

**TORTURE IN ZAMBIA:
THE ROLE OF THE PERMANENT HUMAN RIGHTS
COMMISSION IN MONITORING ZAMBIA'S COMPLIANCE
WITH THE CONVENTION AGAINST TORTURE.**

**BY
MILIMO MOYO**

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BY

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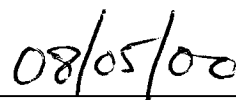
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be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing directed research essays.



Alfred W. Chanda (Dr.).



Date.

In memory

Of my beloved sister, *Thandiwe Moyo Kibombwe (Mrs.)* -
22nd June 1976 - 4th March 1999.

Thandiwe, the pain of losing you is still fresh in my heart. You were the kindest and most loving human being I have ever known. But though you are gone, I thank God that a part of you lives on in your son, Chancy Kibombwe Jr.

You will always have a special place in my heart. I love you very much and miss you terribly.

Dedicated to

My son, ***Twambo Songiso-Moyo;***

for being a constant source of inspiration to me; everything I do is meaningless without you. You are my one true love and my best mate.

My mum, ***Edna Mudenda Moyo;***

Would that a greater woman lived? You definitely are the 'perfect woman' that King Solomon wrote about in Proverbs 31:10-31. Without your constant love and support, I would never have achieved all that I have. Thank you for bringing me forth. I love you so much.

My dad, ***M. B. Moyo;***

For teaching me to value education and to strive for my highest potential in all that I undertake. I love you.

My brothers, ***Memuli, Morgan, Samson and Sipo Jr.;***

What does one say to the coolest brothers on earth? You guys are so cool you don't even know it, but I love you beyond imagination.

My nephew, ***Chancy Kibombwe Jr.;***

Will you ever learn to say anything other than "Aunty Millie" whenever you see me? I love you anyway.

Acknowledgements

The earth produces nothing worse than an ungrateful man.

Aesop (6th B. C.) Androcles

This work owes its successful completion to a host of persons to whom I owe the greatest debt of gratitude.

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LIST OF ABBREVIATIONS

ACHPR	African Convention on Human and People's Rights
ACHR	American Convention on Human Rights
Afronet	African Network for Human Rights and Development
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECOSOC	Economic Social and Cultural Council
FODEP	Foundation for Democratic Process
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IRCT	International Rehabilitation Council for Victims of Torture
LRF	Legal Resources Foundation
MMD	Movement for Multi-party Democracy
PHRC	Permanent Human Rights Commission
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNIP	United National Independence Party
UNZA	University of Zambia
ZCEA	Zambia Civic Education Association
ZIMT	Zambia Independent Monitoring Team

ABSTRACT

Torture is a topical subject in Zambia these days. Not only do reports indicate that the practice is as pervasive today as it was during the Second Republic, but they show that there appears to be tacit approval from the government for the widespread infliction of torture on suspects, particularly political opponents of the ruling party. United Nations documents reveal that Zambia is one of the countries in world where the nefarious crime of torture is committed¹.

During former President, Dr. Kenneth Kaunda's rule, there were strong rumours or allegations that torture was practised but no public commission of inquiry was ever established to investigate them. With the dawn of the Third Republic and democratic rule under President Frederick Chiluba, the Munyama Human Rights Commission was established to, *inter alia*, investigate allegations of torture during the Second and Third Republics². The Commission unearthed overwhelming evidence of torture in Zambian police cells and prisons³. The Commission also found appalling conditions in prisons⁴.

The dawn of democratic rule in 1991 and the wave of human rights awareness that has washed over the country since then, has, however, failed to put a stop to the practice of torture in Zambia. In fact, allegations and reports of torture are being unearthed more frequently than ever before⁵. That torture is a problem in Zambia, is beyond question. The problem is formulating measures for its eradication in the face of a truant and indifferent government.

This study's primary objective is to suggest ways in which the Permanent Human Rights Commission of Zambia can play an effective role in the elimination of torture

in light of Zambia's recent ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, (hereinafter referred to as the “CAT” or the “Convention Against Torture⁶”).

ORGANISATION OF CHAPTERS

Chapter 1 will focus on the problem of torture in Zambia. An attempt will be made to define the term “Torture” before several documented incidences of torture by law enforcement officers are highlighted. In addition, government's apathetic attitude towards the problem of torture will be discussed.

Chapter 2 will discuss the Convention Against Torture and also examine Zambia’s obligations under it. Additionally, this Chapter will discuss the enforceability of this Convention under Zambia’s legal system.

In the third chapter, the writer will be concerned with the Permanent Human Rights Commission; its structure, powers, functions, strengths and shortcomings. It also includes the efforts that the Commission has made in fighting the scourge of torture in Zambia.

Finally, Chapter 4 constitutes a general summary of the research. It summarises and presents the salient points raised in the chapters of the paper. The chapter also submits a number of recommendations regarding the Permanent Human Rights Commission’s role in effectively monitoring Zambia’s compliance with the CAT and fighting torture in general. In this regard, the writer will attempt to suggest

how best the Permanent Human Rights Commission can spearhead this monitoring effort. Chapter four will then end with a cursory glance at the future prospects in the area of torture.

ENDNOTES

¹ UN Doc. E/CN 4/1984/ SR. 33 (1984); See also Amnesty International, "Torture in the Eighties", which lists 66 countries that practice torture, including Zambia.

² Sakala, J. B., "Protection and Promotion of Human Rights in Zambia", UNDP Governance Intervention Programme, (Consultant's Report), (1997), at 12.

³ Ibid at 13.

⁴ Ibid.

⁵ Afronet, "Zambia Human Rights Report", (1997) at 56 and 57; and (1998) at 5-9.

⁶ Center for the Study of Human Rights, Twenty-Five Human Rights Documents, Columbia University (1994) New York, pp 71-79. The Convention was adopted by the UN General Assembly resolution 39/46 on 10th December, 1984. The convention is also an appendix in Afronet, "Southern African Human Rights Review", (Harare: Afronet, 1999) at 14.

CHAPTER ONE

THE PROBLEM OF TORTURE IN ZAMBIA

The United Nations was founded to reaffirm faith in the dignity and worth of the human person; to create better standards of life in larger freedom. We cannot get anywhere near fulfilling the pledge unless we wipe the scourge of torture off the face of the earth.

- Kofi Annan, United Nations Secretary General.¹

1.1 INTRODUCTION

One of the fundamental freedoms guaranteed by the Constitution of Zambia² is the freedom from torture. Article 15 of the Constitution provides as follows:

"A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment".

Despite the non-derogable manner in which this constitutional provision is couched, allegations of torture inflicted by law enforcement officers in Zambia have reared their ugly head on numerous occasions. Previously, when Zambia was under a constant State of Emergency during the dictatorial regime of former president, Dr. Kenneth Kaunda, dark rumours of torture were rife. One would think that after the change of government from one-party dictatorship to multi-party democracy, torture would be curbed. However, it still remains an almost insurmountable problem in this Southern African nation.

This chapter seeks to define torture and explore the extent of the problem it poses in Zambia. A critical examination of the government's attitude towards the distressing issue will also be made.

1.2 DEFINITION OF TORTURE

In the United Nations Convention Against Torture, 'torture' is defined in Article 1 as:

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

For clearer understanding, this elaborate definition may be paraphrased as: the intentional and officially-sanctioned infliction of severe physical or mental pain or suffering on a person, in order to compel him or her to confess to crime or divulge information or make him or her fear and follow the wishes of the torturer. Torture is, therefore, an aggravated form of cruel, inhuman and degrading treatment.

From this definition, it is imperative to note that, for one to prove torture, there must be pain or suffering arising from the actions of one person on another; such pain or suffering must be inflicted for the purpose of obtaining a confession from the victim or a third party close to the victim; further it must be inflicted by a person acting in his official capacity or with the authority, consent or acquiescence of a public official. Any pain or suffering arising from or incidental to lawful sanctions does not amount to torture. Therefore, a person who suffers consequent to his being imprisoned for rape cannot be said to be a victim of torture. Granted, he is suffering, but his suffering is a consequence of a lawful sanction.

One of the most explicable definitions of torture is to be found in the *Greek* case where the European Human Rights Court stated:

"...the word 'torture' is often used to describe inhuman treatment with the purpose of obtaining information or a confession... and is generally an aggravated form of inhuman treatment".³

Therefore, torture as inflicted by a public official or a person acting on his behalf or with his consent, in order to coerce or intimidate the victim into giving information to his torturer, forms the basis of the paper. Other activities outlawed by the CAT are cruel, inhuman or degrading treatment or punishment which would generally cover the appalling conditions of our prisons; use of the death penalty and corporal punishment etc. However, this study is solely concerned with acts of public officials that intentionally inflict severe physical or mental pain or suffering in order to fulfil a certain purpose, such as the extorting of information or confessions or punishment, intimidation or discrimination of a person.

1.3 EVIDENCE OF WIDESPREAD TORTURE IN ZAMBIA

It is essential, for the purposes of this study, to demonstrate that torture is prevalent in Zambia. There have been numerous documented cases of torture inflicted by law enforcement officers, particularly the police, on political opponents, suspects and ordinary civilians in general.

Most of the incidences of torture cited in this study are of recent occurrence. The reason for this is that it is more relevant to discuss the problem in the present rather than past context. Police in Zambia routinely torture suspects in order to extract confessions from them.⁴ This study will, first of all, show the existence of torture

through events following immediately after a coup attempt on October 28, 1997. Further, the study will utilise cases of torture inflicted on ordinary civilians, students and criminal suspects reported in Afronet's Zambia Human Rights Reports of 1997, 1998 and 1999, including newspaper reports.

At this point, a brief account of the failed coup is necessary for purposes of background information.

In the early hours of October 28, 1997, a determined and drunk-sounding soldier calling himself Captain Solo, shook the nation with an announcement of a military take over alleging massive corruption in Chiluba's government. Solo whose true identity is Stephen Lungu of the same rank, accompanied by Captain Jack Chiti and others, was on the airwaves for five hours after which loyalist government forces took over control of the station. Solo and his cohorts' coup attempt had failed miserably. The President declared a State of Emergency to enable security forces investigate the matter thoroughly. This was expected. What was totally unexpected was the vicious reaction of the police under the command of Inspector General of Police, Francis Ndhlovu. Police arrested over 100 suspects in connection with the failed coup attempt, the majority of whom complained of being tortured by police.

Among those tortured were Dean Mung'omba, the President of the opposition Zambia Democratic Congress, Captains Jack Chiti and Steven Lungu, the alleged master-minds of the October 28 coup, Major Musonda Kangwa and several others.⁵ It may be wise to examine one or two of these victims in turn.

