

UNIVERSITY OF NAIROBI



SCHOOL OF LAW

AN ANALYSIS OF THE RIGHT AGAINST TORTURE IN SOUTH SUDAN

**A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW, UNIVERSITY OF
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BY

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DECLARATION

I, TONG KOT KUOCNIN KUER, hereby declared that this Dissertation, with exception of quotations and references contained in published works which have been identified and duly acknowledged, is entirely my own original work and has never been presented in any other academic institution of learning either in part or whole for the award of another similar degree.

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DEDICATION

This dissertation is humbly and kindly dedicated to my Mother MONICA AYEN AWOL, whose unwavering love and support have never ceased. She has endured many hardships and done all that is humanly possible within her power to ensure that I get the best education I could. She has been a guiding star in my academic odyssey thus far.

Mum, I appreciate all your love and support. I appreciate all you have sacrificed for me to pursue an education. May you be abundantly rewarded and blessed.

It is also wholeheartedly dedicated to all victims of torture in South Sudan and on the African Continent, together against torture.

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Law to me means not only rules and regulations, but also a record of human society. Therefore, my journey in the exploration of law means learning about reality and the regular patterns of society, observing the changes in human culture and history, and linking them with the world beyond our shores. In this LLM program, I focus my research on right against torture and on legal reform concerning human rights protection for detainees in South Sudanese cells.

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The Transitional Constitution of the Republic of South Sudan, 2011, Laws of South Sudan

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The Children Act Chapter 586 Laws of Kenya

The Constitution of Kenya 2010 (Promulgated on 27th August 2010).

The Criminal Procedure Code Chapter 75 Laws of Kenya

The Uganda Human Rights Commission 1996, Laws of Uganda.

LIST OF INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986, O.A.U. Doc.CAB/LEG/67/3/Rev.5 (1982).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, adopted and opened for signature, ratification and accession by the General Assembly Resolution No. 39/46 of 10 December 1984 and entered into force on 26 June 1987.

International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23 of March 1976, UN. Doc. A/6316 (1966) 999 UNTS 171.

Optional Protocol to the Convention against Torture, adopted by the UN General Assembly Resolution 57/199 on 18 December 2002.

Optional Protocol to International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

Resolution on the Robben Island Guidelines, adopted by the African Commission at its 32nd Ordinary Session in 2002.

Universal Declaration on Human Rights, adopted on 10 of December 1948; UN. G. A Resolution 217A (III) UN. GOAR, 3rd Session UN. Doc A/810 (1948).

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACHPR	Africa Commission on Human and Peoples Rights
AI	Amnesty International
APT	Association for the Prevention of Torture
CAT	Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment
EHRC	Ethiopian Human Rights Commission
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IDLO	International Development Law Organization
JOSS	Judiciary of South Sudan
NHRAP	National Human Rights Action Plan
NHRIs	National Human Rights Institutions
OHCHR	UN Office of High Commissioner for Human Rights
OPCAT	Optional Protocol to CAT
RIG	Robben Island Guidelines
SSHRC	South Sudan Human Rights Commission
SSLS	South Sudan Law Society
UDHR	Universal Declaration on Human Rights
UNMISS	United Nations Mission in South Sudan
UNHRC	United Nations Human Rights Committee
UNHCR	United Nations High Commissioner for Refugees
UHRC	Uganda Human Rights Commission

ABSTRACT

The issue of human rights violations in criminal investigation emerges as one of the much debated subjects amongst academics since the inception of the idea of fundamental human rights all over the world. Human rights remain a center pillar and a pivot around which criminal justice system revolves. It is a dynamic one that constantly generates new defining and regulatory instruments. Human rights today have received an important credence in democracies all over the world. Human rights are also a key to sustainable development, peace and security as embraced globally. One key right recognized in human rights jurisprudence as pivotal in the protection of human rights and to satisfy international human rights standards is the right to freedom from torture.

The ICCPR under Article 10 provides that detained persons should be treated with respect to their dignity. This approach broadens the horizon of protection of human rights in detention places as torture and ill-treatment is prohibited in many human rights instruments such as, UDHR, CAT, ICCPR, and ACHPR which represent the principal foundation of the concept's development in modern era. Thus, a series of minimum standards for treatment of detained persons are adopted both internationally and regionally which are serving as thresholds to protest violation of human dignity. Therefore, the study, firstly, commences with a thorough analysis and investigation of the violation of the fundamental human rights before and after the country's independence. It gives a historical background of South Sudan political landscape, legal system and practical human rights violations.

