

The Regional and National Framework for the Prevention of Torture, Cruel Inhuman, Degrading Treatment or Punishment in Uganda

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“The ordeal of victims of torture endures even when the torture itself has ended. Victims experience many forms of long-term physical and psychological damage as a result of torture and ill treatment...”

- **Juan E Mendez**

1. INTRODUCTION

Uganda has had a long history of state perpetration of torture and cruel, inhuman, degrading treatment and punishment.¹ The country has gone through a series of regimes, all of which came into power with a disregard for constitutionalism, respect of human rights and the rule of law. The infamous reign of terror that was perpetrated by President Idi Amin Dada is perhaps the culmination of Uganda’s troubled political past.² Nonetheless, state impunity towards violation of human rights continued way past Idi Amin’s regime.³

With such a history, it follows that the government of Uganda has not protected its citizens but has instead been a major perpetrator of human rights violations. This has spilled over into the current times with state security forces (i.e. the Uganda Police and the Uganda Peoples Defence Forces) remaining the lead perpetrators of human rights violations particularly torture and cruel, inhuman degrading treatment or punishment.⁴

In spite of this bleak state of events, it is worth noting that some progress has been made with regard to the international, regional, and local legal frameworks governing the protection of fundamental human rights and freedoms. Uganda is signatory to several international and regional human rights instruments, including the East African Treaty which emphasizes rule of law by state parties. Perhaps the most significant legal instrument is the 1995 Constitution of the Republic of Uganda, which among other fundamental rights and freedoms provides for protection from torture, and cruel, inhuman, and degrading treatment or punishment and is the supreme

¹ Patricia Twasiima Bigirwa, “Torture In Uganda: State Failure and a Case of Old Habits Die Hard, “Center For Policy Analysis, Available at: file:///Users/chapter4_15/Downloads/Torture-in-Uganda-2-1.pdf [Accessed on July 25, 2018]

² Samwiri R. Karugire, “Roots of Instability in Uganda, “Fountain Publishers, Kampala Uganda, 3rd Edition, 1998

³ Patricia Twasiima, quoted Ibid

⁴ Owen Wagabaza, “Torture Looms High in Uganda” *The New Vision*, Available at: https://www.newvision.co.ug/digital_assets/4b7c9475-c69d-463e-82f1-1d7bfd6e072e/ST2NV260618.p35.pdf

domestic law.⁵ These fundamental rights are categorized by the Constitution as non-derogable rights.⁶ Regardless of this, there is still a wide gap between the aspirations and ideals embodied in these instruments and the actual implementation of the goal to end torture in Uganda.⁷

II. DEFINITION OF TORTURE AND DISTINCTION FROM CRUEL, INHUMAN, DEGRADING TREATMENT OR PUNISHMENT

The international community has unequivocally condemned torture and other forms of cruel inhuman degrading treatment or punishment. Prohibition against torture is “generally considered to belong to the category of the *jus cogens* that is, pre-emptory norms having the force of law for the international community.”⁸ It is part of the customary law, which applies to states regardless of whether they have assented to an instrument or not.⁹ Torture is thus not justified under any circumstances.

The legality of cruel, inhuman and degrading treatment, on the other hand, is judged on a case-by-case basis as will be discussed below.

Article 5 of the Universal Declaration of Human Rights (UDHR) provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) also condemns subjecting a human being to torture or cruel inhuman or degrading treatment or punishment and prohibits any medical or scientific experimentation that is done without the free consent of the subject.

Furthermore, Article 10 of the ICCPR creates a positive right for persons whose liberty has been denied; these persons must be “treated with humanity and with respect for the inherent dignity of human person”. Under the Rome Statute of the International Criminal Court (1998), if torture is committed as part of a widespread systematic attack on civilian population it is categorized as a crime against humanity.¹⁰ From the aforementioned provisions, freedom from torture is a non-derogable right that is linked to the absolute respect and dignity inherent to human beings.¹¹

⁵ Article 24 of the 1995 Constitution of the Republic of Uganda

⁶ Article 44 (a) of the 1995 Constitution of the Republic of Uganda

⁷ Maria Burnett, “Addressing Torture in Uganda, Five Actions Police Can Take,” Available at: <https://www.hrw.org/news/2018/06/26/addressing-torture-uganda>

⁸ Jean-Baptiste Niyizurugeri and Patrick Lessene, “Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa,” Available at; http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf [Accessed on July 31, 2018]

⁹ *ibid*

¹⁰ Article 7(1) (f) of the Rome Statute of the International Criminal Court (1998)

¹¹ Jean Baptiste, quoted *ibid*

The aforementioned international instruments do not define what constitutes torture but the United Nations General Assembly on adopting the Convention Against Torture (CAT) in 1984 provided the commonly-accepted definition of torture. The CAT made reference to Articles 5 of the UDHR and 7 of the ICCPR (which condemn torture), and defined torture as follows;

“...any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or sufferings inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹²

