CASE NOTE

JD Mujuzi

Professor of Law, Faculty of Law, University of the Western Cape
ORCID: https://orcid.org/0000-0003-1370-6718

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OBTAINING REDRESS (DAMAGES) FOR TORTURE COMMITTED OUTSIDE SOUTH AFRICA: A COMMENT ON *VAN RENSBURG v OBIANG* (21748/2014) [2021] ZAWCHC 128 (18 JUNE 2021)

SUMMARY

In *Van Rensburg v Obiang*, the High Court (Western Cape Division) awarded the plaintiff damages for the torture, unlawful arrest, and detention to which the plaintiff was subjected by the respondent's subordinates in Equatorial Guinea. However, the court does not clearly explain how the respondent was responsible for the applicant's torture and the legal basis on which it made the order for damages. In this article, the author argues that the court's order is debatable for the following reasons. The evidence before the court did not prove that the defendant had committed torture within the meaning of art. 1 of the UN Convention against Torture and sec. 3 of the *Prevention and Combating of Torture of Persons Act*; some of the acts attributed to the defendant as torture did not amount to torture; there was no legal basis on which the court based its order to award damages to the plaintiff for the torture committed abroad.

1. INTRODUCTION

The right to freedom from torture is protected under sec. 12(1) of the South African *Constitution* and one of the few non-derogable rights. This right is also protected in some of the international instruments ratified by South Africa. These include the African Charter on Human and Peoples' Rights (art. 5), the Convention on the Rights of the Child (art. 37(a)), the African Charter on the Rights and Welfare of the Child (art. 16), and the International Covenant on Civil and Political Rights (art. 7). Torture is also prohibited by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (the UN Convention against Torture). In 2013, South Africa's Parliament enacted the *Prevention and Combating of the Torture*

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of Persons Act[1] to domesticate the UN Convention against Torture. Art. 14 of the UN Convention against Torture requires states parties to put in place measures for victims of torture to obtain redress. However, art. 14 is silent on whether it is applicable to torture committed abroad. Sec. 7 of the *Prevention and Combating of Torture of Persons Act* provides that "[n]othing contained in this Act affects any liability which a person may incur under the common law or any other law". In *Van Rensburg v Obiang*,[2] the High Court found that the plaintiff, a South African citizen, was tortured in Equatorial Guinea. The court awarded him damages. However, the court did not explain the legal basis on which it awarded the plaintiff damages. In this article, the author argues, *inter alia*, that the court did not have a legal basis to award the plaintiff damages for torture committed in Equatorial Guinea. The article first details the facts and decision in the case.

2. FACTS AND DECISION IN THE CASE OF *VAN RENSBURG v OBIANG*

2.1 Facts

The plaintiff, a South African citizen, was in Equatorial Guinea to do business with the respondent and his close associates. However, in October 2003, he was arrested by the officers of the "Rapid Intervention Force [RIF], a division of the Equatorial Guinea police at the instance of" the defendant's uncle (Angabe).[3] After his arrest, he was detained for over a year without being charged or given reasons for his detention.[4] He claimed damages for the "human rights abuses, torture, inhumane and degrading treatment that he suffered while he was kept as a prisoner and/or detained without trial for a long period of time" in Equatorial Guinea.[5] All the alleged violations took place in "Equatorial Guinea in facilities under the command and control of the defendant" who was the second Vice President of Equatorial Guinea and Minister for Defence and Security.[6] He argued that, at the time of his arrest and detention, the defendant was "the Minister in charge of state security and prisons in Equatorial Guinea and was responsible for his unlawful arrest, imprisonment and torture".[7] This was so because the defendant "served as the political head' and was "in charge of the armed forces, police, security, border control, prisons and detention facilities in Equatorial Guinea including the facilities in which the plaintiff was detained and tortured".[8] He "controls" the Rapid Intervention Force "that arrested him several times as well as the

1 *Prevention and Combating of the Torture of Persons Act* 13/2013.
2 *Van Rensburg v Obiang* (21748/2014) [2021] ZAWCHC 128 (18 June 2021).
3 *Van Rensburg v Obiang*:par. 4.
4 *Van Rensburg v Obiang*:paras. 8-9.
5 *Van Rensburg v Obiang*:par. 2.
6 *Van Rensburg v Obiang*:par. 3.
7 *Van Rensburg v Obiang*:par. 8.
8 *Van Rensburg v Obiang*:par. 3.

prison in which he was held".[9] The plaintiff argued that, while in prison after being arrested by the RIF on the orders of Angabe, the defendant "called" the prison and "ordered that the plaintiff be detained".[10] The plaintiff testified that, subsequent to that order,