Early on November 1, 1997, according to Dean Mung'omba's sworn affidavit, a group of up to fifteen police officers began torturing him at Force Headquarters, suspending him between two tables, hung by his handcuffed hands and bound legs from a metal rod. The officers then beat him. This is called "the Kampelwa", ("the swing"). Mung'omba alleges he was tortured again later that day and that officers tried to get him to implicate opposition United National Independence Party (UNIP) president, Kenneth Kaunda, in the coup attempt. He also speaks of the application of burning cigarettes to his body and the application of electric shocks through his handcuffs; he said he was also deprived of sleep, food and water for the first four days of detention.⁶ Human Rights Watch obtained a medical report and photographs of Mung'omba, which showed a condition consistent with allegations of torture.⁷ A letter by Mung'omba smuggled out of prison early November 1997, also described the treatment of other detainees at Lusaka Central Prison, including "forcing a burning match stick into someone's mouth and forcing them to chew and swallow it". He also described, "beating and slapping detainees over nothing except that it was pleasurable to the police officers".⁸ When Mung'omba appeared at Lusaka's High Court on November 4, John Sangwa, one of his lawyers told the press that, "He has scars on his hands and bruises all over. He has been tortured. He has lost a lot of weight. He looks like a patient from hospital."⁹

Captain Jack Chiti told the court that he too was tortured during police interrogation. He was also put on "the swing" and officers tried to get him to implicate opposition politician Rodger Chongwe in the coup attempt. Chiti said he had falsely implicated Chongwe because he had been tortured. He also apologised to UNIP leader, Kaunda, saying he had named him because of torture.¹⁰

Another coup detainee, Major Musonda Kangwa was also tortured during police interrogation. He was held incommunicado until November 11, 1997 when the court intervened, ordering medical treatment because Kangwa complained of pain arising from torture. The writer saw Major Kangwa during his habeas corpus hearing on November 25, 1997. He looked pale, weak and had a badly swollen left eye.¹¹ He described his experience of torture in his sworn affidavit wherein he stated that police officers, not satisfied with pleas of ignorance to their questions, "handcuffed me and tied both my legs and put me on a swing which was suspended between two tables and started beating me on both my feet [asking me what I had done with] the money Mr. Mung'omba gave me. I denied ever receiving money from Mung'omba as alleged or further that I had never met Mr. Mung'omba personally but only seen him on television and in newspapers.; That the officers not being satisfied with my answers continued to torture me by hitting me all over my body, some with Karate Chops [sic] others with short batons while others slapped me on my head and face, including Teddy Nondo who hit me very hard on my left eye causing blood shots in the eye and swelling on the area around the said eye.; That the first session on the swing lasted from 17:50 hours to 20:20 hours while the officers continued to torture me, and at times being blind folded so that I could not see who was beating me until I passed out.; That ... I was dropped to the floor and dragged in [sic] the same corner and where I was kept in handcuffs and for the whole night with no blankets, exposed to mosquitoes and without food until the next morning; That the interrogations continued everyday up to 5th November, 1997 as a result of which I could not talk for three days and received [sic] a big wound across my shoulders, scars all over my body, chest pains, numbness in both hands and general body pains. Further, that I had,

at this moment, lost the will and capacity to reason due to excruciating pain experienced [sic] from the police Torture[sic]. "

Clearly, Major Kangwa's narration leaves no doubt in one's mind as to the practice of torture by police officers in this country.

The torture of the coup detainees was a well-known affair because of the high-profile personalities involved and the nature of the crime they were alleged to have committed - treason. Their torture was thus well publicised in the national and international press. However, there are numerous other cases where ordinary citizens or suspects of crime are tortured but no reports of such torture are made. The few citizens who are aware of their basic human rights report such police abuse to Non-Governmental Organisations concerned with human rights such as the Legal Resources Foundation(LRF). In 1997, Afronet published a number of cases of torture using information obtained from Matero Police station and the LRF. A selected number of these cases of torture will now be examined.

In April, 1997 six youths from a Lusaka township were picked up by police on suspicion that they had committed murder.¹² All of them revealed that they were tortured by Matero Police officers. Patrick Mwitelela, a 22-year-old youth, stated that he sustained a deep sore on his left hand due to torture inflicted on him by police officers at Matero Police station when officers sought to extract a confession from him.¹³ Malisa Mubanga was suspended on the Kampelwa ("the swing") and forced to admit that he had in his possession a gun used to kill the murder victim.¹⁴ Thomas Kapepele, a Zambia Airforce employee, was suspended on "the swing" and beaten

repeatedly with three types of sjamboks while another officer hit his knees and feet with a sledge hammer. Police wanted Thomas to admit that he was in possession of an AK 47 rifle that had been used to kill the deceased.¹⁵

The other two were Dingiswayo Zulu, 29, Ernest Chanda, 23 and Joseph Mwanza, 22 who went through the same experience of torture by police.¹⁶

In addition, the Legal Resources Foundation has documented numerous cases of torture. Some of these were made available to Afronet and published in its 1997 Zambia Human Rights Report. The names of the victims, in this instance, were not published to protect them from victimisation by police.

In July 1994, police picked up a Lusaka resident who was detained on baseless grounds that he was in possession of illegally obtained arms at his house. The police later hang him upside down and he was "repeatedly beaten for several hours resulting in excruciating pain that lasted several days". As if this was not enough, the officers poured a corrosive substance on the victim's genitals resulting in unbearable pain and a permanent disability wherein the man can no longer have sexual intercourse.¹⁷

Another case involved a man, his wife and 19-month-old baby. The man and wife were subjected to torture and indecently exposed. The man was tied up and beaten for several hours while his wife was stripped naked and whipped with a horsepipe-like instrument resulting in her buttocks being swollen for several days. Her screams were so loud as to cause the man psychological torture. The following day, the man was suspended on the "kampelwa" where he was so severely whip-lashed that he remained

paralysed for several hours thereafter. He received no medical attention in all the five days he spent in the police cell. He was later charged with stealing money from his employer but he has never been prosecuted.¹⁸ In February, 1997, another man was kept in some metal container for six days without food or water during which period he was severely tortured¹⁹.

These cases represent a mere tip of the iceberg. The LRF deals with numerous cases of torture every year.²⁰ Newspaper articles also reveal a vicious pattern of torture by police and other law enforcement officers.

On or about November 12, 1998, a grade 12 pupil at Matero Girls secondary School, Bertha Mugamanzila, was tortured to death while police sought to make her reveal the source of examination papers illegally in her possession.²¹

In March 1999, police tortured to death an Evelyn Hone College student Khondwani Musukwa, from whom they sought to extract information regarding four of his friends who were allegedly involved in a motor vehicle theft.²² According to a report in *The Monitor*,²³ a police source in Kafue revealed that Khondwani was stripped, whipped and kicked as police sought to extract information from him. After failing to make him talk, police changed methods and cuffed both his hands and legs and started whipping him with thin shreds of wire. They also allegedly beat him with short batons and struck his head more than a dozen times. Khondwani sustained deep cuts to the head and a broken ankle. After he passed out police left him in the cell hoping he would regain consciousness but he was already dead. A post mortem report indicated

that his death arose from blood clots in the brain and severe bleeding. The death certificate stated that he died from severe wounds.

On 26th July, 1999, Makeni police detained and severely tortured Beatrice Nchimunya of John Laing compound.²⁴ Nchimunya was suspected of having stolen 400 South African Rand. Records at the University Teaching Hospital indicated that "multiple bruises and haematomas on the left and right thigh with laceration and left side of the face" were some of the injuries on Nchimunya. The medical report concluded that these findings were consistent with allegations that Nchimunya was whipped with a Sjambok by two officers at Makeni Police station.²⁵

A 21-year-old Lusaka youth, Augustine Chama died in police custody after being tortured by Chungu police post officers in Barlastone Park area.²⁶ At the time of his death, the dead youths' three colleagues were nursing torture wounds. Chama died after undergoing three days of torture at the police post and then more than five hours in the bush near Barlastone Park Farms. Chama was arrested while visiting his friend Gilbert Mvula Banda who had been detained at the police post on suspicion of theft of household goods.

The vast array of reports of torture would task any reader as they would fill this entire essay. Evidently, there is overwhelming evidence of torture in this country. What has the government done to rid Zambia of this shameful scourge? The next part of this chapter attempts to answer this question.

1.4 GOVERNMENT REACTION TO TORTURE ALLEGATIONS

*Not the torturer will scare me
Or the body's final fall
Not the barrels of death's rifles
Or the shadows on the wall
Not the night when to the ground
At last, dim star of pain is hurled,
But the blind indifference
Of a merciless, unfeeling world.*

Halfdan Rasmussen.²⁷

It has been shown, in the preceding section of this essay, that torture is, sadly, a hallmark of Zambia's law enforcement system. Amid manifold reports of torture in Zambia, there have been urgent calls for the government to implement measures that would curb the scourge. Most human rights activists have called on government to employ effective criminal and civil penalties against perpetrators of torture. One of the police officers that the October 28, 1997 coup detainees have consistently alleged was involved in torture is former acting Assistant Commissioner of Police, Teddy Nondo. Despite these allegations, Nondo was promoted on April 3, 1998 to become deputy commissioner of the Drug Enforcement Commission.²⁸ This move, by the President, Frederick Chiluba, was seen by many as a way of rewarding Nondo for torturing the coup suspects.²⁹

After the coup attempt, the Human Rights Commission was blocked for more than ten days by the police from gaining access to the thirty-odd detainees that were being interrogated (and some reportedly tortured) at Zambia Police Force Headquarters. The Commission, on November 4, 1997 after the prisoners were transferred to the prison system, announced that it would immediately visit all detainees.³⁰ But on 7th November, it was turned away from Lusaka Central Prison (also called Chimbokaila

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Remand Prison). This, as shall be seen in Chapter Three of this study, was in contravention of its mandate which states that it can "visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems ...".³¹ The Commission protested at this obstruction in a press statement of November 7, 1997. On November 9, 1997 the Commission was able to visit the first detainees being held at Lusaka Central Prison. Justice Chibesakunda, chairperson of the Commission, stated in a press statement that the detainees at Chimbokaila were in good condition except for two who complained that they had been tortured.³²

Although the Commission established that torture had occurred, Justice Chibesakunda and three other commissioners and the chairpersons of the Commission's committees left the same day for a week-long study tour in Sweden at the Raul Wallenberg Institute in Lund and in Stockholm.³³

On December 1, 1997 the Commission held a press conference at which it stated that "some detainees at Kamfisa, Lusaka Central, Kamwala Remand and Mukobeko Maximum Prisons complained of and showed the Commission evidence of physical torture. The Commission condemns the actions of police officers who were responsible for inflicting physical torture on detainees. Such actions are in violation of the UN Minimum Standards for the Treatment of Detained Persons [sic] already deprived of liberty." The Commission went on to conclude that " based on the above considerations, the Human Rights Commission has found as a matter of fact that some detainees were indeed physically tortured contrary to the provisions of both the international [law] and [the] Zambian Bill of Rights. The Commission accordingly

condemns the actions of the police officers who engaged themselves in such sordid activities and calls upon police authorities to take appropriate action against such officers, and ensure that the same conduct does not repeat itself in the future".