Human rights material, documents and instruments internationally or locally have been identified, analyzed and discussed. Based on the findings of the research, the study argues that generally speaking, there are no adequate control mechanisms out in place to regulate police and security powers in South Sudan compared to other jurisdictions. It further argues that, some other jurisdictions, such as Ethiopia, Kenya and Uganda have some advanced police intervention mechanisms and programmes aimed at improving and constantly checking police and national security work.

CHAPTER ONE: INTRODUCTION

1.0 Background Information to the Study

South Sudan is home to the largest number of refugees and Internally Displaced Persons (IDPs) in the world and has been part of the longest running conflicts in Africa. Two long running civil wars (1955-1972 and 1983-2005) have left the country crippled and a new serious and devastating one escalated in December 2013.

The 1972 Addis Ababa agreement was the first attempt to bring peace, after a military coup led by Colonel Nimeiri in 1968 overthrew government arguing over an Islamic Constitution. But this agreement was abrogated by President Nimeiri himself in 1983 provoking another civil war in the Southern region.

The civil war in Sudan that has been fought since 1983, arose out of opposition to the central government of Khartoum and its Sudanese Armed forces by the Sudan peoples' Liberation Army (SPLM/A) regarding issues around sharing of resources, political participation and religious matters. This civil war finally came to an end with the signing of the Comprehensive peace Agreement (CPA) on 9th January 2005 in Nairobi, Kenya after more than twenty years of war which caused the death of 2.5 million people.

With the signing of the Comprehensive Peace Agreement (CPA) in 2005, which provided for self-determination for the people of Southern Sudan, the region as per the results of the referendum, gained its independent on 9th July 2011.¹ Over the past decade, the government in Juba has made a significant progress in establishing key institutions, including the police, prisons service, and courts, building necessary infrastructure, and passing new legislations. Yet the legacy of two decades of civil war presents massive challenges to developing a functional criminal justice system, such as lack of trained civil servants, including judicial officers and police, and budgetary constraints. This is clearly reflected in South Sudan's history of war, conflicts, and instability which led to ungovernability of the region caused by fifty years of protracted civil wars.

¹‘The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and The Sudan People’s Liberation Movement/ Sudna People's Liberation Army’, signed in Naivasha Kenya on 9th January 2005.<<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> accessed 2 February 2015.

In his Independence Day speech on 9th July 2011, President Salva Kiir pledged that South Sudan would abide by international conventions and seek accession as soon as possible to respect, protect and fulfill all rights guaranteed by international treaties which Sudan has ratified.² These include the rights guaranteed in treaties such as the ICCPR,³ the UN CRC,⁴ the ICESCR,⁵ the CRPD⁶ and African Charter⁷, all Sudan has ratified. This is because South Sudan is bound by international law favoring the automatic continuation of human rights obligations from predecessor to successor states.⁸ However, in spite of the President's pledge to observe human rights obligations, Human Rights Watch 2012 reports indicates that torture is commonly used by the police and prison staff as a means of extracting confessions or extorting money.⁹ It is also said to have been used by security forces to crush political opponents or dissidents.¹⁰

When Southern Sudan was still part of Sudan, the central government violated the rights of the people of Southern Sudan, men, women and children with impunity. However, when the region got independence from Sudan in 2011, the protection of human rights was not high at the agenda of South Sudan government. However, on signing into law the Transitional Constitution of South Sudan 2011 which was clearly molded on the Sudan Interim Constitution 2005, many South Sudanese express doubts whether South Sudanese leaders were genuinely committed to the

²H.E General Slava Kiir Mayadit, President of the Republic of South Sudan's Maiden Speech. On the Occasion of the Proclamation of Independence in JUBA, 9th July 2011.' (*Gurtong*, 2011) <<http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5440/President-Kiirs-Independence-Speech-In-Full.aspx>> accessed 2 February 2015.

³International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, GA Resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/44/49 (1989), 999 UN T.S. 171, entered into force March 23, 1976 and ratified by Sudan on March 18, 1986.

⁴United Nations Convention on the Rights of the Child (CRC), adopted Nov. 20, 1989, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Sudan on August 3, 1990.