> he was tightly handcuffed so much so that his wrists were cut. His hands were handcuffed to a rail in one of the rooms in a dungeon. He witnessed inmates being tortured in his presence in prison. He was later thrown in a small cell crammed with about thirty inmates. The plaintiff was further tortured by other inmates in the cell. His arms ached from being handcuffed. He found it difficult to breathe in the room as it was hot and humid. He could not even swat a cloud of mosquitos away as his hands were cuffed behind his back. The floor of the cell was slippery and covered with human blood and vomit …[T]he toilets were full of excrements. He had to ask an inmate to unbutton his jeans so that he could relieve himself. He spent sleepless nights sitting against the wall. It was pitch dark in the cell and sweaty bodies pressed up against him.[11]

He spent a night in prison and the next day, "he was forced to sign a document in prison by a personal assistant of Angabe, he was released to go to his apartment where he lived before he was re-arrested".[12] After a few days at his flat, Angabe ordered him to meet him at his house. While at Angabe's house, "the RIF handcuffed him and threw him into the back of the police van and he was taken back to [prison where] [h]e experienced the same appalling conditions … as before. The cell in which he was incarcerated was even more overcrowded than the previous cell".[13] He subsequently appeared before a judge who "advised him that Angabe had laid a charge of theft against him".[14] He defended himself before the judge and was acquitted. The judged ordered his release. However, while at the airport about to board his flight to South Africa,

> Angabe appeared from the terminal building and instructed a police man to arrest the plaintiff. Thereafter, the RIF arrived, manhandled him and took him to custody at the airport. He was later taken to Black Beach Prison by police officers. Black Beach prison is known to be one of the cruellest prisons in the world … [H]is experience in this prison indeed confirmed the fact that it was one of the cruellest in the world. The prison cells were tiny and overcrowded. Inmates were packed into every available space.[15]

He explained the horrible prison conditions:

> [T]here were about four hundred prisoners at any given time in that prison. There were only two bathrooms to serve this prison population. He witnessed … inmates being beaten and others stabbing each

9 *Van Rensburg v Obiang*:par. 8.
10 *Van Rensburg v Obiang*:par. 10.
11 *Van Rensburg v Obiang*:par. 10.
12 *Van Rensburg v Obiang*:par. 11.
13 *Van Rensburg v Obiang*:par. 11.
14 *Van Rensburg v Obiang*:par. 12.
15 *Van Rensburg v Obiang*:par. 12.

> other …; inmates being raped; some inmates executed by the firing squad; and the armed guards shooting and killing each other after drinking beer. He further witnessed many dead bodies of prisoners who succumbed from being beaten removed from the cell … [T]his was a fact of life in that prison and everybody expected to die at any time.[16]

He also testified that, while in prison, the South African ambassador to Equatorial Guinea visited him and "told him that it was the defendant who was behind his incarceration".[17] He added that, in December 2015, while the defendant and Angabe were out of the country, he was assisted by "other officials" to leave the country and "escape this gruesome torture".[18] In other words, "he was detained for a total of 549 days, of which 423 he was imprisoned in" a notorious prison.[19]

On the basis of that evidence, the court observed that, as a result of "his incarceration and torture", the plaintiff was affected "tremendously".[20] For example, he was suffering from post-traumatic stress disorder and panic attacks.[21] His evidence was corroborated by the reports of clinical and forensic psychologists who assessed him and who detailed how his detention in those horrible conditions affected and will continue to affect him.[22] An actuary also submitted a report which estimated the "value of earnings that the plaintiff would have accrued had he not been incarcerated" in Equatorial Guinea for over a year.[23]

2.2 The decision

Against that background, the court held that the plaintiff's evidence had been "uncontested" and that the evidence showed that "the plaintiff was severely tortured".[24] The court highlighted the business relationship between the plaintiff, Angabe and the defendant. It held that the plaintiff's "incarceration was effected, not by an order of court or a judge or in terms of some legislative provision, but by the acts of the RIF having received instructions from the defendant".[25] The court reiterated that

> [t]he RIF is a division of the security services in Equatorial Guinea falling under the direct control of the defendant. The RIF was subject to the control of the defendant and nobody else. The order of the defendant to arrest the plaintiff constituted a wrongful act that attracted delictual liability.[26]

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16 *Van Rensburg v Obiang*:par. 13.
17 *Van Rensburg v Obiang*:par. 14.
18 *Van Rensburg v Obiang*:par. 14.
19 *Van Rensburg v Obiang*:par. 7.
20 *Van Rensburg v Obiang*:par. 15.
21 *Van Rensburg v Obiang*:par. 15.
22 *Van Rensburg v Obiang*:paras. 16-18.
23 *Van Rensburg v Obiang*:par. 19.
24 *Van Rensburg v Obiang*:par. 20.
25 *Van Rensburg v Obiang*:par. 20.
26 *Van Rensburg v Obiang*:par. 20.