One would expect, that after such an impartial assessment of the allegations of torture, the government, in its self-proclaimed fervour to uphold human rights, would prosecute all the officers named by the coup detainees as having engaged in torture. However, this was not the reaction of the government. Foreign Affairs Deputy Minister, Valentine Kayope, accused the Human Rights Commission of damaging the image of the country abroad because it was releasing information to the public before government could assess and act on it.³⁴

Later, in a letter dated April 23, 1998, Minister of Legal Affairs, Vincent Malambo, said the government would investigate alleged violations of human rights by security and police forces. To this end, in August 1998, the government set up a commission to investigate allegations of torture against the failed October 28, 1997 coup suspects, and appointed High Court Judge Japhet Banda to head it.³⁵ This commission was sworn in on November 21, 1999 and began sitting immediately. At the time of writing this paper, it had not yet released its findings or made any recommendations to the government. It did however, hear evidence from persons that were tortured during the 1998 coup investigations and also summoned some of the alleged torturers to appear before it and exculpate themselves.³⁶

Corproal Webby Sikazwe, one of the coup suspects testified that he was gun-butted on the back of the head and this has resulted in impaired hearing and a poor sense of

balance. The gun-butting, he said, was done by two police officers at Kabwata Police Station. Afterwards, he was transferred to Kabwe Police Station where he was kept without water and food for seven days. Corporal Sikazwe was just one of the many torture victims who testified during the sittings of the Torture Commission of Inquiry. Despite the setting up of this commission, it must be borne in mind that the history of Commissions of Inquiry in Zambia is not very encouraging as they can only make recommendations which the government is not obliged to act upon.³⁷

Furthermore, it must be borne in mind that, throughout 1998, independent international verification of the torture allegations continued to be blocked by the Zambian government.³⁸ Human Rights Watch attempted to gain access to the coup detainees in November 1997 through the Human Rights Commission and the Ministry of Home Affairs but was not granted permission to do so. Similarly, Amnesty International also tried to see the detainees in mid-April 1998 using the same channels but was also denied access.³⁹ Local human rights groups such as Afronet were also denied access to detainees, although the LRF began in late December, 1997 to get unhindered access and the Zambia Independent Monitoring Team (ZIMT) did so in March.⁴⁰

Nevertheless, both international and domestic pressure on the state has generated some positive, though minimal response from the government. In February 2000, the government, through the Inter-Ministerial Committee on International and Humanitarian Law, based at the Ministry of Legal Affairs, invited Professor Brent Sorensen of the Committee Against Torture and the International Rehabilitation Council for Torture Victims (IRCT), to attend a workshop on State Reporting at Lusaka's Mulungushi International Conference Centre. One of the major objectives of

the workshop was to train Ministry of Legal Affairs personnel on the machinations of State Reporting under international human rights instruments particularly on how to formulate state reports to the UN institutions monitoring human rights promotion in UN member countries.⁴¹ No doubt such training will benefit Zambia in terms of the Convention Against Torture.

Notwithstanding, the government has not been very forthcoming in curbing the infliction of torture on detainees by police officers or other law enforcement officers as alleged torturers are still allowed to go unpunished. In fact, allegations of torture must be viewed against the backdrop of tacit approval from the executive. The government has not taken any steps to prosecute the officers named by the coup detainees as being torturers. The recommendation of the Human Rights Commission that these officers be held accountable for their vile actions, has been flagrantly ignored. Furthermore, torture *per se* is not an offence under Zambia's criminal law and this remains a major drawback in the struggle to end torture. It will take more than the creation of commissions of inquiry and inter-ministerial committees to curb torture. The solution has to start with the criminalisation of the act of torture itself and the provision of stringent penalties for its punishment. As long as this is not done, any efforts that the government makes will be ineffective.

Thus, the government's rather unresponsive attitude towards the widespread practice of torture in Zambia is dangerous and does not augur well for the fight against torture in this country. As a party to the Convention Against Torture, Zambia's standards in dealing with this problem must, as much as possible, be tailored along the lines of the

convention in question. Only then will the abominable practice of torture be well on the way to extinction.

1.5 CONCLUSION

This Chapter has defined 'torture' and attempted to demonstrate its prevalence in Zambia. In addition, the government's somewhat unresponsive attitude towards the widespread practice of torture was discussed. Reference was also made to some positive steps that the government has taken in addressing torture.

In the next Chapter, the paper examines the international standards for the protection of the freedom from torture, particularly the Convention Against Torture and Zambia's obligations under it. In this regard, the Chapter will also examine the enforceability of the Convention under Zambia's legal system.

ENDNOTES

¹ Quoted from "Democracy", a booklet published by the International Rehabilitation Council for Torture Victims, (1999) at 7.

² Cap 1 of the Laws of Zambia.

³ *Denmark, Norway, Sweden and The Netherlands v Greece* : Applications 3321/67, 3322/67, 3323/67 and 3344/67 filed in September 1967 against Greece for alleged torture practices. A special volume of the *Yearbook* of the Convention on Human Rights - Vol. XXII, 1969 contains this case in Part II of the said *Yearbook*. See also Robertson, A. H., and Merrills, J. G., Human Rights in Europe: A Study of the European Convention on Human Rights, 3rd Ed., (Manchester: Manchester University Press, 1993) at 37 and 53.

⁴ *Sunday Times*, 15 February 1998 at p. 7: "Should the Police Service Use Force?"; *The Post*, 14 May 1998: "Cops Torture Pastors".

⁵ *Times of Zambia*, 15 January 1998: "Chiti apologises to KK"; *The Post*, 12 May 1998: "Captain Solo Dismisses Torture Inquiry: Coup Remandees Oppose Torture Inquiry"; *Ibid.* May 18, 1998 at p. 1: "Mung'omba Accuses Ndhlovu of Torture".

⁶ Affidavit in Support of Dean Namulya Mung'omba's application for a Writ of *Habeas Corpus ad Subjiciendum*.

⁷ Human Rights Watch, "Zambia: No Model for Democracy", May 1998, at 32.

⁸ Copy of letter in the possession of the Human Rights Commission of Zambia, Mulungushi House, Independence Avenue, Lusaka.

⁹ *Times* London, November 5, 1997).

¹⁰ *Times of Zambia* , Lusaka, January 15, 1998.

¹¹ A Human Rights Watch activist present at the time also made the same observations in the Human Rights Watch Report, "Zambia: No Model for Democracy", *Supra* note 7 at 33.

¹² Inter-African Network for Human Rights and Development (Afronet), "Zambia Human Rights Report 1997", (Lusaka: Afronet, 1998) 56 at 59.

¹³ *Ibid* at 60.

¹⁴ *Ibid*.

¹⁵ *Ibid* at 61 and 62.

¹⁶ *Ibid* at 59, 61 and 62.

¹⁷ *Ibid* at 62-63.

¹⁸ *Ibid* at 63-64.

¹⁹ *Ibid* at 64.

²⁰ Interview with LRF lawyer, Geoffrey Mulenga, on April 14, 1999 at the LRF offices, off Great East Road in Lusaka at 15:00 hours.

²¹ *The Monitor*, Lusaka, April 9-15, 1999, at 6.

²² *Ibid* at 1 and 6.

²³ Lusaka, April 9-15 edition at 1.

²⁴ Afronet, "Zambia Human Rights Report 1999" (Lusaka: Afronet, 2000) at 41.

²⁵ Minister of Legal Affairs, Vincent Malambo, and Deputy Minister of Home Affairs, Edwin Hatembo, assured Afronet that the culprits would be brought to book. In July, officers Nyimbiri and Mfuzi, accused of torturing Beatrice, were arrested and charged with unlawful wounding. However, this paper argues that such a charge does not account for the grievous nature of the crime of torture. Only a charge of torture can adequately punish for torture, thus the law should be altered to specifically provide for the crime of Torture. See Chapter Four of this paper.

²⁶ *The Post*, 6th December, 1999 at 1 and 5.

²⁷ Translated from Danish by the late Elsa Gress and published in "Torture", Volume 9, Number 1, 1999 at 3. "Torture" is a quarterly journal published by the International Rehabilitation Council for Torture Victims (IRCT), based in Copenhagen, Denmark

²⁸ Afronet, "Zambia Human Rights Report 1998", (Lusaka: Afronet, 1999) at 9.

²⁹ *Ibid.*

³⁰ Permanent Human Rights Commission, "Press Release", 4th November, 1997.

³¹ Article 9 (d) of the Human Rights Commission Act, No. 39 of 1996.

³² Permanent Human Rights Commission, "Press Release", HRC/PR/02/97, 9th November, 1997.

³³ In a press release on 7th November, the Commission stated that Commissioner Lavu Mulimba would remain to monitor the situation of the detainees. Two days later, after donor unease over the timing of the study tour and diplomatic efforts to encourage a postponement, the Commission determined that Commissioner John Sakulanda would also remain to monitor developments. See Permanent Human Rights Commission "Press Release", *Ibid.*

³⁴ *Times of Zambia*, April 3, 1998.

³⁵ Human Rights Watch, "Zambia: No Model for Democracy", *Supra* note 7 at 39.

³⁶ *Zambia Daily Mail*, 7th December, 1999 at 1.

³⁷ Sikota, S., "Press Freedom in Zambia - 1999 Country Report", article submitted to the Media Institute for Southern Africa in April, 2000, at 2.

³⁸ *Supra* note 35.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Sorensen B., member of the UN Committee Against Torture, addressing University of Zambia students on Friday, 4th February, 2000, Senate Chamber, 16:00 hours.

CHAPTER TWO

INTERNATIONAL PROTECTION OF FREEDOM FROM TORTURE

“Surely one of the most insidious evils in this supposedly modern age is the continued practice of inflicting torture upon individual human beings. This Convention (the CAT) marks, therefore, an extremely important milestone in the continuing efforts of the United Nations to promote and ensure greater respect for human rights. The world community has thus outlawed, once and for all, the abominable practice of torture.”¹

.1 INTRODUCTION

This chapter gives an account of the international measures that have been put in place for the protection of individuals from torture and other forms of ill-treatment. An attempt is also made to examine the salient provisions of the Convention Against Torture and the applicability of the convention under Zambia’s legal framework.

Following the excesses of the Third Reich, the international community took a categorically uncompromising stance against the atrocious practice of torture. According to Bassiouni, millions of Jews and thousands of anti-Nazi activists had been subjected to horrifying acts of torture by the Nazi regime in Germany before and during the Second World War.² Towards the end of the war, while the birth of the UN was still in process, the issue of torture was high on the international community’s list of priorities. Thus, since the UN’s inception in 1948, numerous efforts to fight torture have been made, with the most comprehensive being the Convention Against Torture.

INTERNATIONAL EFFORTS AGAINST TORTURE

Before the adoption of the Convention Against Torture, a number of human rights instruments outlawing the practice were formulated. Thus, article 5 of the Universal Declaration on Human Rights (UDHR) adopted in 1948 prohibits the subjection of individuals to torture. In addition, the 1966 International Covenant on Civil and Political Rights (ICCPR) also prohibits torture.³ Other Conventions – on Genocide, Apartheid and Slavery, for example, outlaw the practice for the groups of persons to which these conventions apply.⁴

Additionally, there are conventions prohibiting torture on a regional basis. There is, in Europe, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which seeks to compliment Article 3 of the European Convention on Human Rights (ECHR).⁵ The former convention has set up a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which conducts visits to places such as prisons where the occurrence of torture is most likely.⁶ The Committee's visits are based on recognition of the fact that the protection of individuals from torture could be strengthened by non-judicial means of a preventive character.⁷

Still on a regional basis, both the African Convention on Human and People's Rights (ACHPR)⁸ and the American Convention on Human Rights⁹ prohibits torture.

It has long been accepted that detainees are most likely to be the victims of torture. In this vein, there are various international mechanisms that have been put in place for the protection of their freedom from torture. Most of these mechanisms were developed long before the CAT came into being. Some of the more important ones will now be outlined before this chapter turns its attention to the CAT itself.