⁵International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UN T.S. 3, entered into force January 3, 1976, ratified by Sudan on March 18, 1986

⁶United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted December 13, 2006, GA Res. 61/106, annex I, UN GAOR, 61st Session, Supp. (No. 49) at 65, UN Doc. A/61/49 (2006), entered into force May 3, 2008, ratified by Sudan on April 24, 2009

⁷ African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, ratified by Sudan on February 18, 1986

⁸ The Vienna Convention on Succession of States in Respect of Treaties, respective of the current status of international law, providing for the continuity of obligations in respect of all treaties that were binding on a predecessor state

⁹Amnesty International (n 8).

¹⁰International Federation of Human Rights Sudan Organization Against Torture, 'Alternative Report to Sudan's Periodic Report Before the African Commission of Human's and People's Rights: Sudan, One Step Forward Many Steps Back' (*International federation for Human Rights*, 2004) <<http://www.refworld.org/docid/46f146c70.html>> accessed 4 February 2015.

protection and promotion of human rights. They were of the view that the Constitution could actually provide a cover for celebrated dictators to continue to perpetrate human rights abuses.

According to the report by Al Nadeem Center for rehabilitation of victims of torture, the methods of torture have been described by torture survivors, documented and reported by Sudanese lawyers, national and regional human rights groups as well as international bodies and organizations.¹¹ Mental forms of torture include prolonged solitary confinement; mock executions, forcible witnessing of torture, death threats and withholding of medical treatments were also reported to have been used by the police and security agents.¹² A study of Sudanese refugees in Egypt by Al Nadeem Centre found that most torture survivors' experienced psychological effects after having been tortured which results in severe pain, physical injuries, including physical disablement or death.¹³

Prior to July 9 2011, the territory that now comprises South Sudan was the Sovereign territory of Sudan. Before and after the independence of South Sudan from old Sudan, the most serious human rights problem in the country is and has been torture.¹⁴ Despite existence of the constitution, torture is still a big concern in South Sudan in which majority of people are widely subjected to torture.¹⁵

In Tonj, guards unabashedly walked around the prison compound carrying whips. One of them told Human Rights Watch researchers that: 'We have rules. The prisoners are like chicken. The first time they do something wrong, you must explain but failure to justify properly, you can beat them'.¹⁶ Also since the beginning of Jonglei Government disarmament campaign in March 2012, SPLA soldiers tortured civilians in Pibor County to compel them to relinquish their weapons to army.¹⁷

¹¹El-Nadeem Centre for Rehabilitation of Victims of Torture, *Torture in Sudan: Facts and Testimonies* (El-Nadeem Centre for Rehabilitation of Victims of Torture 2003) 43.

¹²ibid.

¹³El-Nadeem Centre for Rehabilitation of victims of Torture (n21).

¹⁴United States Department of States: Bureau of Democracy Human Rights and Labour, 'Country Reports on Human Rights for 2011: South Sudan' (2011) 1-2.

¹⁵ibid.

¹⁶ibid.

¹⁷Amnesty International, 'South Sudan: Strengthen Human Rights and Accountability Mechanisms Human Rights Council: Establish an Independent Expert Mandate Written Statement to the 21st Session of the UN Human Rights Council (10-28 September 2012)' (*Amnesty International*, 2012) 56
<<https://www.google.com/search?q=Amnesty+International+reports+on+human+rights+atrocities+in+Jonglei+St>

1.1 Problem Statement

South Sudan has a constitution which prohibits torture, cruel, inhuman or degrading treatment or punishment. It's the only supreme law that protects human rights in the country.¹⁸ South Sudan is obliged under the Constitution to protect human rights, but according to Amnesty International 2011 reports indicate that no fewer than seventeen detainees in five different States in South Sudan told Human Rights Watch researchers that they were tortured or beaten in police custody.¹⁹

In one of the widely publicized case, reports indicate that police officers in Juba tortured and inserted stones and glass bottles into the vagina of a woman merely accused of theft, causing miscarriage and damage to her uterus.²⁰

This study therefore, seeks to examine and analyze the protection of arrested persons from torture in South Sudan as provided for in the Transitional Constitution and other relevant legislations.

1.2 Objectives of the Study

The main objective of this study is to critically analyze the protection of the arrested persons from torture in South Sudan. The specific objectives are:

- 1) To examine the adequacy of the existing legislative framework and identify existing gaps in the protection of arrested persons from torture in South Sudan.
- 2) Establish how other jurisdictions deal with the protection of the arrested persons from torture.
- 3) To establish challenges faced in protecting arrested persons from torture in South Sudan.
- 4) To make recommendations to enhance the protection of arrested persons from torture in South Sudan.

ate&ie=utf-8&oe=utf-

8#q=Amnesty+International+reports+on+human+rights+atrocities+in+Jonglei+State+2012> accessed 4 February 2015.