The court also agreed with earlier case law that, "in ordering the RIF to arrest and detain the plaintiff, the defendant was advancing private interests and not the security of the state".[27] The court added that, in earlier case law, it was held that the defendant "abused his power and ensured that the plaintiff was incarcerated, abused and tortured".[28] This was done by detaining the plaintiff in "appalling condition[s] for an extended period of time in an endeavour to induce him to settle a private debt that arose from an agreement that went wrong".[29] The court also held that

> [i]t is undeniable that the plaintiff was tortured outside the boarders [*sic*] of the Republic of South Africa … [T]his court's jurisdiction to hear this matter is based on the final attachment order that was confirmed and endorsed by the full bench of this court. Torture is a crime against humanity. Further, there is a clear and absolute prohibition of torture in international law. The prohibition applies even in times of national emergencies or wars, and there are no exceptions or justifications.[30]

Against that background, the court pointed out that both South Africa and Equatorial Guinea ratified the UN Convention against Torture and that art. 2(2) of this Convention provides that the prohibition of torture is absolute.[31] The court also referred to art. 4 of the Convention against Torture and held that it requires states parties to the Convention to criminalise torture.[32] It also referred to the definition of torture under art. 1 of the UN Convention against Torture and held that, according to that definition,

> [t]he crime has two objective elements. First, it comprises 'any act by which severe pain or suffering, physical or mental', is inflicted on a person; and second, it is committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[33]

The court also referred to the South African *Prevention and Combating of Torture of Persons Act* 13 of 2013 and held that it domesticates the Convention against Torture and also defines torture.[34] The court cited sec. 12 of the South African *Constitution* and art. 5 of the Universal Declaration of Human Rights and held that they both protect the right to freedom from torture.[35] It also referred to case law from the Constitutional Court to illustrate that the Constitutional Court relied on the UN Convention against Torture for its definition of torture.[36] Against that background, the court held that "the

27 *Van Rensburg v Obiang*:par. 21.
28 *Van Rensburg v Obiang*:par. 21.
29 *Van Rensburg v Obiang*:par. 21.
30 *Van Rensburg v Obiang*:par. 22.
31 *Van Rensburg v Obiang*:par. 22.
32 *Van Rensburg v Obiang*:par. 23.
33 *Van Rensburg v Obiang*:par. 23.
34 *Van Rensburg v Obiang*:par. 23.
35 *Van Rensburg v Obiang*:par. 24.
36 *Van Rensburg v Obiang*:par. 24. It referred to *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death*

evidence that was presented by the plaintiff is overwhelming that he was arrested, tormented and tortured".[37] The court explained how the plaintiff was arrested, detained, charged, acquitted by the Judge, and left the country.[38] The court added that the documents filed by both the plaintiff and the defendant showed that "nothing [was] presented before court that proved or suggested that the arrest and detention was justified."[39] The court also explained the conditions in which the plaintiff was detained.[40] It held that the "defendant is liable to compensate the plaintiff for unlawful arrest and detention and for the torture of the plaintiff".[41] In assessing the damages for unlawful arrest and detention, the court relied on South African case law and stressed that

> [u]nlawful arrest and detention constitutes [*sic*] a serious inroad into the freedom and the rights of an individual. It is trite that the inquiry into unlawful arrest and detention seeks to determine the extent to which the various affected rights of personality were impaired and their duration … The inquiry involve [*sic*] both a subjective element based on the emotional effect of the wrong committed to the plaintiff such as the humiliation or anguish of suffering the injustice, the loss of self-esteem and respect, and an objective impairment based on the external effect of the wrong such as loss of reputation in the eyes of the others.[42]

The court also referred to a textbook on South African law on damages for unlawful arrest and detention[43] and to jurisprudence from the Supreme Court of Appeal to the effect that

> [a]n unlawful interference with a person's right to liberty is not only a common law issue, but is also a constitutional infringement. The effect of constitutionally entrenching rights is that the entrenchment of fundamental rights and values in the Bill of rights enhances their protection and afford them a higher status.[44]

The court relied on South African case law on awarding damages for unlawful arrest and detention[45] and held that "[t]he object of the award of compensation is to place the plaintiff in a position he would have been in but for the

Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC).