The 1955 Standard Minimum Rules for the Treatment of Offenders adopted by the UN General Assembly (UNGA) set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of penal institutions. One of the Standard Minimum Rules provides that corporal punishment, punishing by placing one in a dark cell, and all other cruel, inhuman or degrading punishment be completely prohibited as punishments for disciplinary offences.¹⁰

Also with regard to the treatment of detained persons, Article 24 of the Draft Principles on Freedom from Arbitrary Arrest and Detention prohibits the subjection of detained persons to mental and physical torture or any other form of ill-treatment.¹¹

In addition, there is the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the UNGA in 1975 in its resolution 3452 (XXX) of December 9.¹² Most of the Declaration's 12 articles are contained in the CAT which is discussed below.

In addition, there is the UN Code of Conduct for Law Enforcement Officers which was adopted by the UNGA on December 17, 1979.¹³ This Code was transmitted to governments by the UNGA with recommendations that favourable consideration should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officers.¹⁴ Article 5 of the Code reads as follows:

*No law enforcement officer may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*¹⁵

International Law has further taken into account the crucial role that medical personnel play in the fight against torture as they provide protection from the scourge to detainees and prisoners. In another, less honourable regard, physicians reportedly have performed experiments on behalf of their governments in order to scientifically study the effects of torture.¹⁶ Therefore, the UNGA adopted the Principles of Medical Ethics on 18 December 1982.¹⁷ These principles are relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture. Principle 1 of the Principles of Medical Ethics provides that:

It is a gross contravention of medical ethics as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture and other cruel, inhuman or degrading treatment or punishment.

In addition, health personnel may not use their knowledge and skills in the interrogation of prisoners and detainees which may adversely affect the latter's physical or mental health¹⁸. Moreover, according to these principles, medical personnel may not certify a

prisoner or detainee as being fit for certain forms of punishment that may be deemed to be cruel or degrading.

This Chapter has thus far outlined the various international instruments available under the United Nations system for the prevention of torture. It must be noted that the prohibition of torture undoubtedly formed part of customary international law by the time the CAT was adopted in 1984.¹⁹ The unanimous adoption of the 1975 Declaration and Convention against torture is therefore, best interpreted as confirming the existence of such a customary international norm²⁰ which is binding on all states whether or not they are members of the UN.

The Chapter will now discuss the most important UN mechanism for combating torture – the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.3 THE CONVENTION AGAINST TORTURE

For the parties to it, the UN Convention Against Torture adds to the customary international law prohibition on torture by requiring them to facilitate the punishment of torture through their municipal law. The Convention also provides further international procedures for the investigation and condemnation of torture, thus adding to the obligations and enforcement mechanisms in the ICCPR²¹ and other regional human rights treaties.²² The CAT, which consists of 33 articles, became effective as of 26 June 1987.²³

Article 1 of the Convention has already been discussed in the previous chapter of this paper. There is absolutely no derogation that may be invoked as a justification for torture; the CAT explicitly notes that no order from a superior or exceptional circumstance may be invoked as a justification of torture.²⁴

Furthermore, under the Convention, no State Party may expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.²⁵

State Parties to the Convention also pledge to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction. The criminalisation of the act of torture, strongly recommended by the International Law Commission in its Draft Articles on state responsibility, was made mandatory by the Convention.²⁶ Thus, article 4 of the Convention requires each State Party to ensure that all acts of torture including an attempt to commit torture, are made offences under the criminal law and punishable by appropriate penalties that take into account the grave nature of these offences. An example of a country that has followed this requirement is Canada, which has amended its Criminal Code to make torture a specific offence punishable by fourteen years' imprisonment.²⁷

The Convention also introduces two new elements of particular significance to efforts by the United Nations to combat torture. The first is that a torturer may be prosecuted wherever he is to be found in the territory of any State Party to the Convention.²⁸ This is

because the Convention specifies that persons alleged to have committed acts of torture may be tried in any State Party or that they may be extradited so that they are tried in the State Party where they committed the torture.²⁹ The second new element is that the Convention contains a provision which allows for an international inquiry if there is reliable information indicating that torture³⁰ is being systematically practised in the territory of a State Party to the Convention.³¹ Such an inquiry may include a visit to the State Party concerned, with its consent of course. At the end of such a visit, the Committee sends its findings to the government concerned with its comments or proposals.³² This procedure is confidential except that following its completion, the Committee may include a “summary account” of the results in its annual report, which is published.³³ Such publicity is the only sanction available should the Committee find the existence of a “systematic practice” of torture.³⁴ Evidently, article 20 of the Convention is important to the fight against torture.³⁵ However, the import of this provision is diminished by the ‘opting-out’ clause that was included in the text of the Convention at the request of the former European communist countries. This clause enables a State Party to the Convention to enter a reservation against article 20. In effect, what this means is that the article is inapplicable to such a State Party.

It must be mentioned here that when Zambia acceded to the CAT in October, 1998 it entered a reservation against article 20.³⁶ The action was condemned by some human rights organisations in Zambia who viewed it as a major blow to the fight against torture. In its 1998 Human Rights Report on Zambia, AFRONET condemned the reservation stating that the government “acted in bad faith” and that there was “no political will on

the part of the government to implement the provisions of the CAT”.³⁷ However, others insisted that the reservation had no adverse impact on the main purpose of the CAT and that despite the reservation, the force of the Convention still remained substantial.³⁸ Fortunately, the Zambian government saw the light and lifted the reservation in December 1999.³⁹

Furthermore, the States Parties agree to afford one another the greatest measure of assistance in connection with criminal proceedings brought forward in respect of acts of torture.⁴⁰ They also undertake to ensure that education and information regarding the prohibition against torture is fully included in the training of law enforcement personnel, civil or military, medical personnel, 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.⁴¹

The States Parties also agree to ensure that, in their legal systems, victims of acts of torture obtain redress and an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.⁴²

The Convention furthermore provides for the establishment of the Committee against Torture (“the Committee”) to monitor the implementation of the CAT.⁴³ The Committee consists of 10 experts⁴⁴ of “high moral standing” and recognised competence in the field of human rights who serve in their “personal capacity”; they are not government representatives.⁴⁵ Elected by secret ballot, the experts serve for four years and are then

eligible for re-election.⁴⁶ Under the Convention, States Parties are enjoined to submit through the UN Secretary General reports to the Committee on measures that they (the States Parties) have taken towards fulfilling the provisions of the Convention.⁴⁷ Each report is considered by the Committee, which may make general comments and include such information in its annual general report to the States Parties and to the UNGA. Generally, however, all proceedings of the Committee are confidential and, at all stages of the proceedings, the co-operation of the State Party is sought.⁴⁸

Expenses incurred by the Committee in connection with its activities are borne by the States Parties to the CAT.⁴⁹ At their initial meeting, the States Parties decided that they would share expenses in proportion to their contributions to the budget of the United Nations, but that no single State's share should be more than 25 per cent of the total expenses.

It is important to mention that under its rules of procedure, the committee may invite specialised agencies, UN bodies concerned, regional inter-governmental bodies and NGOs in consultative status with the Economic Social and Cultural Council to submit to it information, documentation and written statements, relevant to the Committee's activities under the Convention.⁵⁰

2.4 INTERNATIONAL SUPERVISION AND IMPLEMENTATION OF THE CAT

Within the UN, there are several supervisory mechanisms which are in place for the effective supervision and implementation of the CAT. Some of the mechanisms considered by the paper are also useful for curbing torture in those states that are not party to the CAT.

Apart from the various mechanisms put in place by the CAT itself regarding the supervisory functions of the Committee Against Torture,⁵¹ under certain conditions, the Committee may deal with complaints submitted by a party to the CAT in respect of non-compliance with obligations under the Convention by another State Party.⁵² However, before a complaint is laid against the violating State Party, the latter must have made a declaration recognising the competence of the Committee to receive state complaints against it.⁵³ This procedure is similar to that under Article 41 of the ICCPR. A matter may only be referred to the Committee if a prescribed process of negotiations between the parties has been unsuccessful. Having determined that local remedies have been exhausted, the Committee must make available its good offices, which may include the establishment of an *ad hoc* conciliation commission, with a view to achieving a friendly settlement.⁵⁴ If no such settlement is reached, the Committee must confine its report to a brief statement of the facts.⁵⁵

The CAT also provides for an optional system of individual petitions,⁵⁶ which is closely modelled on that under the First Optional Protocol of the ICCPR.⁵⁷ However, for the

committee to consider such applications, the party to the CAT against which the complaints are being made must have recognised the right to complain in advance. Furthermore, the Committee may only consider a communication to it if “the same matter has not been, and is not being, examined under the another procedure of international investigation or settlement”.⁵⁸ When the Committee has completed its examination of a communication, it “shall forward its views to the State Party concerned and to the individual”.⁵⁹ These “views” are not binding in law.⁶⁰ By 1st June, 1998, 38 countries had recognised the competence of the Committee under Article 22.⁶¹ Unfortunately, Zambia is yet to recognise the competence of the Committee to receive inter-state and individual complaints against Zambia. Therefore, as at now, articles 21 and 22 of the Convention do not really apply to Zambia and this is a serious flaw in the fight against torture.

Under the UN system, an alternative supervisory mechanism in matters of torture is the provision for submission of complaints to the Human Rights Committee (HRC) established under the ICCPR.⁶² In addition, the First Optional Protocol to the ICCPR, which protocol Zambia has ratified, provides for individual complaints to the HRC.

Furthermore, in its resolution 1985/33, the UN Commission on Human Rights appointed a Special Rapporteur to examine questions relevant to torture, requesting him to seek and receive credible and reliable information on such questions and to respond to that information *without delay*.⁶³ His work thus demands urgent action. The Special Rapporteur is required to report directly to the Commission, which is composed of

government representatives, on the phenomenon of torture in general.⁶⁴ In this respect, therefore, his mandate differs significantly from that of the Committee Against Torture whose terms of reference give it a quasi-legal function. Therefore, the Special Rapporteur establishes contact with governments with a view to establishing the legislative and administrative measures they have taken to prevent torture and to tackle its consequences whenever it occurs.⁶⁵ Perhaps the most remarkable feature of the Special Rapporteur is that his task is not only confined to States Parties to the CAT but to all UN members states in general.⁶⁶

A petition related to torture may also be submitted under the Economic Social and Cultural Council (ECOSOC) 1503 Procedure to the UN High Commissioner for Refugees (UNHCR). This procedure, which was formulated by both the ECOSOC and the UNHCR, creates a confidential procedure to deal with communications on violations of human rights.⁶⁷ Only communications which indicate a “consistent pattern of serious and reliably documented violations of human rights” qualify for consideration under this procedure.⁶⁸

Moreover, within the framework of the UNHCR, a debate has been taking place since 1992 as to the issue of an Optional Protocol to the CAT, which will establish “a preventive system of regular visits to places of detention”.⁶⁹ Since then, the Committee against Torture has proposed a draft Optional Protocol to the Convention, which would indeed permit the Committee to visit places of detention.⁷⁰

OTHER EFFORTS AGAINST THE EFFECTS TORTURE

In addition to the international efforts for the promotion of the freedom from torture already referred to in this study, mention must be made of the UN Voluntary Fund for Victims of Torture. The Fund was established by the UNGA Resolution 36/151 of 16th December 1981, in order to receive voluntary contributions for humanitarian, legal and financial aid to individuals whose human rights have been seriously violated as a result of torture, and to their relatives.⁷¹ Priority is given to victims of violations of states of which the human rights situation has been the subject of resolutions or decisions adopted by either the UNGA, Economic Social and Cultural Council or the United Nations High Commissioner for Refugees.⁷²

Another organisation which supplements the efforts of the Fund is the International Rehabilitation Council for Torture Victims (IRCT) based in Copenhagen, Denmark.⁷³ The establishment of rehabilitation centres for torture victims in various places in the world appears to be a favoured measure of the IRCT. In Cape Town, South Africa for example, the Trauma Centre for Victims of Violence and Torture offers medical services to torture victims which include emotional, psychological, spiritual and social therapy.⁷⁴ This has proved to be an effective deterrence against the adverse effects arising from torture. Other places include the United States of America where there is the Centre for Victims of Torture in Minneapolis; Romania with its ICAR Foundation based in Bucharest; Nepal which has a Centre for Victims of Torture based in Kathmandu; and Argentina which has the Argentine Team for Psychological Assistance based in Buenos

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Aires.⁷⁵ All these centres operate under the auspices of the IRCT. The Council is working tirelessly to establish similar centres in all countries in the world, but there is general reluctance by governments to establish such centres as they feel that such action would amount to admitting to the existence of torture in their countries.⁷⁶

APPLICATION OF THE CAT IN ZAMBIA

In examining the extent to which the CAT can be applied in Zambia, it is imperative to make mention of the role that the Convention, as an international human rights instrument, plays to states in general. It is also important to gain an insight into the general applicability of international human rights instruments at national level.