Further, the CAT under Article 16 prohibits any other acts of cruel inhuman or degrading treatment or punishment which do not amount to torture. This invites the conclusion that the two prohibitions are considered distinct under international law. The definition of torture has been expounded on by the UN Special Rapporteur on Torture and the UN Special Rapporteur on Violence Against Women to include rape and sexual assault against women,¹³ prolonged incommunicado detention, corporal punishment, among others.¹⁴ The UN Special Rapporteur on Torture further considered the distinction between torture and cruel and inhuman degrading treatment or punishment. Whereas torture is prohibited under all circumstances, cruel, inhuman or degrading treatment or punishment may not amount to torture depending on the circumstances of the case.¹⁵ In exploring this distinction, the report stated that,

“...a thorough analysis of the travaux preparatoires of Articles 1 and 16 of [UNCAT] as well as a systematic interpretation of both provisions in light of the practice of the committee against torture leads one to conclude that the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted...”

From the above statement, actions may still amount to torture even if they do not necessarily meet the threshold of Article 1 of the CAT. Nonetheless, the CAT has

¹² Article 1(1) of the Convention Against Torture (1984)

¹³ Presentation by the Special Rapporteur on Torture in his 1992 Report to the Commission on Human Rights, 21st Meeting, United Nations Document E/CN.4/1992/SR.21)

¹⁴ Resolution 1998/38 of the Commission on Human Rights

¹⁵ Centre for Justice and International Law and the Association for the Prevention of Torture, “Torture in International Law: A Guide to Jurisprudence,” at Page 11

recognised that in practice, the distinction between the two prohibitions is often not clear.¹⁶ The African Commission on Human and Peoples Rights (ACHPR) also attempted to make a distinction between torture and cruel, inhuman or degrading treatment in the case of *International PEN, Constitutional Rights Project (on behalf of Ken Saro-Wiwa Jnr) vs. Nigeria*, wherein it was stated that¹⁷;

“...Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience...”

International jurisprudence therefore seems to categorise torture as a narrower and much more severe derogation of human dignity as opposed to the broader cruel, inhuman or degrading treatment or punishment. The distinction between torture and cruel, inhuman, or degrading punishment or treatment can thus be summarised as follows: “... [torture is]an act inflicting severe pain or suffering, whether physical or mental; the element of intent; the specific purpose; and the involvement of a State official, at least by acquiescence (A/HRC/13/39/Add.5, para. 30). Acts falling short of this definition may constitute cruel, inhuman or degrading treatment or punishment under article 16 of the Convention (A/63/175, para. 46)...”¹⁸

III. REGIONAL FRAMEWORK

Uganda is signatory to a number of international instruments that provide a regional framework relevant to torture and cruel, inhuman or degrading treatment. The African Charter on Human and Peoples’ Rights (African Charter) was ratified by Uganda on May 10, 1986 and is the major human rights instrument under this regional framework. Under Article 1 of the African Charter, Member States have agreed to undertake legislative or other measures to give effect to the rights and duties codified in the African Charter. Under Article 5 of the African Charter, torture and cruel and degrading punishment are prohibited: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, *torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*” (*Emphasis added*). By virtue of these two sections of the African Charter, Uganda has taken domestic legislative measures to give effect to the prohibition of torture and cruel, inhuman or degrading treatment as will be discussed below.

¹⁶ CAT, General Comment No.2, quoted in “Torture in International Law: A Guide to Jurisprudence, *Ibid*

¹⁷ African Commission on Human and Peoples Rights, Communication 137/94-139/94-154/96-161/97

¹⁸ Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 22nd Session, February 1, 2013

The African Charter establishes the African Commission on Human and Peoples Rights (African Commission), whose functions are laid out under Article 45 and include amongst others to “formulate and laydown principles and rules aimed at solving legal problems relating to human and people’s rights and fundamental freedoms upon which African Governments can base their legislations.”¹⁹ Pursuant to this mandate, the African Commission has adopted a number of instruments that have a bearing on the regional legal framework on torture. Such instruments include: the Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa, the Resolution on the Adoption of the Ouagadougou Declaration, and the Plan of Action on Accelerating Prison and Penal Reform in Africa.²⁰

The Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa provide that states should ensure that they are party to regional and international human rights instruments and that these instruments must be fully implemented through domestic legislation. Individuals should be accorded the maximum scope for accessing the human rights machinery that they establish, which may include ratification of the African Charter (that establishes the African Court on Human and Peoples’ Rights as well as the African Commission), ratification of the CAT, the International Covenant on Economic Social and Cultural Rights, and the Rome Statute of the International Criminal Court.²¹ Uganda has ratified each of these initiatives. The Robben Island Guidelines also encourage criminalization of torture and making torture an extraditable offence, and further state that notions such as “necessity”, “national emergency”, “public order” and “ordre public” shall not be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment.²² The Robben Island Guidelines also state that incommunicado detention constitutes a form of torture.²³

The Resolution on the Adoption of the Ouagadougou Declaration and the Plan of Action on Accelerating Prison and Penal Reform in Africa both contain recommendations that encourage states to promote measures that make prisons administrations more accountable for their actions and to encourage the rights and fundamental freedoms enshrined in the African Charter.²⁴