37 *Van Rensburg v Obiang*:par. 25.

38 *Van Rensburg v Obiang*:par. 25. He bribed the head of prison and a judge. See *Obiang v Van Rensburg and Another* [2019] 4 All SA 287 (WCC):par. 17.

39 *Van Rensburg v Obiang*:par. 25.

40 *Van Rensburg v Obiang*:par. 26.

41 *Van Rensburg v Obiang*:par. 27.

42 *Van Rensburg v Obiang*:par. 28.

43 *Van Rensburg v Obiang*:par. 29. It referred to Neethling *et al.* 2004.

44 *Van Rensburg v Obiang*:par. 30. It referred to the cases of *Thandani v Minister of Law and Order* 1991 (1) SA 702; *Van Eeden v Minister of Safety and Security* [2002] 4 AII SA 346 (SCA).

45 *Van Rensburg v Obiang*:par. 31-42. These cases were *Rahim and 14 Others v Minister of Home Affairs* 2015 (4) SA 433 (SCA); *Ochse v King William's Town Municipality* 1990 (2) SA 855; *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 (SCA), and *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D).

commission of delict and not to enrich him".[46] The court awarded him general damages accordingly.[47] The court also awarded him damages for loss of past and future income.[48] This judgment raised very important issues with regard to compensating South Africans for torture committed against them outside South Africa. These issues are discussed next.

3. ANALYSING THE JUDGMENT

In the judgment, the plaintiff alleged that he was subjected to torture while in prison. The court agreed that he was indeed tortured. In concluding that the plaintiff was tortured, the court referred to the definition of torture under art. 1 of the UN Convention against Torture. As the court rightly pointed out, the UN Convention against Torture was domesticated in South Africa through the *Prevention and Combating of Torture of Persons Act*. This raises the question as to whether the defendant was responsible for the plaintiff's torture, as the court found. To answer this question, one should refer to the definition of torture under art. 1 of the UN Convention against Torture – the same definition, with minor differences,[49] is included in sec. 3 of the *Prevention and Combating of Torture of Persons Act*. Art. 1 of the UN Convention against Torture defines torture to mean:

> 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 the plaintiff to succeed in his claim that he was subjected to torture, he had to prove that the act(s) in question amounted to torture within the meaning of art. 1 of the UN Convention against Torture. Much as the plaintiff was subjected to treatment, which could be classified as torture, the court's conclusion that the acts of torture were attributable to the defendant is debatable for the following reasons. Although there was evidence, albeit hearsay, that the defendant ordered the plaintiff's detention, there was no direct or circumstantial evidence to show that he ordered the plaintiff's mistreatment. In fact, the defendant denied any knowledge of the plaintiff "plight" in Equatorial Guinea.[50] The court's conclusion that the defendant was responsible for the plaintiff's mistreatment was based on the fact that he was in effective control of the RIF and was also the Minister responsible for prisons. In effect, the court approached the issue

46 *Van Rensburg v Obiang*:par. 43.
47 *Van Rensburg v Obiang*:par. 59.1.
48 Van Rensburg v Obiang:paras. 44-59.
49 See Mujuzi 2015:339-355.
50 *Obiang v Van Rensburg and Another*:par. 54.

as if it was dealing with the question of superior responsibility – the superior is punished for the offences committed by his subordinates, or for failing to prevent the subordinates from violating the law, or for failing to take the necessary steps to punish his subordinates for violating the law. This concept is well-established in international criminal law.[51] If the court had not adopted this reasoning, one would have expected it to explain in which capacity the defendant was responsible for the plaintiff's torture within the definition of torture under art. 1 of the UN Convention against Torture. The evidence showed that the defendant was not the direct perpetrator of the torture. In other words, the pain or suffering was not inflicted by the defendant personally. In that case, he could only be held accountable for the plaintiff's torture if there was evidence that he had instigated it or that it was committed with his consent or acquiescence. There was no evidence to prove any of these three. It, therefore, means that holding the defendant accountable for the plaintiff's torture remains debatable. Without the evidence linking the defendant to the acts of torture, the court appears to have held him accountable for the horrible prison conditions in which the plaintiff was detained. In other words, in his capacity as Minister responsible for prisons, he should have ensured that the prison standards in his country met international standards.