The CAT, being part of international human rights law, seeks to provide states with a standard to follow. Further, it provides international remedies for state violations of the freedom from torture. It has been pointed out, though, that the remedies under this Convention are similar to those in the general sphere of international law.⁷⁷ Generally, a state party to an international agreement can report human rights violations contrary to the agreement by another party and seek redress through diplomatic channels or by agreed upon international mechanisms.

However, it is not easy to compel a state to observe its obligations under an international human rights instrument as it impinges on the domain of municipal (domestic or state) law.⁷⁸ States generally assert their right to treat their citizens in any manner they see fit.

Over the years two main theories on the relationship between international and state law have emerged, namely: monism and dualism.⁷⁹ Monists see international law and state law as two sides of the same coin or “concomitant aspects of one system – law in general”.⁸⁰ According to dualism, however, international law and state law represent two distinct legal systems.⁸¹

The actual application of the rules of international law on the national level varies from state to state. Generally there are two theories in respect of the manner in which a treaty is applied in municipal courts. One is called the transformation theory and the other the delegation theory.⁸² Positivists posit the view that the rules of international law cannot directly and *ex proprio vigore* be applied at national level by the domestic courts. In order to have treaties applied domestically, positivists are of the view that these laws must undergo a process of specific adoption (or incorporation) into domestic law. This stems from their assertion that international and state law constitute two strictly separate and structurally different systems. Thus, international law cannot impinge upon state law unless the latter allows its constitutional machinery to be used for that purpose. With particular regard to treaty rules, the positivists posit that the treaty must be transformed into state law before it can be applied.⁸³

Critics of the transformation theory have put forward their own hypothesis, the delegation theory. According to this theory, there is delegated to each state by constitutional rules of international law, the right to determine when the provisions of a treaty or convention are to come into force and the manner in which they are to be embodied in state law.⁸⁴ The

procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. There is no transformation, neither is there a fresh creation of rules or municipal law, but merely an elongation of one single act of enactment. The constitutional requirements of state law are thus merely part of a unitary mechanism for the creation of law.

Zambia is not only dualist but also aspires to the transformation theory. This means that, while customary international law is automatically part of the law of Zambia (provided it does not conflict with domestic law – case law or legislation) conventional international law is not.⁸⁵ International treaties, though ratified by Zambia cannot be directly invoked in Zambian courts. Only if Zambia has, by adopting appropriate legislation, incorporated a treaty it has ratified as part of the domestic law, may the said treaty be invoked in Zambian courts.⁸⁶

Therefore, although Zambia has ratified the Convention Against Torture, a person whose rights under the Convention have been violated, cannot directly plead the CAT in any court in Zambia since Parliament has not passed legislation incorporating the said instrument as part of the internal law of Zambia. Fortunately, though, the prohibition of torture is part of international customary law, which is automatically binding on Zambia. Therefore, Zambia is obliged to explicitly prohibit torture in its jurisdiction. Article 15 of the Zambian constitution fulfils this requirement. But for purposes of criminally prosecuting perpetrators of torture, an express provision creating the specific offence of

torture is required in the Zambian Penal Code. A torture victim cannot use the CAT to prosecute a torturer in Zambia.

Internalisation of international human rights treaties, such as the CAT, is therefore a critical factor in the further protection of the human rights guaranteed under those instruments. In dualistic states, such as Zambia, the ultimate effectiveness of international human rights instruments is contingent on appropriate legislative measures by government incorporating those instruments as part of domestic law.

CONCLUSION

This chapter has attempted to discuss the international measures undertaken to promote the freedom from torture particularly the UN Convention Against Torture. In discussing the CAT, the chapter also outlined the international supervision and implementation of the Convention Against Torture. Finally, an attempt was made by the paper to examine the application of the CAT under Zambia's legal system.

Having outlined the basic international endeavours for the protection of the freedom from torture, the paper's next chapter examines the institution best placed to spearhead the fight against torture in Zambia – the Permanent Human Rights Commission (PHRC).

ENDNOTES

¹ The words of former UN Secretary General, *Javier Perez de Cuellar*, on the occasion of the adoption of the CAT on November 10, 1984. United Nations, “Outlawing An Ancient Evil: Torture”, (New York: United Nations Information Unit 1985) at 1.

² Bassiouni, M. C., Crimes Against Humanity In International Law, (Dordrecht: Martinus Nijhoff Publishers, 1992) at 180.

³ Article 7 of the ICCPR.

⁴ *Supra* note 1.

⁵ Article 3 of the ECHR prohibits torture and other forms of ill treatment.

⁶ Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁷ Human Rights Reference Handbook (The Hague: The Netherlands’ Ministry of Foreign Affairs – Human Rights, Good Governance and Democratisation Department, 1993) at 49.

⁸ Article 5 of the ACHPR.

⁹ Article 5 (2) ACHR.

¹⁰ Rule 31.

¹¹ World Campaign for Human Rights, “Methods of Combating Torture”, Fact Sheet No. 4 (New York: Centre for Human Rights, 1988) at 5 : These principles were drafted at the behest of the UN Commission on Human Rights, which was composed of four member States of the Commission.

¹² *Supra* note 7 at 49.

¹³ *Supra* note 11 at 6.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Supra* note 2 at 328. In fact, Bassiouni makes reference to a report in the Manchester Guardian of May 3, 1974 in which photos taken during interrogation appeared of prisoners in Portugal. These prisoners were made available to prison doctors who wanted to study the effects of torture. He asserts that medical experimentation *does* become torture when no useful scientific purpose is served and the subject is transformed into a suffering victim.

¹⁷ Christian I. P. G., Civil and Political Rights, (Berlin: Wolfenstein Publications, 1998) at 14-15.

¹⁸ Principle 2 of the Principles of Medical Ethics.

¹⁹ Joyner, C. C., The United Nations and International Law, (New York: Cambridge University Press, 1997) at 142.

²⁰ *Ibid.*

²¹ *Supra* note 3.

²² *Supra* notes 5, 8 and 9.

²³ *Supra* note 7 at 67.

²⁴ Article 2.

²⁵ Article 3.

²⁶ *Supra* note 19 at 400.

²⁷ Section 245. 4 (1) of the Canada Criminal Code, *Ibid.*

²⁸ Articles 5, 6 and 7.

²⁹ Article 8.

³⁰ This provision only applies to torture *per se* and not to cruel or degrading treatment or punishment.

³¹ Article 20.

³² Article 20(4).

³³ Article 20(5).

³⁴ Harris, D. J., Cases and Materials on International Law, (London: Sweet and Maxwell, 1998) at 716.

³⁵ In an interview conducted on Thursday 27th January 2000, Mr. Enoch Mulembe, a lawyer and researcher with the Permanent Human Rights Commission (PHRC), stated that Article 20 is by far the most significant sanction under the Convention because it exposes a suspect country to international scrutiny. He said that without this recourse, the strength of the CAT is considerably reduced and a country could well get away with numerous violations of the freedom from torture.

³⁶ Afronet, "Zambia Human Rights Report 1998" (Lusaka: Afronet, March 1999) at 8.

³⁷ *Ibid.*

³⁸ *Supra* note 35.

³⁹ Writer's interview with Zambia's National Legal Expert, Mr. Paulman Chungu from the Ministry of Legal Affairs on 28th January, 2000.

⁴⁰ Article 9.

⁴¹ Article 10.

⁴² Article 14.

⁴³ Article 17.

⁴⁴ According to Harris (*Supra* note 34), the current members of the Committee are Burns (Canada); Camara (Senegal); Dipanda Mouelle (Cameroon); Gonzales-Poblete (Chile); Ilopoulos-Strangas (Greece); Pikis (Cyprus); Regmi (Nepal); Sorensen (Denmark); Yakovlev (Russian Federation); and Zupancic (Slovenia).

⁴⁵ Article 17 (1).

⁴⁶ Article 17(5). According to Hughes C., Fighting Torture, (Berlin: Wolfenstein Publications, 1998) at 121. The current members of the committee were elected in 1998 and become eligible for re-election in 2000.

⁴⁷ Article 19.

⁴⁸ Article 21 and 22.

⁴⁹ Article 18(5).

⁵⁰ *Supra* note 7 at 69. This is according to Rule 62 of the Committee's Rules of Procedure. These rules were formulated in April 1988 in Geneva Switzerland at the Committee's initial meeting.

⁵¹ These are discussed above.

⁵² Article 21 Harris (*Supra* note 34 at 717) writes that so far, 37 states have made Article 21 declarations. However, no cases have yet been referred to the Committee.

⁵³ Article 21(1).

⁵⁴ Article 21(1)(e).

⁵⁵ Article 21(1)(h)(ii).

⁵⁶ Article 22.

⁵⁷ *Supra* note 34 at 717 and 649.

⁵⁸ Article 22(5)(b).

⁵⁹ Article 22(7).

⁶⁰ *Supra* note 34 at 717.

⁶¹ *Supra* note 7 at 123.

⁶² Article 28 of the ICCPR.

⁶³ *Supra* note 11 at 11.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Supra* note 7 at 123.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at 49. Also see UNHCR Resolution 1998/34.

⁷⁰ *Supra* note 7 at 122.

⁷¹ *Supra* note 11 at 12.

⁷² *Ibid.*

⁷³ Afronet, "Southern African Human Rights Review", (Harare: APPHO – Southern Africa Printing and Publishing House, 1999), at 7.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ A. W. Chanda, "Introduction to the theory of human rights : Evolution of human rights standards and systems", Paper presented at an Advanced Workshop on Human Rights Law, 13th – 17th July, 1998, at 5.

⁷⁸ J. G. Starke, Introduction to International Law, 10th Edition (London: Butterworths, 1989) at 71, 72.

⁷⁹ *Ibid* at 74.

⁸⁰ *Ibid* at 76, 77.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid*.

⁸⁴ *Ibid*.

⁸⁵ Anyangwe C., "The Zambian Legal System and Internationalisation of Human Rights Instruments", Paper presented at the SAPES/AFRONET workshop at Lusaka's Mulungushi International Conference Centre in 1999, at 15.

⁸⁶ *Ibid*.

