

IMPLEMENTING ANTI-TORTURE STANDARDS IN COMMON LAW AFRICA: PROHIBITION AND DEFINITION OF TORTURE

An overview of the prohibition and definition of torture in The Gambia, Ghana, Kenya, Nigeria, South Africa, Sudan, Uganda and Zimbabwe

THE PROHIBITION OF TORTURE

The prohibition of torture is a *jus cogens* norm and a peremptory norm of international law, which cannot be derogated from. The absolute nature of the prohibition is expressly recognised in numerous international and regional human rights treaties, including the [United Nations Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment \(UNCAT\)](#) and the [African Charter on Human and Peoples' Rights \(African Charter\)](#). The prohibition of torture and other cruel, inhuman, and degrading treatment or punishment ([CIDTP](#)) also enjoys a non-derogable nature and cannot be justified under any exceptional circumstance, including war, threat of war, internal political instability or any other public emergency. Orders by superior officers cannot be invoked as a justification of torture.

IS TORTURE PROHIBITED UNDER NATIONAL LAWS?

The constitutional entrenchment of the prohibition of torture and other ill-treatment is common across all reviewed jurisdictions, although not all studied States expressly provide for its non-derogable nature:

State	UNCAT Ratification	Constitutional prohibition	Specific anti-torture legislation	Express provision on non-derogability
The Gambia	Yes	Article 21	No	No
Ghana	Yes	Article 15(2) and Article 28	No	No

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State	UNCAT Ratification	Constitutional prohibition	Specific anti-torture legislation	Express provision on non-derogability
Kenya	Yes	Article 29	Yes – The Prevention of Torture Act, 2017 (PTA)	Yes – Constitution Article 25; PTA, Article 6
Nigeria	Yes	Article 34(1)	Yes – Anti-torture Act, 2017 (ATA)	Yes – ATA, Section 3(1)
South Africa	Yes	Article 12	Yes – Prevention of Combating and Torture of Persons Act, 2013 (PCTPA)	Yes – Constitution, Article 37(5); PCTPA, Article 4(4)
Sudan	Yes	Article 50	No	Yes (related to torture only, not CIDTP) – Constitutional Charter, Article 40
Uganda	Yes	Article 24	Yes – The Prevention and Prohibition of Torture Act, 2012 (PPTA)	Yes – Constitution, Article 44; PPTA, Article 3
Zimbabwe	No	Article 53	No	Yes – Constitution, Articles 86(3)(c) and 87(4)(b) Yes

Caselaw spotlight

The non-derogable nature of the prohibition of torture and other ill-treatment has also been upheld by domestic Courts:



KENYA. EG & 7 OTHERS V ATTORNEY GENERAL.

In 2019, the High Court at Nairobi upheld the absolute nature of the prohibition of torture and that of cruel or degrading treatment or punishment, recognising it as a fundamental right that no law can seek to limit.



UGANDA. ISSA WAZEMBE V ATTORNEY GENERAL.

In 2019, the High Court held that freedom from torture and CIDTP is a non-derogable right, stating that torture absolutely “cannot be tolerated”.



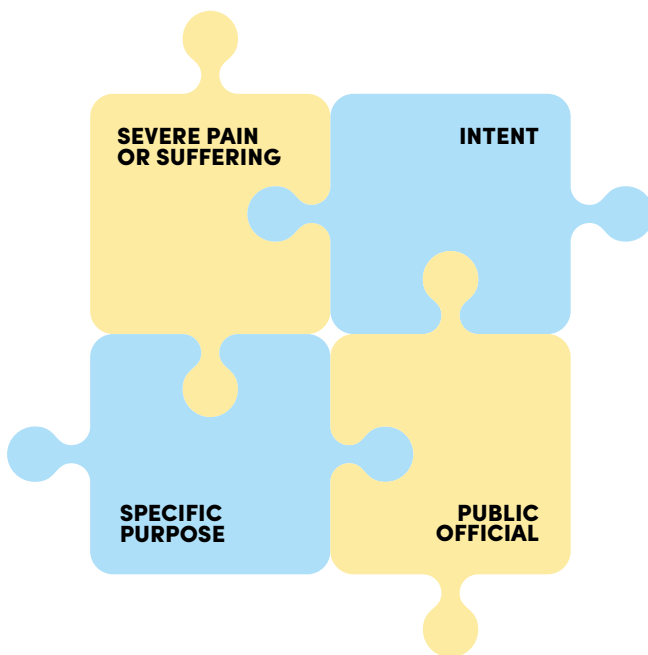
SOUTH AFRICA. S V MTHEMBU.

In 2008, the Supreme Court of Appeal drew on the absolute nature of the prohibition of torture under UNCAT for its holding: “no derogation from it is permissible, even in the event of a public emergency (...). Our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment”.

ELEMENTS OF THE DEFINITION OF TORTURE

The definition of torture under UNCAT is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application (Article 1.2. UNCAT). States may decide to incorporate the UNCAT definition by amending existing legislation, such as their Criminal Code or other relevant criminal laws, or by adopting a stand-alone anti-torture law.

