elements and entail less severe penalties.

The duty to protect, promote and respect the right to freedom from inhuman treatment basically falls upon all law enforcement officials in Lesotho, especially those in the disciplined forces and services. This obligation is understandably placed on such personnel for the mere reason that they are the ones most capable of violating such right. In the LDF, the law seeking to uphold this right is expressed better than in any other law available in Lesotho. Several decisions of the High Court and Courts-Martial revealed that acts of torture and other cruel, inhuman or degrading treatment or punishment are perpetrated by some members of the LDF in the military detention centres and/prison. But there are military offences which may be invoked to protect those whose right to freedom from inhuman treatment has been breached. Nevertheless, the elements and penalties for such offences cannot measure up with the prerequisites of the offence of torture and its gravity. The elements of the military offences fall short of the definition of torture as stated in the CAT and the penalties to be awarded upon conviction are too lenient and inappropriate. Similarly, such offences, though inadequate, are not being implemented in practice against those who are alleged to have committed them. Thus, the study concluded that the LDF Act is not in *full* compliance with the provisions of the CAT as well as other international and regional instruments.

Apart from the LDF Act, the Imprisonment and Detention Regulations are adopted to govern the rights of the detainees and prisoners. These Regulations have some positive provisions in respect of the prohibition in question. Nevertheless, the study revealed numerous shortcomings in these Regulations pertaining to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Thus, the Regulations are inadequate and do not comply *fully* with the obligations of the CAT and other international standards.

Lastly, the Discipline Regulations provide for redress procedure in respect of any aggrieved member of the LDF. The procedure is important because it guarantees the right of the aggrieved members to claim some relief. Nonetheless, such procedure has several deficiencies, and more importantly, it was not specifically intended for the prevention of torture and other cruel, inhuman or degrading treatment or punishment in the LDF. The totality of these deficiencies warrants the conclusion that the laws, practice and procedures in Lesotho, especially in the LDF do not *fully* comply with the provisions of the CAT and other international and regional instruments.

5.2 Recommendations

The Government of Lesotho and the LDF command must take several measures to prohibit acts of torture and other cruel, inhuman or degrading treatment or punishment. In the absence of law criminalising torture, the Government must ensure that the criminal remedies are implemented accordingly. The alleged perpetrators of these acts in issue must be prosecuted on the available relevant common law crimes discussed above. This may be achieved through effective assistance between the Government departments, especially the offices of the Commissioner of Police (COMPOL) and the Director of Public Prosecution (DPP). In addition, the Government must educate law enforcement officials as well as the physicians on the prohibition in question. This may be successful through successive workshops on human rights issues, particularly on the right to freedom from inhuman treatment.

Besides, the Government must establish the office of the Human Rights Commissioner to supplement the office of the Ombudsman on the effectiveness of struggle against torture and other cruel, inhuman or degrading treatment or punishment. Moreover, it must amend the Constitution and the Human Rights Act to accommodate *fully* its obligations preserved in the CAT and other

international and regional instruments. Lastly, the Government of Lesotho must transform all its international treaties in local law.

Apart from the Government, the LDF command has to stop acts of torture and other cruel, inhuman or degrading treatment or punishment taking place in or outside the military barracks, especially in the detention centres and/ prison. The command has to implement the military offences discussed above against the alleged perpetrators of these acts. Furthermore, it must educate the members, particularly in the MI and MP Units, on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. In addition, it must initiate the process of amendments of the LDF Act and Regulations to meet the Lesotho's obligations enshrined in the CAT and other international and regional instruments. Lastly, the LDF command must cultivate the culture of respecting, promoting and protecting the Constitution and the Human Rights Act, especially with regard to the right to freedom from inhuman treatment.

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