CHAPTER THREE

THE PERMANENT HUMAN RIGHTS COMMISSION AND TORTURE

People do not accept that a government that violates human rights can stop doing so when told by its own arm. It is a genuine fear that needs to be addressed. Morally, it does not make sense for a violator of human rights to set up an organ to supervise the manner in which the violator tries to comply with basic rights and freedoms.

-Michelo Hansungule (Dr.) on the Permanent Human Rights Commission: Afronet File, December 1997 at 6.

3.1 INTRODUCTION

In the last chapter, the Convention Against Torture was examined. The chapter also considered the prospects for implementing the convention in a dualistic legal system such as Zambia's. In this the third chapter, the Permanent Human Rights Commission (PHRC) will be discussed. After a brief summary of the background to and the establishment of the Commission, the chapter will discuss the PHRC's composition, powers, strengths and weaknesses. In its final segment, the chapter will turn its attention to the efforts that the Commission has made or undertaken towards the fight against torture in Zambia and also attempt to outline the role that the commission can play in monitoring Zambia's compliance with the CAT. A conclusion will close the chapter.

Considering the Zambian government's failure to ensure that torture is curbed, the establishment of a permanent Human Rights Commission in March 1997 was, in principle, a welcome development. The Commission was created primarily to hear individual claims of human rights abuse and miscarriage of justice.¹ It is currently, in the writer's opinion, the institution best placed to monitor and, ultimately, ensure that

Zambia complies with the requirements of the CAT. Although the Zambian government has portrayed the PHRC as a permanent and *autonomous* human rights "watch dog", it still remains to be seen whether the Commission has the strength and will to play an effective role in the fight against torture. It is hoped that by identifying the weak links in the PHRC's operational structure, measures will be taken to strengthen it in a manner that will lead to greater protection of the freedom from torture in Zambia.

3.2 BACKGROUND TO THE ESTABLISHMENT OF THE PHRC

The conception of the PHRC perhaps owes its 'genesis', so to speak, to the ruling Movement for Multi-party Democracy (MMD)'s desire to be re-elected to office in the 1996 general and presidential elections. In August that year, three months before election, the MMD published its revised manifesto, which, *inter alia*, pledged its commitment to the establishment of a Human Rights Commission in the country.

The manifesto's preamble claimed that since 1991, the MMD government had taken numerous steps towards observing and protecting fundamental human rights and stated that one of the major challenges was to "institutionalise what has been achieved so as to make Zambia the haven of human rights, not subject to disruption even in the change of government".²

It is worth noting here that three years earlier in May 1993, the Munyama Human Rights Commission, named after its chairman, lawyer Bruce Munyama, had been appointed by President Chiluba. Its mandate was to investigate and establish

violations of human Rights during the Second Republic years (1972 to 1991) as well as violations that occurred in the Third Republic (after October 30, 1991 when the MMD came into power).³ Initially, the MMD had opposed investigation of violations during its term, but yielded to internal and international pressure to widen its remit.

This Commission operated for two years in a generally favourable and cooperative climate until July 1995. In the findings it submitted to the President in September 1995, the Commission exposed the existence of secret detention centres throughout the country where human rights abuses, particularly torture, took place in both the Second and Third Republics.⁴ Close to 1,000 people had been detained and tortured. Significantly, the Commission's findings also highlighted that torture was occurring on a significant scale in the MMD Third Republic years. The Commission recommended that victims of state security abuses, including torture, be compensated, but it did not propose that the offenders be prosecuted.⁵ It also recommended the creation of a permanent Commission to deal with issues of human rights. (So the MMD revised manifesto could have plagiarised this recommendation by the Munyama Human Rights Commission Report).

The government's White Paper relating to the findings of the Munyama Human Rights Commission was not released until a year later, on October 1, 1996.⁶ In it, the government announced its intention to establish a permanent human rights commission that would submit annual reports to the President and Parliament. The White Paper also granted the Commission power to investigate complaints of violations freely, visit jails and detention centres and make recommendations to the

President and Parliament on effective measures to promote human rights and provide compensation to victims of human rights violations.⁷

3.3 THE ESTABLISHMENT OF THE PERMANENT HUMAN RIGHTS COMMISSION

After the publication of the White Paper, there was little official talk about the Human Rights Commission. The November 1996 elections and their outcome clearly absorbed the government's attention until late March 1997 when the Human Rights Commission Act, number 39 of 1996 (hereinafter referred to as "the Act") was enacted. The Act was passed by the Zambian parliament on March 13 and signed into law by the president the next day. It took effect on March 31, 1997. The Act establishes the Permanent Human Rights Commission and outlines its composition, functions and powers.

Although the establishment of the Commission was hailed as an indication of the government's efforts to uphold democracy and the rule of law in the country,⁸ the opposition parties and some members of civil society viewed its conception with a great deal of speculation and declined government's invitations that they send their members to represent their interests on the Commission.⁹

3.4 COMPOSITION AND STRUCTURE OF THE PHRC

Section 5 of the Act provides for a commission of seven Commissioners consisting of the Chairperson, Vice Chairperson and not more than five other Commissioners. Pursuant to section 5(2) of the Act, President Chiluba appointed Judge Lombe

Chibesakunda as chairperson, and five other Commissioners namely Dr, Dickson Konkola, Lavu Mulimba, Francis Nsokolo, Reverend Foston Sakala and John Chipawa Sakulanda.⁶ Commissioner Konkola died on 19th December 1997 and President Chiluba has since appointed Mr. Lewis Changufu as Commissioner.

The appointment of the initial Commissioners was not without controversy. The President appointed the Commission members too quickly, and a select committee of parliament approved them in one day.¹⁰ Many of the nominees were approached by a letter or phone call from the President on March 19 or 20, 1997, invited for a meeting at State House or asked to attend a Select Committee hearing on March 22 with little time for briefing.¹¹ Chairing the Select Committee was MMD Publicity Committee chairman, Vernon Mwaanga, flanked by ten other MMD parliamentarians none of whom have had any human rights experience.¹² According to individuals who attended the hearings, few questions asked to the nominees related to human rights issues.¹³ Even within MMD circles, there was consensus that the ratification of the appointees had been rushed without opportunity for debate or discussion.¹⁴ In fact, the proceedings were so quick that many have wondered whether the government was trying to have the Commissioners sworn in before the April 25 (1997) pre-Consultative Group meeting in London.¹⁵ And since then, the greatest concern has been that most Commissioners do not have human rights credentials or records of commitment to human rights.¹⁶ Of greater concern is that, as presidential appointees, the new Commissioners may not have the independence to effectively carry out the duties of their offices without undue government interference.¹⁷ The Commissioners are on three-year renewable contracts, and renewal is subject to presidential and parliamentary approval.¹⁸

It must be noted here that the announcement of the PHRC appointments generated intense debates throughout Zambia. The lack of transparency and accountability in the selection process drew angry responses from civil society leaders.¹⁹ The government went to some lengths to portray the establishment of the PHRC as a success and to deflect criticism. On April 2, for example, then Vice President, Brigadier General Godfrey Miyanda, told Malawi's High Commissioner to Zambia that, as always, the "armchair critics" were criticising the composition of the PHRC.²⁰ The appointees, he said, all had credible records and were "citizens of unquestionable record who would carry out their duties without being partisan".²¹ Thus, we see that although the establishment of the PHRC was a welcome development, the manner in which the government constituted its Commissioners was and still is seen as a drawback on the Commission's ability to work independently; and in any case, the public see the commission as a rubberstamp of government which should not be the case if the Commission is to win public confidence in its work.

The Commission is further composed of a Director and a Deputy Director.²² The Director is also the Secretary to the Commission and responsible for the management and administration of the Commission. The Commission is also empowered to appoint, on such terms and conditions as it may determine, other such staff as it may consider necessary for the performance of its functions.²³

The Commission has also put in place a number of committees to enable it fulfil its functions.²⁴ This has been done in accordance with section 15(1) of the Act. These committees, referred to as National Thematic Committees are as follows:

- (i) Children's Rights Committee, which is chaired by Dr. Tukiya Kankasa-Mabula, a former lecturer at the University of Zambia and expert in Children's rights;²⁵
- (ii) Civic and Political Rights Committee chaired by Mutumba Mainga Bull, lecturer and researcher with the University of Zambia Institute of Economic and Social Research;²⁶
- (iii) Committee Against Torture formerly chaired by the late Edward Shamwana, a prominent State Counsel;²⁷
- (iv) Conciliation, Mediation and Arbitration Committee, chaired by Commissioner Francis Nsokolo, a former Principal Resident Magistrate.²⁸
- (v) Economic, Social and Cultural Rights Committee, chaired by Dr. Mweene Mwiinga, a prominent private economist and management consultant;²⁹
- (vi) Gender Equality Committee, chaired by Gladys Mutukwa, a prominent lawyer and former national chairperson of the National Women's Lobby Group;³⁰
- (vii) Information, Education and Communications Committee, chaired by Commissioner Lavu Mulimba, a former Minister in the Second Republic;³¹
and
- (viii) Minority and Communal Rights Committee, chaired by Simon Zukas, a former minister in the Third Republic.³²

The majority of the committees came into existence early in 1998 although preparation for their formation was undertaken during 1997.³³ In addition to National Thematic Committees, the Commission also created Provincial committees to perform some delegated functions of the Commission as well as enabling the Commission deal more effectively with human rights issues at a provincial level.³⁴

According to the Act, the Commission is required to make rules by statutory instruments in instances where it delegates any of its functions or powers to committees. In this chapter, however, only the activities of the Committee Against Torture will be examined in some detail.

3.5 FUNCTIONS OF THE COMMISSION

Section 9 (a-f) of the Act provides that the functions of the Commission shall be to:-

- a) investigate human rights violations;
- b) investigate any maladministration of justice;
- c) propose effective measures to prevent human rights abuse;
- d) visit persons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- e) establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights; and
- f) do all such things as are incidental or conducive to the attainment of the functions of the Commission.

3.6 POWERS OF THE COMMISSION

The Commission's powers are enumerated in section 10 of the Act. According to this section, the Commission has powers to investigate any human rights abuses on its own initiative or on receipt of a complaint or allegation under the Act by (i) an aggrieved party acting in such person's own interest; (ii) an association acting in the interests of its members; (iii) a person acting on behalf of an aggrieved person; (iv) a person acting on behalf of and in the interest of a group or class of persons. The Commission is also empowered to summon or order the attendance of any person before it. It can also question any person in respect of any subject matter under investigation before the Commission. Furthermore, the Commission can require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission and also recommend the punishment of any officer found by the Commission to have perpetrated an abuse of human rights.

A number of the Commission's powers are exercised by way of recommendations. It is empowered, under section 10(5), when it considers it necessary, to recommend the release of a person from detention. It can also recommend payment of compensation to a victim of human rights abuse or to such victim's family. Furthermore, the Commission can recommend that an aggrieved person seek redress in a court of law and make recommendation on whatever action it deems necessary. These powers cannot be exercised when a matter is already before the courts of law.