As a general matter, the aforementioned guidelines are more of soft law meant to provide guiding principles for state parties. With regard to adopting domestic

¹⁹ Article 45(1) (b) of the African Charter on Human and Peoples Rights (1981)

²⁰ Report of the Special Rapporteur on Prisons Conditions of Detention in Africa, Presented by Hon. Commissioner Mad. S.K Kaggwa at the 52nd Ordinary Session of the African Commission in Human and Peoples Rights, 9-2 October 2012

²¹ Guideline A of the Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa

²² Guideline C of the Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa

²³ Part II, Guideline A, 20 of the Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa

²⁴ Hon. Commissioner Mad. S.K Kaggwa; quoted *ibid*

legislation to implement such guidelines and thus prevent torture and cruel, inhuman, or degrading treatment, Uganda has enacted laws to this effect.

IV. INSTITUTIONAL FRAMEWORK AT THE REGIONAL LEVEL

The African Charter established the African Commission to promote human rights and ensure their protection in Africa.²⁵ General Comment No. 4 on the African Charter provides for the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment. The African Commission has issued several decisions upholding the aforementioned articles. For instance, in *Egyptian Initiative for Personal Rights and INTERIGHTS v. Arab Republic of Egypt (1 March 2011, ACHPR, 334/06, 9th Extra-ordinary Session)*, the complainants brought the complaint on behalf of several men who alleged that they were detained, tried, and sentenced to death after being accused of several bombings. During their detention, the victims alleged that they were tortured to elicit confessions. The African Commission found overall that the action of Egypt constituted multiple violations of Article 5 of the African Charter.

Furthermore, in the case of *Gabriel Shumba v. Zimbabwe (April 2012, ACHPR, 288/04, 51st Ordinary Session)*, personnel from the Central Intelligence Organization arrested the complainant, a human rights lawyer, beat him, detained him without charge or access to counsel, and denied him food and water. The day after his arrest, he was moved to a different location and tortured. He was subsequently charged with organizing, planning, and conspiring to overthrow the government. The African Commission found that the state was in violation of the victim's rights under Article 5 of the African Charter to not be tortured and ill-treated. The African Commission found that he was beaten and electrocuted, and that the state did not take steps to investigate or address these actions. Thus, the African Commission recommended that the state pay the victim compensation and attempt to bring to justice the officials who committed the torture.

The international standards on prohibition from torture were also upheld in *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, November 2013, ACHPR, 368/09, 54th Ordinary Session. The victims in this case were Sudanese nationals who fled from Darfur and settled in a refugee camp outside of Khartoum. They were arrested and held for over 12 months and it is alleged that they were tortured. After two years without an investigation, the complainants brought their case to the African Commission, which found that the sustained beatings, whippings, food deprivation, death threats, and other forms of ill-treatment clearly constituted torture.

²⁵ Article 30 of the African Charter on Human and Peoples Rights

The Robben Island Guidelines on the Prohibition and Prevention of Torture in Africa establish the Robben Island Guidelines Monitoring Committee (Resolution No. 61 of the 32nd Ordinary Session in October 2002) as a follow-up committee to disseminate information about the guidelines throughout Africa.²⁶ The latter committee was then re-named the Committee for the Prevention of Torture in Africa vide Resolution 158 adopted at the 46th Ordinary Session held in Banjul the Gambia on November 2009.²⁷ Mr. Hatem Essaiem was appointed in 1-5 November 2017 as the Chairperson of the working group, with Maria Teresa Manuela, Lawrence Murugu Mute and Dr. Solomon Ayele Dersso as members.

Under its functions enshrined under Articles 45 and 46 of the African Charter -- which include amongst others to undertake studies, research and investigations on human rights issues -- the African Commission established the Special Rapporteur on Prison and Conditions of Detention in Africa in 1996, as well as the Special Rapporteur on the Rights of Women in Africa in 1999 to play a supplementary role with regard to its functions.²⁸

The role of the Special Rapporteur on Prisons and Conditions of Detention in Africa is to examine the situation of persons in detention within the territories of the state signatories to the African Charter. Places of detention are possible areas where torture can be perpetrated; consequently, the best safeguard against torture is transparency and holding prison administration accountable through prison visits, which are majorly done by the Special Rapporteur.²⁹

It should be noted that international and regional bodies make reference to jurisprudence of each respective body and independent experts such as the Special Rapporteurs. This results in creation of a more consistent and coherent body of international human rights law.³⁰ For instance, the UN Special Rapporteur on Torture and other forms of cruel, inhuman, or degrading treatment and punishment stated in a report in 1986 that rape constituted torture.³¹

His statements were then reiterated in other international bodies, especially in the inter-American system. In 1998, in the case of *The Prosecutor vs. Akayesu*, the International Criminal Tribunal of Rwanda concluded that rape is indeed an act of torture.³² In 2000, in the case of *Malawi African Association and others vs.*

²⁶ Hon. Commissioner Mad. S.K Kaggwa; quoted *ibid*

²⁷ <http://www.achpr.org/mechanisms/cpta/about/> [Accessed on August 2,2018]