As provided for in Article 1.1 of UNCAT, four elements are needed for an act to amount to ‘torture’ under the Convention:



1. **Severe pain or suffering**, whether physical or mental
2. **Element of intent** (pure negligence does not amount to torture)
3. **Specific purpose** (for example, obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, or any other purpose)
4. Infliction by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**

IS TORTURE DEFINED IN NATIONAL LAWS?

Half of the eight States under review have defined torture, mostly in line with Article 1.1 of UNCAT, into their legal framework:



KENYA – PREVENTION OF TORTURE ACT, ART. 4

“Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person — (a) for the purposes of — (i) obtaining information or a confession from him or her or any other person; (ii) punishing him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or (iii) intimidating or coercing him or her or any other person to do, or to refrain from doing, anything; or (b) 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 officer or a person acting on behalf of a public officer, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”



NIGERIA – ANTI-TORTURE ACT, ART. 2

“Torture is deemed committed when an act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person to – (a) obtain information or a confession from him or a third person; (b) punish him for an act he or a third person has committed or is suspected of having committed; or (c) intimidate or coerce him or a third person 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 provided that it does not include pain or suffering in compliance with lawful sanctions”.



SOUTH AFRICA – PREVENTION AND PROHIBITION OF TORTURE ACT, ART. 3

“Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) For such purposes as to (i) obtain information or a confession from him or her or any other person; (ii) punish him or her for an act he or she or any other person committed, is suspected of having committed or is planning to commit; or (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or (b) 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, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”



UGANDA – PREVENTION AND PROHIBITION OF TORTURE ACT, ART. 2

“Torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official capacity or private capacity for such purposes as – (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.”

UNCAT	Element 1	Element 2	Element 3*	Element 4
Kenya	✓	✓	Not quite – list of purposes is not non-exhaustive	✓
Nigeria	No – lacks “severe”	✓	Not quite – list of purposes is not non-exhaustive and conflates intimidation or coercion with discrimination of any kind	✓

South Africa	✓	✓	✓	✓
Uganda	✓	✓	No – lacks discriminatory purpose	✓ Also extends the scope to include private actors

Caselaw spotlight



UGANDA

Paulo Baguma Murama v Uganda Revenue Authority. In 2020, Uganda’s High Court clarified that “torture does not presuppose violence” and can be practiced through subtle techniques not leading to physical pain but instead to “the disintegration of an individual’s personality, the shattering of his mental and psychological equilibrium and the crushing of his will”.



KENYA

Coalition on Violence Against Women & 11 others v Attorney general of the Republic of Kenya & 5 others. In the aftermath of Kenya’s general election in December 2007, several women, men and children were subjected to forms of sexual and gender-based violence including rape, gang rape, sodomy and other acts perpetrated by State and non-State actors. The victims reported that the State failed to adequately investigate the facts and to prevent the foreseeable violence, due to lack of training of the police, failure to plan and prepare policing operations during post-election violence, and to intervene where violence did occur. The High Court found that “the State does indeed have an obligation to prevent violations by State actors and non-State actors”. It held that the State’s failure to prevent, investigate and prosecute those violations was a basis for holding the State itself accountable for torture.

Shared challenges:

- For some States, the lack of criminalisation of torture as a separate offence prevents acts amounting to torture from being prosecuted as such and, although such acts could be prosecuted under other ordinary criminal offences, this strategy may be insufficient to reflect the gravity of the crime and ensure adequate penalties.
- Similarly, domestic definitions of torture which do not always include (at a minimum) all four elements of the definition under UNCAT may inappropriately limit their scope and application.
- States do not always recognise in law and/or comply in practice with the duty to prevent torture by both State and non-State actors.

- Even where torture is criminalised, mostly in line with UNCAT, accountability may be hindered by procedural barriers, such as amnesties, immunities and statutes of limitation.



PROPOSALS FOR STATES

1. Ratify, without reservations, UNCAT and its Optional Protocol (OPCAT) and other relevant international and regional human rights treaties containing a prohibition against torture.
2. Review domestic laws and assess against international and regional treaty obligations, especially where relevant legislation such as Criminal Codes date back to a time prior to ratification of UNCAT.
3. On the basis of the legislative review, consult and decide on the best approach to align national laws with international anti-torture standards, for example, by adopting a stand-alone anti-torture law or amending existing relevant legislation accordingly, and the process for undertaking these reforms.
4. Amend relevant domestic laws or adopt new legislation to ensure they provide for the absolute and non-derogable nature of the prohibition of torture and other ill-treatment, in accordance with Article 2.2. and 2.3. of UNCAT.
5. Introduce or amend national legislation to incorporate a definition of torture that, at a minimum, includes all four elements contained in Article 1 of UNCAT.
6. Ensure State responsibility for acts of torture committed by non-State actors and private actors when the State fails to exercise due diligence to prevent, investigate, prosecute and punish them for the commission of such acts; and consider the issue of whether or how to incorporate the acts of non-State actors and private actors in the domestic definition of torture.
7. Encourage prosecution of acts amounting to torture and other ill-treatment, and eliminate any obstacles that impede accountability, including amnesties, immunities or statutes of limitation.