¹⁸ Article 9(1)(2)(3)(4) of the Transitional Constitution of South Sudan 2011

¹⁹ Human Rights Watch (n34).

²⁰ Human Rights Reports and interview with K. R., prisoner, Juba Central Prison, July, 2011. This case was publicized in the local press, and the President's Office assisted in transporting the woman to Uganda for medical care. The police officers accused of this torturous act were later acquitted by Central Equatoria High Court in May 2012

1.3 Research Questions

The study is guided by the following research questions:

- 1) How adequate is the existing legislative framework in the protection of arrested persons from torture in South Sudan?
- 2) What are the challenges (weaknesses/gaps) in the existing legislative framework for the protection of arrested persons from torture in South Sudan?
- 3) What best practices can South Sudan learn from other jurisdictions in protecting arrested persons from torture in South Sudan?
- 4) What measures can be taken to enhance the protection of the arrested persons from torture in South Sudan?

1.4 Justification for the Study

South Sudan is a young country and has inherited some bad system from its predecessor. Thus it is hope that the findings of this study will contribute to the knowledge available on the right to freedom from torture in South Sudan. This study seeks to break new ground by studying the policy framework that exists in the country and to bridge the information gap. The study is important for several reasons:

Firstly, it is an academic contribution that will purge the dearth for credible enhancement for the protection of human rights of the arrested persons from torture.

Secondly, the findings of the study may guide legal reforms by yielding policy proposals on how to ensure the arrested person's right to protection from torture in the country is enhanced and upheld.

Thirdly, the study will be useful to policy-makers as it highlights and explores hitherto neglected rights: the arrested person's right to protection from torture in South Sudan.

Finally, the study findings will help human rights practitioners, jurists and the entire society in understanding torture in protecting the rights of the arrested persons.

1.5 Limitations of the Study

Although it would have been ideal to collect data in South Sudan by conducting interviews, but this is not possible due to the ongoing conflict. Hence, the study will review the existing literature on the topic of this study. This includes the reports of by humanitarian organizations such Amnesty International report 2011, Human Rights Watch report 2012, human Rights Commission report and many other human rights reports on South Sudan. The time and duration of this study is limited to the period between 2014 and 2015.

1.6 Scope of the Study

The scope of the study is to analyze the existing legislative frameworks on the right to freedom from torture. In addition, the study will examine the practical challenges which are faced in implementing the provisions of the legislative framework on the right to freedom from torture in South Sudan.

1.7 Hypothesis of the Study

The inadequacy of legislations in South Sudan impacts negatively on the protection of the rights against torture. Although adequate legislations will not end the practice of torture in South Sudan, it is important to have reforms and legislations that criminalize torture and all its forms in place.

1.8 Theoretical Framework

The study applies Two Theories namely: Natural Law Theory (The Rights Theory) and the Legal/Positive Theory. Natural Law Theory is relevant to the study in as far as it explains that human rights are God given and they should not be taken away by anyone, not even the state.

The natural rights theory explains the fact that all human beings are equal and entitled to human rights by virtue of being human beings. The right theory is relevant to this study to the extent that it argues for balancing and full protection of these rights. Arrested persons rights to freedom from torture therefore need to be fairly balanced if the protection of the rights of those deprived of their liberty can fully be ensured and protected.

1.8.1 The Natural Rights Theory (The Rights Theory)

Though the expression ‘human rights’ had its origin in international law, which is not older than the world War II, the concept of an individual having certain basic, inalienable rights as against a sovereign State had its origin in the doctrines of natural law and natural rights.

The idea of human rights can be traced to natural rights theory as propounded by the ancient Greek Stoic philosophers, and further developed by other thinkers such as John Lock, Thomas Hobbes and Jean-Jacques Rousseau and their jurist successors who viewed natural law as providing a standard for making, developing and interpreting the law. Thomas Hobbes was the first champion of the theory of ‘natural rights’. In his celebrated book, ‘*Leviathan*’, he advocated that no individual could ever be deprived of the right to life, which he enjoyed in the state of nature. He asserted that all human beings are equal, without any consideration.

The concept of natural rights was developed further by Thomas Aquinas who argued that rights are entitlements due to people naturally because they are human beings.²¹ Aquinas viewed the concept of natural rights as entitlements to human beings from a moral perspective.