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ Centre for Justice and International Law and the Association for the Prevention of Torture, "Torture in International Law: A Guide to Jurisprudence," at Page 3

³¹ The 1986 Report of the Special Rapporteur on Torture, UN Doc. ECN. 4/1986/15, referred to in "Torture in International Law: A Guide to Jurisprudence," at Page 3 and 4

³² Case No. ICTR-96-4-T, ICTR Trial Chamber 1, judgement of September 2, 1998

Mauritania, the African Commission also held that rape constituted an act of torture.³³

V. SUB-REGIONAL FRAMEWORK

On the sub-regional level, Uganda is a signatory to the Treaty for the Establishment of the East African Community (Treaty). Under Article 3 of the Treaty, to become a member, or associated with the Community, a country must adhere “to universally acceptable principles of good governance, democracy, *the rule of law, observance to human rights and social justice.*” (*Emphasis added*). Adherence to the rule of law and the promotion and protection of human rights are also listed as fundamental principles that govern the achievement of the objectives of the East African Community under Article 6 and as operational principles of the East African Community under Article 7. Further, under Article 123, one of the objectives of the common foreign and security policies of the East African Community is to “develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.”

The Treaty also created the East African Court of Justice (EACJ), but did not grant the court explicit jurisdiction to hear human rights cases. The EACJ has nevertheless addressed cases involving individual rights. In *Katabazi v. Secretary General of the East African Community*, the EACJ conceded that “jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se.*” However, the Court disposed of the case on the merits, having determined that “it will not abdicate from exercising its jurisdiction of interpretation under Article 17(1) merely because the reference includes allegation of human rights violation.”

This was demonstrated further in the case of *Attorney General of the Republic of Kenya v. Independent Medical Legal Unit*, in which the claimant contended that the failure by the respondents to take measures to prevent, investigate, or punish those responsible for executions, acts of torture, and cruel, inhuman and degrading treatment of over 3,000 Kenyans violated several International Human Rights Conventions, the Kenya Constitution, and the Treaty. The EACJ found that “the government’s failure to investigate those human rights violations, to prosecute and punish the perpetrators, and to afford relief to the victims, constituted a breach of the Treaty Principles of the Rule of Law, Good Governance, promotion and protection of Human and People’s rights, as expressly stipulated in Articles 5, 6, and 7 of the Treaty; and contravenes several International Conventions, International Law, as well as the Constitution and Laws of the Republic of Kenya.”

³³ African Commission on Human and Peoples Rights Communication Nos. 54/1991, 61/1991, 98/1993, 164/1997, 196/1997 and 210/1998.

VI. THE UGANDAN CONTEXT

A. Constitutional provisions

Article 24 of the Constitution of Uganda prohibits torture, cruel inhuman or degrading treatment and punishment. Article 44 (a) of the Constitution provides for non-derogation of the right of freedom from torture and cruel, inhuman, or degrading treatment or punishment, thus making this fundamental right absolute. In the Constitutional Appeal of *Attorney General vs. Susan Kigula*, the Supreme Court considered the constitutionality of the death penalty and analysed Article 24 of the Constitution.

The Supreme Court had referred to the Preamble of the Constitution which took into account the history of Uganda that has been marred by human rights violations, with torture being perpetrated by state security forces against perceived political opponents. The Supreme Court noted that Article 24 is *in pari materia* with Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, which are absolute prohibitions against torture. The Supreme Court, in deciding whether the death penalty is in violation of Article 24, held as follows;

“...The framers of the Constitution were also aware of the numerous instances of torture and other cruel punishments that had characterised our recent history. They seem to have come out on these two aspects of our history and dealt with them by providing that life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise the prerogative of mercy. On the other hand, there must not be torture or cruel, inhuman or degrading punishment under any circumstances...”[emphasis added]

It follows therefore that the prohibitions of torture and cruel, inhuman degrading treatment or punishment enshrined in Article 24 of the Constitution draw inspiration from Uganda’s unique history and also have regard to the international human rights instruments to which Uganda is a signatory. The Constitutional Court in the case of *Centre for Human Rights and Development vs. Attorney General*³⁴ was persuaded by decisions of the African Commission to expound on what constitutes torture and to reiterate its prohibition;

“...we find that the language of sections 45(5) of the Trial on Indictments Act is derogatory and thus contravenes Article 24 of the Constitution that provides for respect for human dignity and protection from inhuman treatment. It strips mentally disabled/impaired persons of dignity.... In reaching this conclusion, we have drawn inspiration from the case of Purohit and Moore v. The Gambia, African Commission