The manner in which the PHRC uses its powers is stipulated in the various provisions of the Act but for the purposes of avoiding the wordiness of the Act, the writer

discusses, in the next few paragraphs, the operation of the PHRC using the provisions of the Act as contained in the 1997 Zambia Law Journal.³⁵

Complaints, which must be signed or thumb-printed by the complainant, and also bear his/her name and address, must be addressed to the Secretary of the Commission, and must be lodged within a period of two years from the date on which the abuse of human rights occurred or became known to the complainant. The Commission may refuse to conduct, or may decide to discontinue an investigation where it is satisfied that the complaint or allegation is malicious, frivolous, vexatious or the particulars accompanying it are insufficient to allow a proper investigation to be conducted and must inform the complainant in writing accordingly.³⁶

The Commission is required to conduct all sittings in public and make all reports in respect of such sittings public. However, the Commission may hold its sittings in camera when it considers it necessary to do so. The Commission must send written reports of its findings to the parties concerned and, depending on its findings make such recommendations as it considers necessary to the appropriate authority. Within thirty days from the date of such recommendation, the appropriate authority must make a report to the Commission, on any action taken by such authority to redress any human rights violation. The contravention of this requirement by any person or authority is an offence which can cost the guilty party a fine not exceeding ten thousand penalty units, or imprisonment for a term of up to three years or both.³⁷

The Commissioners and staff enjoy immunity from civil and criminal proceedings for anything done in the exercise of their functions. No commissioner or staff member

shall be called to give evidence before any court or tribunal in respect of anything coming to such person's knowledge in the exercise of his or her functions.³⁸

In terms of compelling witnesses to testify before the Commission, the Act makes it an offence attracting a penalty of up to ten thousand penalty units or imprisonment of up to a term of three years or both if: being a witness before the Commission and without lawful excuse, refuses to be sworn or affirmed or having been sworn or affirmed, refuses to answer fully and satisfactorily any questions put to such person; gives false testimony in any material particular to any matter under investigation; insults, interrupts or otherwise obstructs any commissioner or any member of staff in the performance of his/her functions under the Act; or disobeys any order made under the Act.³⁹

The Commission's funds shall comprise such moneys as may be appropriated by Parliament; be paid to the Commission by way of grants or vest in or accrue to the Commission. Subject to approval by the President, the Commission may: accept money by way of grants or donations from any source; and raise by way of loans or otherwise, such moneys as it may require for the discharge of its functions.⁴⁰

The Commission is required to send an annual report to the President concerning its activities during the year. The President is then required to table it before Parliament.

3.7 STRENGTHS OF THE COMMISSION

One of the major strengths of the Commission is that it is provided for in the Constitution of Zambia and thus enjoys constitutional backing.⁴¹

Another strength lies in the fact that it enjoys government support. This is good in the sense that the government will be able to cooperate with it and will continue to allow its existence for the benefit of the Zambians.⁴²

Furthermore, the Commission has received and continues to receive tremendous support from the donor community in terms of institutional and financial support.⁴³

Additionally, the Commission has the support of the people of Zambia who see it as a mechanism for quick and cheaper enforcement and promotion of human rights.⁴⁴

3.8 WEAKNESSES OF THE COMMISSION

Despite the strengths of the Commission outlined above, there are a number of factors that serve to weaken its ability to effectively fulfil the objectives for which it was set up and these are examined below.

One of the major constraints that the Commission faces is lack of enforcement power.⁴⁵ The Human Rights Act only gives the Commission powers to make recommendations. The Commission, therefore, cannot, of its own volition, enforce its decisions or punish those it finds guilty of human rights violations. It also has no

power to institute legal proceedings on behalf of any complainant.⁴⁶ Although it submits annual reports containing recommendations to the President, he is not bound by any provision of the Act or any other law to adopt and implement the recommendations of the Commission. There is further no legal provision compelling those that have been found guilty of human rights violations to compensate their victim or redress their wrong deed.⁴⁷

The ineffectiveness of mere recommendation was seen most clearly in the aftermath to the October 28, 1997 foiled coup attempt (considered in Chapter 1 of this paper). Despite a public call by the PHRC for the prosecution of those in the police service who allegedly committed torture, and who have been publicly named by their alleged victims, no steps have been taken to prosecute the said policemen. The alleged torturers remain on the job as police officers able to torture again with impunity. Had the Commission been granted the power to take punitive action against violators of human rights, it would have certainly done so against the alleged torturers of the coup detainees.

As such, the recommendations or decisions, which the Commission makes will remain solutions on paper unless there is political will on the part of the government to act on such decisions and enforce them.⁴⁸ There is, therefore, a need to strengthen the powers of the Commission as provided for by law.

Furthermore, the Commission suffers from lack of adequate funding⁴⁹. Commission chairperson, Justice Lombe Chibesakunda has observed as follows:

"The Commission has not been able to implement its full programme of work mainly due to financial constraints. ...(the Commission) needs to

be given a reasonable budget allocation for start up and for its programmes and projects to be favourably funded to ensure that the institution does not collapse before it takes off'.⁵⁰

Indeed, the Commission requires a great deal of funds to enable it pay its staff, travel to areas of human rights violations, undertake effective research, and basically conduct all those activities necessary for the achievement of its mandate. The constraints outlined above have proved to be a hurdle on the Commission's ability to fulfil its mandate.⁵¹ They have in fact been the reasons why some people have criticised the PHRC for being weak and ineffective.⁵²

3.9 COMMISSION'S EFFORTS AT FIGHTING TORTURE

The Commission's efforts in addressing the problem of torture go back to the time that the coup detainees were tortured by police. Following the arrest and detention of the coup suspects, the commission visited Lusaka Central, Kamwala Remand, Mukobeko Maximum and Kamfisa prisons to see and interview those detained in connection with the coup. The Commission then issued a press release stating that it had found that torture had in fact occurred. But the impact of the Commission's press statement was spoiled by the commissioners scurrying off to Sweden for a one-week tour there even before the visits were concluded.⁵³ Many viewed this move with disdain because it portrayed the image that the Commission was not really concerned with the detainees after all; that the Commission couldn't care less if the state took measures to redress the situation or not.

After the trip to Sweden, at a press conference on 1st December, 1997, the Commission stated that it had found "*as a matter of fact*, that some detainees were

indeed physically tortured contrary to the provisions of both the International and Zambia Bill of Rights."⁵⁴ The Commission condemned the action of police officers who engaged themselves "in such sordid activities" and called upon police authorities to take appropriate action against the guilty officers and ensure that such conduct is not repeated in future.⁵⁵

In response to the Commission's press conference the government demanded a written report from the Commission,⁵⁶ which the latter produced in March 1998. In this report, the PHRC concluded that at least nine of the detainees held in connection with the coup attempt had been tortured and identified 12 officers as being responsible for the same.⁵⁷

Reacting to the Commission's finding that torture was in fact inflicted on the coup detainees, the government announced in May 1998, that it would establish an impartial inquiry into the allegations of torture and develop a comprehensive human rights training program for law enforcement officers.⁵⁸ In August 1998, the President appointed High Court Judge, Japhet Banda, to head a Commission of Inquiry to investigate the allegations of torture made by the coup detainees.⁵⁹ His appointment meant that the inquiry was further delayed because he was the presiding judge at the trial of those charged in connection with the foiled coup attempt which trial was set to continue through much of 1999.⁶⁰ The establishment of this commission by the government is clear indication that the determination by the PHRC of the infliction of torture on some coup detainees was one of the most decisive actions ever taken by the Commission on this matter to date.

Another effort of the Commission towards fighting torture has been the establishment of a Committee Against Torture. This Committee was created under the chairmanship of Lusaka lawyer Edward Shamwana, who died in February, 2000. Nobody has yet been appointed to replace him. The writer's visit to the Commission to find out how much work the committee has done in relation to combating torture yielded very little result as none of the committee's officers seemed to know anything. However, the writer was able to obtain a few cases of torture that the Commission, in conjunction with the committee, has dealt with from 1998 to date. (The names of the victims have been withheld on request by the Commission.) Only a few of the cases are described below:

1. The complainant was severely beaten up by police officers who suspected him of diverting telephone lines. He suffered irreparable damage to his ears and can no longer hear. The Commission has closed the matter as it was referred to the courts of law.
2. The complainant filed a complaint on behalf of his son who had been arrested and tortured by police. He was suspected of having been involved in aggravated robbery. The Commission has closed the case as it is now before the courts.
3. Another man was employed as a security guard for Kara Counselling. On December 27, 1997, thieves stole tyres from the storeroom and the complainant was held as a suspect and subjected to torture.
4. The complainant alleged that the deceased died after being tortured by police who arrested him (the deceased) after the Makeni Islamic Society reported him for having stolen money from them. The Commission found

that the deceased had not been tortured but had, in fact, died as a result of poor health.

5. The complainant alleged ill-treatment in the guard room by Chamba Valley Zambia National Service Officers. He was later handed to Zambia Police who allegedly tortured him while in custody. The Commission is still investigating the matter.

None of the cases of torture before the Commission has resulted in successful prosecution of the police officers involved in the crime. In fact, only one case cited above indicates a recommendation by the Commission to institute criminal proceedings against the perpetrator. The pattern of most cases dealt with by the Commission is the same - either the matter is closed because it is in court or the allegations have been 'found' to be false after investigations. Another surprising factor is that, although the Commission has had less than thirty cases of torture reported to it by the public in the period between 1998 and 1999,⁶¹ information by AFRONET and LRF (discussed in Chapter One of this paper) demonstrates that a lot more people are tortured every year in Zambia. The fact that only a few of them get to the Commission is evidence of the need for the institution to seriously conduct a public awareness campaign to bring itself to the attention of the common man on the street who, more often than not, is in constant danger of being tortured by police.

In addition to the above-stated efforts, the Commission is also working closely with the Inter-Ministerial Committee on Human Rights and Humanitarian Law at the Ministry of Legal Affairs in preparing Zambia's first report to the UN Committee Against Torture under the CAT's state reporting system.

Furthermore, the Commission is in the process of preparing a ten-year Plan of Action for Human Rights promotion in Zambia. The Draft Plan of Action lays down some of the specific steps that the Commission intends to undertake in order to fight the nefarious scourge of torture in Zambia. A number of these steps are considered in the next chapter under the realm of recommendations. At this point, the writer will examine, how best the PHRC can monitor Zambia's compliance with the CAT.

3.10 THE ROLE OF THE COMMISSION IN MONITORING ZAMBIA'S COMPLIANCE WITH THE CONVENTION AGAINST TORTURE.

Zambia is now a party to the CAT. In the previous chapter, we noted what the requirements for the protection of freedom from torture are as stipulated by the Convention. If Zambia is to effectively combat the insidious crime of torture, it is imperative that it complies with the provisions of the CAT. The PHRC is in the best position to ensure that the country complies with these requirements. There are a number of ways in which the Commission can do this. (Some of these ways are restated in the next chapter by way of recommendations)

First of all, the Commission can use its investigative powers to find out and expose acts of torture in police cells, prisons and wherever torture may be practised. It could also obtain information on activities of torture from non-governmental human rights bodies such as AFRONET, LRF, Young Women's Christian Association, Catholic Commission for Justice and Peace, etc.

Secondly, the Commission could submit periodic reports to the government recommending the appropriate legislative and administrative action for the effective eradication of torture in Zambia's policing system.

Furthermore, the Commission could also submit an annual report to the Committee Against Torture on government's efforts, if any, aimed at curbing torture. In this regard, if the government is not doing anything to fight torture, the Commission could provide such information rather than leaving the Committee Against Torture to rely on a biased report from government under the state reporting system. In fact, since Zambia has not recognised the competence of the UN Committee Against Torture to receive inter-state and individual complaints against Zambia, the Commission could act on behalf of individuals and submit information, to the UN Committee Against Torture, relating to acts of torture by government officials on individuals including what measures, if any, have been taken to bring the perpetrators of the scourge to book.