Another shortcoming with the court's judgment is that some acts of "torture" by private individuals were attributed to the defendant. The court found that, while in prison, "the plaintiff was further tortured by other inmates in the cell".[52] Although it is not uncommon for South African courts to erroneously find that private persons committed torture,[53] the definitions of torture in the UN Convention against Torture and the South African *Prevention and Combating*

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51 Art. 28 of the Rome Statute of the International Criminal Court (1998). See generally, Werle & Jessberger 2014:222-223. In *The Prosecutor v. Bosco Ntaganda* (Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal) (ICC-01/04-02/06-2666-Anx3) (30 March 2021) (Appeals Chamber):par. 296: "[S]uperior responsibility is a residual mode of liability that, in contexts of mass criminality where crimes are often perpetrated through organised power apparatuses, can only be resorted to when other more appropriate modes of liability cannot be established." In *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (21 March 2016):par. 171, the Trial Chamber held that "Article 28 provides for a mode of liability, through which superiors may be held criminally responsible for crimes within the jurisdiction of the Court committed by his or her subordinates."

52 *Van Rensburg v Obiang*:par. 10.

53 *S v Tshikolo and Others* (CC44/2020) [2020] ZAECGHC 136 (27 November 2020):par. 9 (the accused were convicted of the murder and assault of their neighbour); *Pieterse v S* (A214/19) [2020] ZAWCHC 62 (2 June 2020):par. 6 (the appellant raped and murdered his deceased); *L K v S* (A162/2019) [2020] ZAFSHC 14 (10 February 2020):par. 21 (the appellant 'tortured' his former girlfriend); *E A and Others v Minister of Police* (14/41567) [2019] ZAGPJHC 9 (12 February 2019):par. 31 (the court held that 'it stands to reason that whoever is detained unlawfully suffers unexplainable pain and psychological torture'); *S v Saunders* (SS64/2017) [2018] ZAWCHC 147 (7 November 2018):par. 250 (the accused convicted of murder and rape of the deceased); *Binjane v S* (A131/2020) [2021] ZAGPPHC 529 (12 August 2021):paras. 15, 23 and 28.

of Torture of Persons Act show that torture can only be committed by a public official, or by a person acting in an official capacity, or by a private person "with the consent or acquiescence of a public official or other person acting in an official capacity". The drafting history of the *Prevention and Combating of Torture of Persons Act* shows that the decision to provide that the offence of torture can only be committed by public officials was deliberate. As one of the members of Parliament submitted during the second reading of the Prevention and Combating of Torture of Persons Bill:

> Several submissions wanted us to also criminalise acts by private individuals, but that is not the purpose of this Bill, nor is it in line with the convention. Any offences by private individuals can be dealt with under the common law.[54]

Therefore, the plaintiff's mistreatment by his fellow inmates would have been torture if there was evidence that the inmates had mistreated the plaintiff "at the instigation of or with the consent or acquiescence of" the defendant as a public official.

Another criticism is that the court appears to have blurred the distinction between torture as a crime against humanity, on the one hand, and torture as a discrete crime, on the other. In explaining the abhorrent manner in which the plaintiff was treated, the court correctly observed that "[t]orture is a crime against humanity".[55] The UN Convention against Torture and the South African *Prevention and Combating of Torture of Persons Act* deal with torture as a discrete crime – which was the subject matter of the case in question. On the other hand, torture as a crime against humanity is governed by the *Implementation of the Rome Statute of the International Criminal Court Act*.[56]

It is not clear on which basis the court awarded damages to the plaintiff for the torture. One has to recall that South African law, as a general rule, does not have extra-territorial application.[57] Whereas the *Prevention and Combating of Torture of Persons Act* provides that South African courts have jurisdiction over persons who have committed torture abroad, this is, in the context of criminal liability, for torture. Thus, sec. 6 of the *Prevention and Combating of Torture of Persons Act* provides that

> (1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 4 (1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person – (a) is a citizen of the Republic; (b) is ordinarily resident in the Republic; (c) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, offshore installation, a fixed platform

54 Submission by Mrs DA Schäfer, Proceedings of the National Assembly (14 November 2012):18.

55 *Van Rensburg v Obiang*:par. 22.