³⁴ Constitutional Petition No. 16 of 2011

on Human and Peoples Rights, Communication No. 241/2001 (2003). The applicants in that case challenged the Lunatics Detention Act (LDA) of the Gambia. One of the grounds for their complaint was that the provisions of the LDA condemning any person described as a lunatic to automatic and indefinite institutionalization are incompatible with and violate Articles 2 and 3 of the African Charter.....The African Commission held that human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities, as the case may be, are entitled to without discrimination.....It reiterated its earlier decision in the case of Media Rights Agenda v. Nigeria, where it stated that “cruel, inhuman or degrading punishment and treatment” is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental. The Commission also relied on its earlier decision in the John K. Modise Vs Botswana (2000) AHRLR 25 (ACHPR 1997) where it held that exposing victims to personal suffering and indignity violates the right to human dignity.... The above case interpreted the provisions of a Gambian statute vis-a-vis the African Charter that is worded in a similar language to the Uganda section 45(5) of the Trial on Indictments Act. We consider it to be a persuasive authority... We thus come to the conclusion on this aspect, section 45(5) violates the letter and spirit of Article 24 of the Constitution as it subjects persons living with mental illness/impairment to inhuman and degrading treatment in the language used to describe them, contrary to Article 24 of the Constitution....”

From these cases, it is clear that courts in Uganda are aware of the country’s troubled political history and have deep regard for international and regional standards on human rights. With this approach, courts are taking a more progressive approach to enforcement of human rights, which is a positive step to the prevention of torture.

Although Articles 24 and 44 (a) of Uganda’s Constitution are the fundamental provisions on prohibition of torture and cruel, inhuman, or degrading punishment or treatment, there are other provisions that uphold this right indirectly in ways such as reference of respect of human dignity, or prohibition of certain acts which may constitute torture. Take the example of Article 23 (2) of the Constitution which provides that a person arrested, restricted or detained shall be kept in a place authorized by law. This article is meant to prohibit the existence of safe houses in which torture is usually perpetrated. It also allows for inspection of detention centers like prisons.

Further, Article 23(4) of the Constitution provides for the 48-hour rule which is to the effect that a person arrested if not earlier released must be brought before a court as soon as possible and not later than 48 hours from the time of her arrest. This article is meant to ensure that detained persons are not subjected to torture while in detention. It can be argued that this article embodies the writ of habeas corpus. In addition, under Article 44(d) the right to an order of habeas corpus is non-derogable. The writ of habeas corpus is also provided for under the Judicature Act and the Judicature (Habeas Corpus) Rules, Statutory Instrument Number 13-16.³⁵

³⁵ Section 34 of the Judicature Act Cap. 13

The writ of habeas corpus in the aforementioned laws is in three-fold; first, *habeas corpus ad subjiciendum* which entails an application to bring a person who is in another person's custody before a court. The judge when dealing with this application, is required to make an inquiry about the facts of the case and make a finding as justice of the case requires. *Habeas corpus ad testificandum* and *habeas corpus ad respondendum* are for evidential purposes. The detained person for whom this writ is made is brought before a court for purposes of examination/testifying about the matter pending before a court.³⁶

In the matter of *Jovia Karuhanga Vs. Inspector General of Police and three others (Miscellaneous cause No. 86 of 2013)*, Justice Stephen Musota ruled as follows on the importance of the aforementioned writ;

“...The purpose for a writ of habeas corpus ad subjiciendum is to review the legality of the applicant's arrest, imprisonment and detention and challenge the authority of the prison or jail warden to continue holding the applicant. The application is used when a person is held without charges or is denied due process. It ensures that a prisoner can be released from unlawful detention i.e detention lacking sufficient cause or evidence or detention incommunicado...” (emphasis added)

Closely related to the above, Article 23(5) provides for prevention of incommunicado detention.³⁷ The article gives the next-of-kin, lawyer and personal doctor of a detained or restricted person the right to access that person. It follows that this provision, read together with those on the writ of habeas corpus, are a shield against incommunicado detention, which in itself constitutes torture and can foster torture due to lack of knowledge and transparency for the person detained (See *Behangana and Another vs. The Attorney general (Constitutional Petition No. 53 of 2010)*).

Violations of Article 23 of the Constitution can be interpreted by courts to culminate into torture depending on the facts of the case. For instance, in the case of *Omar Awadh and 10 others vs. Attorney General, (Constitutional Petitions Numbers 55 and 56 of 2011)* the actions perpetrated by the state security forces against the petitioners were referred to the High Court for further investigations into whether they constituted a violation of Article 23 as well as Article 24 of the Constitution. The High Court outlined the facts as follows;

“...In the instant case, what is on record are allegations made by the petitioners that are controverted by the State. Most of the complaints in the allegations are general to all the petitioners. They may be summarized as follows. The manner of arrest, (shackled, handcuffed and in some cases hooded, threatened) and detained (long

³⁶ Rule 13 of the Judicature (Habeas Corpus) Rules SI 13-16

³⁷ The Un Special Rapporteur on Torture has categorized incommunicado detention as torture; refer to Resolution 1998/38 of the Commission on Human Rights

interrogations by among others FBI and other foreign agents in the absence or presence of Uganda Police officers; threats, insults, torture during interrogation, lack of access to lawyers; lack of access to medicare; poor feeding; lack of hygiene; length of detention at RRU. On the conditions of detention at Luzira Upper Prison, the petitioners complained of lack of visitation; duration of the interrogations; the alleged threats and coercion by the interrogators; denial of the right to practice religion; length of lock up time in Luzira; and lack of access to lawyers among other complaints...”