Lock advanced Aquinas argument further and defended the notion of natural rights as God given, sacred and inalienable.²² Therefore, Lock’s perception of natural rights influenced the discourse that informed the American Declaration of Independence and France’s Declaration of the Rights of Man and Citizen in 1789. The French Declaration proclaimed 17 rights as the natural, inalienable and sacred rights of man.

Hence, Thomas Paine defines natural rights as those rights which appertain to man in light of his existence.²³ Another rights’ theorist, Jean-Jacques Rousseau views the notion of rights from the social contract perspective which argues that the state has a responsibility to protect the rights of its citizens equally.²⁴ Rousseau’s argument is relevant to this study since it argues for equal protection of citizen’s rights.

²¹Hugo Grotius, *On the Law of War and Peace* (Kessinger Publishing 2004)22.

²²Jim Powell, ‘John Locke: Natural Rights to Life, Liberty, and Property’ (*Foundation for Economic Education*, 1996) <<http://fee.org/freeman/detail/john-locke-natural-rights-to-life-liberty-and-property>> accessed 4 February 2015.

²³Thomas Paine, *The Rights of Man* (Penguin Books 1965) 68.

²⁴Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston trans, Penguin 1968)50.

The other thinker is Rousseau who is regarded as the greatest master of natural law school. In his celebrated book, 'the Social Contract', Rousseau states that 'all men are born free but everywhere they are in chains'. Rousseau proclaimed that men are bestowed with inalienable rights of liberty, equality and fraternity. These concepts became the basis for the French Declaration of the rights of Man and of the Citizen in 1789. Therefore, the contemporary notion of human rights views rights as arising essentially from the nature of human kind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are the direct descendents of natural rights.²⁵

The preamble of the UDHR provides that human beings are entitled to human rights which flow from the inherent dignity of the human person. However, the importance of the rights theory is that it views rights as the basic and fundamental entitlements to human existence which must take precedence over any other consideration. Hence, human rights are therefore paramount and override any other claims within the society.²⁶The UDHR defines human rights as 'rights derived from the inherent dignity of the human person'.

According to this view, law should be made and developed so that it corresponds to nature.²⁷ Natural law theory stresses the duties which God imposes on every human society in an orderly cosmos, as the time went on these duties came to be regarded as natural rights for the individual²⁸

The evolution and development of human rights in the international context can be traced to the Magna Carta (1215)²⁹ and the English Bill of Rights (1689)³⁰ followed by the French Declaration of the Rights of Man and of the Citizen, (1789)³¹and the American Bill of Rights.³²

²⁵Marx Karl, Jeremy Bentham and Burke, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Jeremy Waldron ed, Taylor and Francis 1987) 185-208.

²⁶Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 78.

²⁷ibid.

²⁸Powell (n 46).

²⁹ The Magna Carta (Great Charter) 1215, available at <<http://www.constitution.org/eng/magnacar.pdf>> accessed 4 February 2015.

³⁰John Locke, *Two Treatises of Government* (Oxford University Press 2007 for Whitmore and Fenn, and C Brown, 1821).

³¹ The French Declaration of the Rights of Man and Citizen, (1789), available at <http://www1.curriculum.edu.au/dddunits/downloads/pdf/dec_of_rights.pdf> accessed 4 February 2015.

Although natural-law theory and natural rights have vacillated, they still remain influential on the idea of human rights which politically and intellectually today derive their authentic origins from the seventeenth and eighteenth-century concepts.³³

The American and French revolutions and the declarations that were based on the principles that emanate from them took natural rights and made them secular, rational, universal, individual, democratic, and radical.³⁴

The first theoretical design of the idea of human rights was expressed by John Locke in which his efforts to define and justify the natural rights of man must be considered and evaluated as a product of the seventeenth-century constitutional crisis in England which arose from the autocratic reign of the Stuart kinds.³⁵

In his *Two Treatises of Civil Government* (1669),³⁶ Lock laid down the foundations for the doctrine of human rights, to assert the inalienable title of the people against the claims to unlimited powers of the executive, to certain basic rights and fundamental freedoms.³⁷ He argued that every human being has a natural right to life, personal liberty, and property and that no governmental authority has power to deprive individuals of these rights because they had enjoyed them even before the creation of the civil or political society.