56 *The Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

57 See *Okah v S and Others* [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).

> or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention, or (d) has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.
>
> (2) If an accused person is alleged to have committed an offence contemplated in section 4 (1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions contemplated in section 179 (1) (a) of the Constitution, who must also designate the court in which the prosecution must be conducted.[58]

Sec. 4(1) of the *Prevention and Combating of Torture of Persons Act* provides that a person convicted of torture is "liable to imprisonment, including imprisonment for life". The *Act* is silent on the issue of compensation for victims of torture. However, sec. 7 of the *Act* provides that "[n]othing contained in this Act affects any liability which a person may incur under the common law or any other law". The drafting history of sec. 7 shows that it is aimed at giving effect to art. 14 of the UN Convention against Torture.[59] Art. 14 is to the effect that

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

The drafting history of art. 14 of the UN Convention against Torture shows that the initial draft provided that:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture be redressed and have an enforceable right to fair and adequate compensation including the means for his [rehabilitation]. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.[60]

58 *Kouwenhoven v DPP (Western Cape) and Others* (288/2021) [2021] ZASCA 120 (22 September 2021):par. 62.

59 Prevention and Combating of Torture of Persons Bill [B21-2012]: Briefing by Department of Justice and Constitutional Development, 12 June 2012. Available at https://pmg.org.za/committee-meeting/14555/.

60 United Nations Economic and Social Council, Commission on Human Rights, Thirty-seventh session, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CI.4/L.1576, (6 March 1981):par. 40.

The Working Group mainly discussed the word 'rehabilitation' and "decided to qualify that word by adopting the expression 'for as full rehabilitation as possible'".[61] The Working Group also decided "to add the words 'committed in any territory under its jurisdiction' after the word 'torture'".[62] Art. 14, as adopted (in 1980) by the Working Group "by consensus" provided that:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture committed in any territory under its jurisdiction be redressed and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.[63]

Thus, the intention of the drafters of the Convention was to limit the application of art. 14 to "an act of torture committed in any territory" of the state party. In other words, victims of torture were not to obtain redress for torture committed abroad. However, the phrase is missing in the 1983 and 1984 drafts of the Convention.[64] When the final draft of the UN Convention against Torture was adopted, the words "an act of torture committed in any territory under its jurisdiction" were missing. It remains unclear at which stage those words were omitted.[65] The United States has submitted that those words were deleted by mistake and that is why it has argued that it has no obligation to enact legislation providing for redress for victims of torture committed abroad.[66]

Whether or not art. 14 provides for universal civil jurisdiction and consequently jurisdiction on courts to award damages for torture committed abroad is an issue over which academics[67] and courts have disagreed. For example, in *Jones v Ministry of Interior for the Kingdom of Saudi Arabia &*

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61 Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:par. 41.

62 Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:par. 42.

63 Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:par. 43.

64 United Nations Economic and Social Council, Commission on Human Rights, 39th session, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (E/GN.4/I983/L.2), (28 February 1983):29; United Nations Economic and Social Council, Commission on Human Rights, 40th session, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN. 4/1984/L. 2 (20 February 1984):17.

65 *Naït-Liman v Switzerland* (Application no. 51357/07)(15 March 2018):par. 49.

66 *Naït-Liman v Switzerland*:paras. 50-51.

67 *Naït-Liman v Switzerland*:paras. 56-58. The Court lists publications in which authors have interpreted art. 14 differently. Those who have argued that art. 14 applies to torture committed abroad include Hall 2007; Grover 2010:33; Pfander 2017:108; da Costa 2012:266. For a contrary view, see Kloth 2010:266.

Ors,[68] the House of Lords held that "article 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear."[69] Likewise, the Supreme Court of New South Wales held that art. 14 of the UN Convention against Torture "does not unequivocally indicate that each State party to the Torture Convention is obliged to provide a universal civil jurisdiction available to victims of torture seeking redress in respect of state activity in any other country".[70] In *Naït-Liman v Switzerland,*[71] the Grand Chamber of the European Court of Human Rights surveyed legislation of 39 member states and concluded that "only [T]he Netherlands recognise universal civil jurisdiction in respect of acts of torture"[72] and that "[t]he other Contracting States studied do not recognise universal international jurisdiction before the civil courts, whether for acts of torture or for other criminal acts or offences".[73] The court also surveyed jurisprudence and practice of the Committee against Torture[74] and jurisprudence from Canada, the United States, and European Union law,[75] and emphasised:

> [T]he broad international consensus recognising the existence of a right for victims of acts of torture to obtain appropriate and effective compensation … While there is little doubt as to the binding effect of this right on the States with regard to acts of torture perpetrated on the territory of the forum State or by persons within its jurisdiction, the same does not apply to acts committed by third States or persons under their jurisdiction.[76]

The court added that, although the Committee against Torture (as illustrated below) indicated in its General Comment that art. 14 has no geographical limit, its jurisprudence states that it "has shown a more reserved attitude towards the geographical scope of Article 14."[77] The court also held that:

> [U]nlike in civil matters, universal jurisdiction is relatively widely accepted by the States with regard to criminal matters, a situation which is reflected in the fact that Article 5 § 2 of the Convention against Torture clearly provides for universal jurisdiction in criminal matters, in contrast to Article 14, which is more ambiguous with regard to its geographical scope.[78]

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68 *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26 (14 June 2006).