It is therefore clear that violations of Article 23, depending on the facts of the case, can be interpreted by courts to constitute torture or cruel, inhuman, or degrading treatment or punishment. It also can be argued that Article 23 is a provision that contemplates state perpetrated torture and thus is able to prevent circumstances that favour its perpetration. Both Articles read together and having cognisance of the state of human rights in Uganda are a buffer against state perpetrated torture.

B. Application to Marginalized Groups

When discussing torture, it is important to take account the context in which marginalized groups such as women face torture. This context has been taken into account under Uganda’s Constitution. Under Article 32(2), laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized groups are prohibited by the Constitution.

Furthermore, Article 35 provides for the right to human dignity for persons with disabilities and Article 33(1) provides that women shall be accorded full and equal dignity of the person with men. These provisions of the Constitution are in place because marginalized groups in Uganda such as women or persons with disabilities are at risk of being subjected to practices that amount to torture, thus undermining their inherent dignity as human beings.

In the case of *Law and Advocacy for Women in Uganda vs the Attorney General Constitutional Petition No. 8 of 2007*), Justice Twinomujuni JA, as he was then, stated that respect for human dignity and protection from inhuman treatment is enshrined under Article 24 of the Constitution. Pursuant to this, the cultural practice of female genital mutilation which is carried out among some communities in Uganda, was held to be unconstitutional because it was found to be harmful and detrimental to the health and dignity of women and girls. His Lordship after quoting Articles 44 (a), 32 (2) and 33(1) and (3) held as follows;

“...The meaning and effect of the above quoted provisions of the Constitution cannot be mistaken. Any person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment...”

Marginalized groups have a different account when it comes to being victims of torture. Their subjection to torture is dependent on societal attitudes, stereotypes and culture as seen in the above case. This context has been taken into account under the Constitution (through the aforementioned provisions) and by courts which is a positive approach.

C. Statutory Provisions

Uganda promulgated the Prevention and Prohibition of Torture Act 2012 and the Prevention and Prohibition of Torture Regulations S1 53-2017 to give effect to the CAT which was adopted by the General Assembly of the United Nations on December 10, 1984 and ratified by Uganda on June 26, 1987. These laws together criminalize torture and all other forms of cruel, inhuman, and degrading treatment or punishment.³⁸

On May 25, 2010, Uganda passed the International Criminal Court Act 2010 to give effect to the Rome Statute of the International Criminal Court and provide for offences under the laws of Uganda corresponding to offences within the jurisdiction of that court and for other connected acts.³⁹ Section 8(1) of the International Criminal Court Act provides that a person is liable on conviction of an indictment to a penalty of life imprisonment or lesser term where such person commits a “crime against humanity” in Uganda or elsewhere. (Subsection 2 of this section refers to Article 7 of the Rome Statute in the definition of a crime of humanity.) Article 7(2) of the Rome Statute defines torture as: the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

In the case of *Uganda vs. PTE Turyamureba Amon and another, his Lordship T.W Kwesiga*, his Lordship made reference to the International Criminal Court Act in specific to torture occurring during investigations:

“Article 55 (i) (b) of the Statute of the International Criminal Court provides that a person under investigations “shall not be subjected to any form of coercion, duress or threat, to torture or any other form of cruel, inhuman or degrading treatment or punishment. In view of the above I cannot convict any Accused person based on a confession extracted under duress at whatever stage of interrogation into alleged criminal activity. Suspects have the right to

³⁸ Section 4 of the Prevention and Prohibition of Torture Act 2012 criminalizes torture and under Section 3 of the same act a state of war or a threat of war, internal political instability, public emergency and an order from a superior office or public authority does not constitute a defense for acts of torture.

³⁹ The Long Title of the International Criminal Court Act 2010.

be treated without subjecting them to any physical or psychological violence or duress.”

The other domestic legislation that prohibits acts of torture is the Children (Amendment) Act 2016 under Section 4(1) (i), which makes reference to the rights stated in the United Nations Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990), which apply to Uganda. Under the United Nations Convention on the Rights of a Child, state parties are mandated to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.⁴⁰ The African Charter on the Rights and Welfare of the Child also mandates state parties to take all appropriate measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical mental injury and abuse, neglect or maltreatment including sexual abuse.⁴¹ The Children (Amendment) Act -- which references these broader instruments -- thus prohibits torture against children.

The Prisons Act 2006 (which repealed the Prisons Act Cap. 304 in order to bring the latter in line with the Constitution) also in a way prohibits torture in detention centres.⁴² Section 57 (a) of the Prisons Act 2006 provides that prisoners shall be treated with respect that is due to their inherent dignity and value as human beings. Section 81 of the same Act provides for restraint of a prisoner in a separate cell in the event of the prisoner threatening violence, an attempted escape, on recommendation of medical grounds or on grounds of good discipline, and stipulates that a prisoner subjected to this shall not be subjected to any form of torture. The section prohibits stripping a prisoner naked, pouring water in their cell, depriving the prisoner of food, and administering corporal punishment and torture.⁴³ This Prisons Act therefore effectively prohibits acts of torture in prison against persons that are detained.