Another way in which the Commission could ensure Zambia's compliance with the CAT is by agitating for the inclusion of "torture" as a specific offence in Zambia's Penal Code. This has been done in England and Canada and it can be done here too.⁶² In this regard, the Commission could also identify laws that facilitate torture and lobby for their repeal.

The Commission could, additionally, campaign for the punishment of torturers and for the adequate compensation of their victims. So far, none of the police officers accused of torturing the 1997 coup detainees has been prosecuted and no adequate

compensation has been given to the victims. If the Commission made enough noise over the issue, something would be done about it.

The Commission could also provide human rights educational material for the training of law enforcement officers so that the latter stop seeing torture as a constituent of investigative skills. Such an action would be in line with the requirements of the Convention.

Therefore, although the Act gives the Commission few powers to pursue its mandate, there is a possibility that the Commission could broadly construe these powers so as to effectively ensure that Zambia complies with the provisions of the CAT. In this regard, the PHRC would efficiently monitor Zambia's compliance with the Convention Against Torture. The next chapter contains more recommendations on the subject.

3.11 CONCLUSION

This chapter has examined the background to and establishment of the PHRC. The chapter has also considered the composition, functions, powers, strengths and weaknesses of the Commission and, furthermore, attempted to outline the efforts the Commission has so far made towards the fight against torture. The chapter also considered the role that the PHRC could play in monitoring Zambia's compliance with the CAT.

In the next Chapter, the paper summarises the findings of this study and outlines a number of recommendations on how best the PHRC can monitor Zambia's compliance with the Convention Against Torture. The chapter will close with a brief discussion on future prospects relating to the problem of torture in Zambia.

ENDNOTES

¹Section 10(d) of the Report of the Zambian Government to the pre-Consultative Donor Meeting in London in 1997. Cited in Human Rights Watch /Africa, "Zambia: The Reality Amidst Contradiction", July 1997, Volume 9 number 3.

² "MMD Manifesto", full text published in *The Sun*, September 2-8, 1996 at 5.

³ Sakala J. B., "Protection and Promotion of Human Rights in Zambia", (Ndola: UNDP Governance Intervention Programme), at 12.

⁴ "Report of the Human Rights Commission of Inquiry," Lusaka, September 6, 1995, section 4.3, at 58.

⁵ *Ibid.*

⁶ A leaked copy of the Commission's report was published in *The Post* (Lusaka) on January 12, 1996.

⁷ "Summary of the Report of the Munyama Human Rights Commission of Inquiry and Government Reaction to the Recommendations", Government Paper No. 2 of 1996 (White Paper).

⁸ Then Republican Vice-President, Brigadier General Godfrey Miyanda: ZNBC Radio, Lusaka, 21st March 1997, 18:00 GMT (BBC Monitoring Service).

⁹ *Ibid.* For example, the government had trouble finding persons to fill in certain positions in the Commission. A number of people reportedly approached to fill the positions rejected the offers including President of the Foundation for Democratic Process (FODEP), Dr. Alfred W. Chanda, a respected human rights expert, who was offered the post of director. And Dr. Michelo Hansungule, another respected Zambian lawyer from the University of Lund., Sweden rejected the offer of vice-chairman of the Commission: *Supra* note 1, Human Rights Watch/Africa, at 57.

¹⁰ *Supra* note 1, Human Rights Watch / Africa at 56.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.* In fact, the hasty constituting of PHRC prior to the pre-Consultative Donor Meeting in London is one of the reasons that has led a number of people to conclude that the creation of the PHRC is merely a window-dressing exercise for donors and not seriously meant to address human rights violations in the country.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ "Miyanda Defends Rights Body": *The Post*, 3rd April, 1997 at 1.

²¹ *Ibid.*

²² S. 18 of the Act.

²³ S. 18(3) of the Act.

²⁴ Permanent Human Rights Commission, "Annual Report", (Lusaka: 1997) at 6.

²⁵ *Ibid.*

²⁶ *Ibid.* at 7.

²⁷ *Ibid.* This Committee is currently without a chairman.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ "Zambia Law Journal", Volume 29, 1997 (Lusaka: UNZA Press), at 118 - 121.

³⁶ *Ibid* at 119.

³⁷ *Ibid* at 120-121.

³⁸ *Ibid* at 121.

³⁹ *Ibid* at 121.

⁴⁰ *Ibid* at 121.

⁴¹ Article 125 of the Constitution which provides for its establishment.

⁴² *Supra* note 3 at 11.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ "Rights Body-A No Win Situation", Afronet File, Issue No. 4, December 1997 at 6.

⁴⁶ *Supra* note 3 at 10.

⁴⁷ "Afronet Human Rights Report 1998" (Lusaka, Afronet Publications, 1999) at 70.

⁴⁸ *Supra* note 45.

⁴⁹ *Supra* note 47 at 69.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Times of Zambia*, 10th January 1998, "Shamenda Prods Rights Commission."

According to this report, Zambia Congress of Trade Unions President Fackson Shamenda accused the Commission of ignoring workers' rights. See also *The Post*, 30th March, 1998 : "Rights Body neglects Poor People, says Mwebe".

⁵³ *Supra* note 45.

⁵⁴ Amnesty International Report 1998, "Zambia - Misrule of Law: Human Rights in a State of Emergency", (London: Amnesty International Publications, 1998) - <http://www.amnesty.org.aipub/1998/AFR/16300498.htm> at 13.

⁵⁵ *Ibid.*

⁵⁶ Human Rights Watch, "Zambia: No Model for Democracy", (May 1998) at 39.

Kindly refer to Chapter one of this paper for further details on this matter.

⁵⁷ "Amnesty International Report 1999", (London: Amnesty International Publications, 1999) at 368.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ This assessment was made from the list of torture cases made available to the writer by the Commission.

⁶² "Africa Confidential", Volume 40 No. 1, 8th January, 1999 at 8.

CHAPTER FOUR

GENERAL CONCLUSION, RECOMMENDATIONS AND PROSPECTS FOR THE FUTURE

4.1 SUMMARY

This dissertation has examined the problem of torture in Zambia. The study established that the practice of torture, as defined in the Convention Against Torture, is rife in this country. The study further demonstrated that, although the government of Zambia has made a number of efforts in support of the fight against torture, more effective measures need to be employed if the scourge is to be wiped out. The study further outlined the international measures for the protection of the freedom from torture. This dissertation further considered the Permanent Human Rights Commission and how this institution can best monitor Zambia's compliance with the CAT.

Chapter One focused on the problem of torture in Zambia. An attempt was made to define the term "torture". The chapter presented a number of documented incidences of torture in Zambia and also discussed the government's reaction to the problem.

In Chapter Two, international standards for the protection of freedom from torture were reviewed. In particular, the salient provisions of the Convention Against Torture were scrutinised and an analysis of the applicability of the CAT under Zambia's legal system was done.

The focus of Chapter Three was the Permanent Human Rights Commission - its establishment, composition, functions, powers, strengths and weaknesses. The chapter further examined the efforts the Commission has made in fighting the scourge of torture and also proposed the role that the PHRC can play in monitoring Zambia's compliance with the Convention Against Torture.

4.2 **RECOMMENDATIONS**

1. The powers of the PHRC should be strengthened to enable it deal effectively with the problem of torture. Thus, the Commission should be empowered to enforce its own recommendations and impose sanctions on perpetrators of torture, or, in the alternative, the law should place an obligation on the government to enforce the recommendations of the Commission.¹
2. The Commission should ensure that Zambia specifically provides for the offence of torture in its Penal Code.² Such provision should define 'torture' and the penalties provided by the law should take into account the gravity of the offence of torture.
3. The Commission should undertake a comprehensive exercise reviewing all of Zambia's national laws in light of the provisions of the CAT and lobby for the amendment of these laws according to the standards set by the Convention.³

4. The Commission should ensure that the education of members of the Police Service, Defence forces, other law enforcement personnel and medical officers regarding the prohibition against torture is included in their training.⁴
5. Measures for the full rehabilitation of torture victims should be put in place.⁵ The PHRC can act as facilitator for such an initiative by those who have the financial means to set up a torture rehabilitation centre.
6. The Commission should undertake regular inspection of detention centres and places of imprisonment.⁶
7. There should be established an Independent Police Complaints Authority to deal with, *inter alia*, complaints of torture by police officers.⁷
8. Periodic reports on the subject of torture in Zambia should be submitted to the Committee Against Torture by the PHRC as appendices to the State Reports that Zambia is obliged to submit under the CAT.⁸ The reports by the PHRC should include all legislative and administrative measures that the government has put in place to curb torture. The reports could also incorporate whatever cases of torture the PHRC has investigated and concluded.
9. All findings in respect of torture allegations must be made public to ensure that the culprits are brought to book.⁹

10. An intensive awareness campaign must be conducted by the PHRC to sensitise the masses and law enforcement officials on the evils of torture.¹⁰
11. The Commission should ensure that all evidence obtained by means of torture is not admitted in any court of law in Zambia.¹¹
12. The PHRC should lobby for the provision by government of adequate financial assistance to law enforcement agencies for the procurement of human rights-friendly investigative techniques such as finger printing devices and lie detectors.¹²

4.3 PROSPECTS FOR THE FUTURE

The Commission cannot, in its present condition, achieve the recommendations submitted in this paper. It needs to be strengthened both financially and legally. Thus, a more powerful and broader mandate should be provided for the PHRC to compel co-operation by the authorities, through imposing administrative or legislative sanctions when the exercise of its power to investigate and take remedial action is obstructed. Its mandate should, in addition, be expanded to enable it achieve the above-stated recommendations.

More importantly, however, is the fact that the commission cannot curb torture in isolation. To effectively monitor Zambia's compliance against torture and, generally, fight the nefarious practice of torture, the Commission will have to employ the

co-operation of various law-enforcement agencies and Non-Governmental Organisations (NGOs) dealing with Human Rights. Since the Commission is more of a centrally placed organ, it would command the necessary co-operation from both government agencies and NGOs. In this regard, the Commission should ensure that whatever future measures it puts in place to combat torture include the concerted efforts of these institutions. Only then will the Commission effectively fulfil its role in monitoring Zambia's compliance with the Convention Against Torture.

ENDNOTES

¹ Afronet File, Issue No. 4, December 1997 at 6.

² Convention Against Torture, Article 4.

³ See United Nations Human Rights Website - Summary of Recommendations to the Namibian Government by the UN Committee Against Torture, 1993, at 6.

⁴ *Supra* note 2, article 10.

⁵ *Ibid.*, article 14.

⁶ PHRC, proposed Ten-Year Plan of Action for Human Rights in Zambia, (Unpublished) at 30.

⁷ Afronet, "Zambia Human Rights Report 1999", at 44.

⁸ Professor Brent Sorenson, Committee Against Torture member addressing various NGOs at Kepa Zambia on 1st February, 2000 at 18:30 hours.

⁹ Legal Resources Foundation, "LRF News", July 1998 at 2.

¹⁰ *Supra* note 6 at 28.

¹¹ *Ibid.*, at 30.

¹² Government of the Republic of Zambia, "National Capacity Building Program for Good Governance in Zambia", 26th April, 1999 at 16.

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