69 *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors*:par. 25.

70 *Li v Zhou* [2014] NSWCA 176 (5 June 2014):par. 78.

71 *Naït-Liman v Switzerland* (Application no. 51357/07)(15 March 2018).

72 *Naït-Liman v Switzerland*:par. 69.

73 *Naït-Liman v Switzerland*:par. 70.

74 *Naït-Liman v Switzerland*:paras. 52-55. The Committee against Torture is the enforcement body of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and is established under art. 17 of the Convention. For its mandate, see arts 20-22 of the Convention.

75 *Naït-Liman v Switzerland*:paras. 73-93.

76 *Naït-Liman v Switzerland*:par. 97.

77 *Naït-Liman v Switzerland*:par. 54.

78 *Naït-Liman v Switzerland*:par. 178.

The court added that:

> [A]s it currently stands, international treaty law also fails to recognise universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.[79]

However, the Canadian Supreme Court and the Committee against Torture have come to a different conclusion in this regard. For example, in *Kazemi Estate v Islamic Republic of Iran*,[80] the Supreme Court of Canada referred to art. 14 of the UN Convention against Torture and held that, "[o]n a plain reading, Article 14 imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain redress and ha[ve] an enforceable right to fair and adequate compensation". The text provides no indication that the "act of torture" must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture.[81] The court added that:

> The absence of any territorial dimension to the provision is significant. When the parties to the Convention Against Torture wished to limit their obligations to their respective territorial jurisdictions, they did so expressly. The obligations imposed by Articles 2(1), 5(1)(a), 5(2), 11, 12, 13 and 16 of the Convention, for example, are limited or modified by the words "in any territory under its jurisdiction ...[82]

The court explains why, in its opinion, the omissions of the words "committed in any territory under its jurisdiction" from the final draft of art. 14 was neither a mistake nor an oversight.[83] The court emphasises that "[s]ubsequent state practice and the views of the Committee against Torture further confirm that Article 14 does not embody a 'mistake', or that it is merely understood to be territorially limited".[84] It went ahead to outline this practice and views.[85]

In its General Comment on art. 14,[86] the Committee against Torture explained that

> [t]he Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory.

79 *Naït-Liman v Switzerland*:par. 188.
80 *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), [2014] 3 SCR 176.
81 *Kazemi Estate v. Islamic Republic of Iran*:par. 215.
82 *Kazemi Estate v. Islamic Republic of Iran*:par. 216.
83 *Kazemi Estate v. Islamic Republic of Iran*:paras. 217-221.
84 *Kazemi Estate v. Islamic Republic of Iran*:par. 222.
85 *Kazemi Estate v. Islamic Republic of Iran*:paras. 223-226.
86 Committee against Torture, General Comment No. 3 (Implementation of art. 14 by States parties) (13 December 2012) (CAT/C/GC/3).

> This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.[87]

The Committee against Torture stressed the fact that, for a victim of torture to obtain redress, it is not a requirement that the perpetrator should first be convicted. Thus, "[c]ivil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place".[88] The jurisprudence of the Committee against Torture shows that it does not agree with the submission that "the obligations to provide redress, compensation and rehabilitation contained in article 14 are limited to victims of acts of torture committed within the territory of the State party, or by or against one of its citizens."[89]

It is evident from the above discussion that the question of whether art. 14 of the Convention against Torture obliges states parties to establish universal civil jurisdiction in cases of torture is far from being settled. In my opinion, the drafting history of the Convention shows that the intention was to limit the application of art. 14 to acts of torture that had been committed in the territory of the state party. However, if a country goes ahead and ratifies a treaty that does not have this geographical limitation, one can argue that it did not have a problem with that provision; otherwise, it would have made a reservation or declarative interpretation of art. 14, as the United States did when it ratified the Convention against Torture.[90] South Africa did not make a reservation or interpretative declaration on art. 14 of the Convention against Torture.[91] This implies that it does not object to establishing universal civil jurisdiction for torture.