The Geneva Conventions Act Cap. 363 (assented to on October 16, 1964) also protects one's rights on freedom from torture. The purpose of this legislation is to give effect to certain international conventions assented to at Geneva in 1949. These conventions are vestiges of World War II meant to prevent the commission of atrocities done during that time. These conventions include: the Geneva Convention for the amelioration of the conditions of the wounded and sick of armed forces in the field of August 12, 1949, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, the Geneva Convention Relative to the Protection of civilian persons in times of war of August 12, 1949 and the Geneva

⁴⁰ Article 19(1) of the UN Convention on the Rights of a Child (1989)

⁴¹ Article 16(1) of African Charter on the Rights and Welfare of the Child (1990)

⁴² The Long title of the Prisons Act 2006

⁴³ Section 81(2) of the Prisons Act 2006.

Convention for the amelioration of the conditions of the wounded, sick and shipwrecked members of the armed forces at sea of August 12, 1949.

The aforementioned conventions contain provisions that prohibit acts of torture and cruel, inhuman degrading treatment and punishment. For instance, under the Geneva Convention for the amelioration of the conditions of the wounded and sick of armed forces in the field of August 12, 1949, Article 3(1) on conflicts not of an international character, prohibits violence to life and person, in particular murder of all kinds, mutilation and cruel treatment and torture. Furthermore, under Article 12, members of the armed forces who are wounded or sick shall be respected and protected in all circumstances, shall be treated humanely and cared for by the party to the conflict in whose power they may be without distinction of any kind. Under Article 50, wilful killing, torture or inhuman treatment are one of the grave breaches of the convention.

The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 provides that prisoners of war must be treated humanely⁴⁴ and Article 3(1) of the Geneva Convention Relative to the Protection of civilian persons in times of war of August 12, 1949 prohibits at any time and place, “outrages upon personal dignity in particular humiliation and degrading treatment” of persons not taking part in hostile activities.

Section 2 of the Geneva Conventions Act Cap. 363 gives power to Uganda’s Director of Public Prosecutions to institute proceedings against persons who commit grave breaches of the conventions mentioned above. Each convention provides for what constitutes a grave breach. From all the provisions of the conventions, torture or inhuman treatment is categorised as a grave breach and anyone who commits such offenses is liable to be indicted, tried and punished by virtue of the legislation.⁴⁵

D. Institutional framework at the domestic level

The legal regime in Uganda provides several platforms for the protection against torture. First, claims can be made through an application for the protection of fundamental rights and freedoms under Article 50 of the Constitution before the High Court presided over by a High Court judge. The procedure is by Notice of Motion under Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, Statutory Instruments No. 55 of 2008. This was espoused in the case of

⁴⁴ Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949

⁴⁵ Article 50 of the Geneva Convention for the amelioration of the conditions of the wounded and sick of armed forces in the field of August 12, 1949, Article 51 of the Geneva Convention for the amelioration of the conditions of the wounded, sick and shipwrecked members of the armed forces at sea of August 12, 1949, Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 and Article 147 of the the Geneva Convention Relative to the Protection of civilian persons in times of war of August 12, 1949, provides for grave breaches

Bukenya Church Ambrose vs. Attorney General, Constitutional Appeal No. 3 (decided in May 22, 2017) in which it was held that the aforementioned statutory instrument was the appropriate procedure to institute an application for enforcement of fundamental rights and freedoms.

Second, the Constitutional Court can also be used to enforce and protect the freedom from torture, cruel, inhuman and degrading treatment. This is through challenging the constitutionality of a law or an action that is contrary to Article 24 of the Constitution. This was espoused in the case of ***Attorney General vs Salvatori Abuki***⁴⁶, where the Supreme Court held that the order of banishment under the Witchcraft Act contravened Article 44(a) of the Constitution. This case was an appeal from the Constitutional Court brought under Article 137 for interpretation of the constitutionality of the banishment order under the Witchcraft Act.⁴⁷

Third, under the Prevention and Prohibition of Torture Regulations S1 53-2017, claims can be brought through an institution of criminal proceedings with a police officer bringing an arrested person before a Magistrate upon charge, through a public prosecutor or through private prosecution vide a complaint on oath.⁴⁸ This consequently brings the Magistrates Courts under the institutional framework that adjudicates on issues of torture. Such proceedings are criminal in nature and thus require evidence to prove beyond reasonable doubt that the acts of torture were committed by the accused persons.

This approach is evident in ***Uganda vs. Nansamba***, where the accused person was found guilty of the offence of torture after tying the hands of two minors behind their backs and inflicting corporal punishment on them which culminated into the death of one.⁴⁹ The standard of proof in the criminal prosecutions does not mean beyond a shadow of doubt; once sufficient evidence is produced to inculcate the accused person; the court shall not hesitate to find the accused guilty of torture.