However, for one to be compensated for torture committed abroad, there has to be legislation on which a court should base its order for damages. It is against that background that South Africa's Parliament included sec. 7 in the *Prevention and Combating of Torture of Persons Act*. Much as sec. 7 of the *Prevention and Combating of Torture of Persons Act* provides that nothing contained in the *Act* "affects any liability which a person may incur under the

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87 Committee against Torture, General Comment No. 3:par. 22.

88 Committee against Torture, General Comment No. 3:par. 26.

89 *A.N. v. Switzerland*, Decision, Communication No. 742/2016, U.N. Doc. CAT/C/64/D/742/2016 (CAT, Aug. 03, 2018):par. 4.1 (the submission by the state party was rejected by the Committee).

90 When ratifying the Convention against Torture, the United States made several reservations, including the one to the effect that "it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY &mtdsg_no=IV-9&chapter=4&clang=_en.

91 South Africa has made reservations or interpretative declarations on some of the treaties it has ratified. See Mujuzi 2008.

common law or any other law", South Africa has not yet enacted legislation providing for circumstances in which a person who has been tortured abroad can be awarded damages. This explains why the court did not refer to such legislation. In the absence of such legislation, one would have expected the court to explain whether common law was applicable. However, it did not. This creates room for the argument that there was no legal basis (legislative or common law) for the court to award the plaintiff damages for the torture committed abroad.

The argument that there was no legal basis for the Court to award damages to the plaintiff for the torture committed against him abroad applies with equal force, if not more, to the court's order awarding the plaintiff damages for unlawful arrest and detention. The court did not explain why, under the Equatorial Guinea law or international law, the arrest and detention of the plaintiff were unlawful.[92] Even if it had found that the arrest and detention were unlawful according to Equatorial Guinea law, it did not have the jurisdiction to award the plaintiff damages against the defendant for violating foreign law. The facts of the case show that the court found that the rights of the plaintiff, as provided for in the South African *Constitution* and as expounded by South African courts, were violated. South African law is not of universal application and, therefore, the court erred in awarding the plaintiff damages for wrongful arrest and detention.

4. CONCLUSION

It is evident from the above discussion that sec. 7 of the *Prevention and Combating of Torture of Persons Act* is silent on the question as to whether South African courts have jurisdiction to award damages to a victim of torture committed abroad. Since South Africa did not make a reservation or interpretative declaration on art. 14 of the UN Convention against Torture, it did not object to establishing universal civil jurisdiction in cases of torture. It is recommended that sec. 7 of the *Act* be amended to address this issue. This will ensure that citizens or residents of South Africa who are tortured abroad can obtain redress. This will also be in line with the practice and jurisprudence of the Committee against Torture. Sec. 7 should also be amended to specifically provide that a person who has been tortured is compensated on the basis of the *Prevention and Combating of Torture of Persons Act*. There is no need for a victim of torture to litigate before he or she can be awarded damages for torture. The government should establish a special fund for that purpose and, for example, empower one of the relevant Chapter Nine institutions or establish an ombudsperson to handle these claims. Since the coming into force of the *Prevention and Combating of Torture of Persons Act*, South African courts, including the Constitutional Court, have found that some people were tortured

92 However, in *Obiang v Van Rensburg and Another*:par. 48, the applicant, then the respondent, argued that his arrest and detention were contrary to "constitutional and international law obligations to which Equatorial Guinea is subject".

and awarded damages.[93] However, in this jurisprudence, courts neither refer to sec. 7 of the *Act* nor do they specify the amount of damages awarded for violating the right to freedom from torture.[94] In some cases, courts find that the accused was tortured but he or she is awarded damages for assault.[95] There is a need for courts to clearly specify the damages awarded for torture. This will, *inter alia*, show that courts take torture seriously and could be one of the ways in which to exert pressure on government to put in place measures to combat torture.[96]

93 *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10 (14 May 2021); *Mzingeli and Others v Minister of Police* (139/2015) [2019] ZAECMHC 68 (12 November 2019).

94 *Mahlangu and Another v Minister of Police*; *Mzingeli and Others v Minister of Police*.

95 See, for example, *Ndlovu v Minister of Police* (33237/2010; A5054/2013) [2018] ZAGPJHC 595 (11 October 2018); *Mabota v MEC for Community Safety*, *In Re: Mabota v MEC for Community Safety* (24878/2015) [2018] ZAGPJHC 64 (10 April 2018); *M and Others v Minister of Police and Others* (9676/2013) [2021] ZAGPPHC 407 (8 June 2021) (in this case the court used assault instead of torture).

96 For some of the measures that the government is required to put in place to combat torture, see *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* 2021 (3) BCLR 269 (CC); *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP).

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