The judiciary plays an important role in condemning acts of torture, even when the parties have not raised the issue specifically. In the case of ***Uganda vs. PTE Turyamureba Amon and another, his Lordship T.W Kwesiga***, several acts of torture occurred during an interrogation of the victim during an investigation into a criminal charge. The confession obtained from the victim was the subject of this case. His Lordship stated as follows:⁵⁰

“...Torture and other forms of ill-treatment of suspects must be condemned. Judges have a duty to ultimately make decisions over life, freedoms, rights and duties of

⁴⁶ Constitutional Appeal No. 1 of 1998[1999] UGSC 7(May 25, 1999)

⁴⁷ Constitutional Appeal No. 1 of 1998 [1999] UGSC 7(May 25, 1999)

⁴⁸ Section 12 (1), (a)-(c) of the Prevention and Prohibition of Torture Act 2012

⁴⁹ Criminal Sessions Case No. 0152-2015 [2018]UG-HCCRD, 35 [February 8, 2018]

⁵⁰ HCT-05-Cr-CSC-0297 of 2006

citizens. This duty includes being alert for any sign of torture or ill- treatment or duress of any kind that might take place in course of Criminal investigation and deprivation of liberty as a mistreatment to the suspects.

Article 44(a) of The Constitution of The Republic of Uganda states;

“Notwithstanding anything in this constitution, there shall be no derogation from enjoyment the following rights and freedoms-

(a)Freedom from torture and cruel, in human or degrading treatment or punishment.”

Unlike the aforementioned procedure, protection of human rights applications under Article 50 and Article 137 are of a civil nature and thus require a lower standard of proof. Courts have nonetheless emphasized and upheld the importance of this non-derogable protection. For instance, in the case of ***John Ogil vs The Attorney General***, the court relied on the testimony of the plaintiff and scars on his body corroborated by the testimony of one witness to award damages for acts of torture.⁵¹

The Constitution also established quasi-judicial bodies such as the Uganda Human Rights Commission, which is mandated to investigate human rights violations, to visit detention centres, to monitor state compliance with international treaties and to make such orders such as payment of compensation or legal remedies as redress for human rights infringement.⁵² The Uganda Human Rights Commission has powers to sit and hear matters and has on several occasions awarded monetary compensation to victims of torture.⁵³

The Equal Opportunities Commission is another relevant quasi-judicial body, which was established under the Equal Opportunities Commission Act 2007 and enacted pursuant to Article 32(3) and (4) of the Constitution to give effect to the state’s constitutional mandate to eliminate all forms of discrimination against any individual or groups of persons on the ground of sex, age, race, color, ethnic origin, creed, religion, health status, social and economic standing *inter alia* and to take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purposes of re-dressing such imbalances.⁵⁴ Tortured persons, especially those belonging to marginalized groups (e.g., like women through cultural activities such as female genital mutilation) have locus to address such an act of torture through the Equal Opportunities Commission.

⁵¹ HCT-02-CV-CS-0094-2004

⁵² Articles 51, 52 and 53 of the 1995 Constitution of the republic of Uganda.

⁵³ Mr Gideon Tugume was awarded Ug Shs. 48,856,500/= as compensation for being shot by a police officer. Accessed at: <http://uhrc.ug/uganda-human-rights-commission-orders-award-compensation-torture-victim>

⁵⁴ Long Title of the Equal Opportunities Commission Act 2007.

VII. CONCLUSION AND RECOMMENDATIONS

Despite Uganda's history of disregard for fundamental human rights, there is a strong framework of international, regional and domestic treaties and laws that will help strengthen these protections for the future. The courts of law have been progressive in their interpretation of these protections, which the Ugandan judiciary will hopefully use as guidance. As discussed above, the aspirations and ideals embodied in these laws and decision by courts do not mirror or dictate reality.

We should therefore focus on government institutions where the torture is mostly perpetrated and we recommend as follows;

A. General Recommendations

1. Creation of collaborations between state authorities, police, the judiciary, national institutions and civil societies that focus on human rights protection and promotion to eliminate torture in all institutions.
2. Recognition of the institutionalised nature of torture by all stakeholders.

B. Recommendations to the State

1. Recognise that torture is institutionalised and start combating it at institutional levels through requiring institutions to have anti-torture policies and monitoring mechanisms.
2. Put in place specialised programmes for all intuitions to educate their officials about prohibition of torture and cruel, inhuman, or degrading treatment or punishment.
3. Collaborate with civil society organisations to form coalitions against torture.
4. Promote transparency through opening up institutions to international and domestic monitoring personnel such as special rapporteurs and civil society organisations.
5. The state, together with the efforts of civil society, should explore the role of forensic and other sciences with the view of detecting and eradicating all forms of torture, particularly in government institutions

6. Creation of a counter-torture force of sorts that shall facilitate successful prosecutions of torture cases. The task force shall include state security forces, civil society and international personnel.

C. Recommendations to Civil Society

1. Forge alliances with the state to combat torture and reduce the back and forth rhetoric.
2. Push for creation of zero tolerance of torture and cruel, inhuman, and degrading treatment and punishment in all state institutions.
3. Forge relations with international stakeholders who are against torture.

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