Although the nineteenth-century contributed significantly to the development of human rights, emphasis shifted from the idea of natural rights to utilitarianism as well as the emergence of positivism led to the virtual antithesis of human rights as a result of the decline of natural-law theory.³⁸

³² The U.S Constitution and Amendments: The Bill of Rights, available at https://www.constitutionfacts.com/content/constitution/files/Constitution_BillOfRights.pdf accessed 4 February 2015.

³³Powell (n 46).

³⁴ibid.

³⁵Locke (n 54).

³⁶ibid.

³⁷ibid pp 11.

³⁸Powell (n 46).

Lock imagines the existence of human beings in a state of nature. In that state men and women were in a state of freedom, able to determine their actions, and in a state of equality in the sense that no one was subjected to the will or authority of another.³⁹

To end the hazards and inconveniences of the state of nature, men and women entered into a social contract by which they mutually agreed to form a community and set up a body politic. But, still in setting up that political authority, individuals retained the natural rights of life, liberty and property.⁴⁰ Government was obliged to protect the natural rights of its subjects, and if government neglected this obligation, it forfeited its validity and office. Natural rights theory was indeed the philosophic impetus for the wave of revolt against absolutism during the late eighteenth century.

It is visible in the French Declaration of the Rights of Man, in the US Declaration of Independence, in the Constitutions of numerous states created upon liberation from colonialism, and the principal UN human rights documents. Therefore, the state has an obligation to protect, uphold and promote human rights as enshrined in the international and regional instruments as well as the national constitution and other legislations. Hence, Natural rights theory makes an important contribution to this study and it is on this vein that the study chooses it because it identifies with and provides security for human freedoms and equality, from which other human rights flows.

It is relevant to the study because it affords an appeal from realities of naked power to a higher authority that is asserted for the protection of human rights. The right theory is relevant to this study to the extent that it argues for balancing and full protection of these rights.

1.8.2 The Positivist Theory

The other theory is legal positivism which is associated with HLA Hart, Raz and others. Classical positivist philosophers deny an a priori source of rights and assume that all authority stems from what the state and officials have prescribed.⁴¹ Under positivist theory, the source of human rights is found only in the enactments of a system of law with sanctions attached to

³⁹Locke (n 54).

⁴⁰ibid.

⁴¹Rhoda Callaway and Julie Harleson-Stephens (eds), *Exploring International Human Rights: Essential Readings* (Lynne Rienner Publishers 2007) 23.

it.⁴²This approach by the positivists rejects any attempt to discern and articulate an idea of law transcending the empirical realities of existing legal systems. Concepts such as law, justice, morality, democracy, freedom etc, were considered historical categories, whose content was determined by the material conditions and the social circumstances of a people.⁴³ Such a conceptualization of the nature of society precludes the existence of individual rights rooted in the state of nature that are prior to the state. The only rights are those granted by the state and their exercise is contingent on the fulfillment of obligations to society and to the state.⁴⁴ According to Marx, the pursuit of the prior claims of society as reflected in the interests of the Communist state has resulted in systematic suppression of individual civil and political rights.⁴⁵

The rights theory explains the inherent need to protect all human kind. It also explains the resulting conflict in an attempt to protect the groups or individuals rights in the society who have conflicting and competing interests. It therefore puts into perspective the study's concerns about lack of protection of the rights of arrested persons from torture in South Sudan. It lays the foundation in protecting the rights of arrested persons from torture in South Sudan.

The preamble of UDHR provides that human beings are entitled to human rights which flow from the inherent dignity of the human person. Therefore, natural law theory (the rights theory) lays the foundation for a justification in protecting the rights of the arrested persons from torture in South Sudan.

The rights theory justifies the study's argument for the need to protect the rights of the arrested persons in South Sudan. The theory provides a standard of examining the current practice in protecting an arrested person from torture in South Sudan. It also provides a theoretical framework for analyzing whether or not arrested persons enjoy equal protection by law as enunciated in the constitution and other legislations currently in force in South Sudan.

The theory enables the study to examine whether or not the rights of the arrested persons are adequately protected as based on the provisions of international and regional instruments and domestic legislations in protecting the arrested persons from torture in South Sudan. The rights

⁴²ibid.

⁴³ibid.

⁴⁴ibid.

⁴⁵ibid.

theory as a theoretical framework assists the study in assessing the adequacy of the existing legislations in protecting the rights of the arrested persons in South Sudan. The important tenet of the rights theory is that it views rights as basic fundamental entitlements to human existence which must take precedence over any other considerations in the society.

The implication is that the state has all it takes to protect the rights of the arrested persons from torture. This makes the rights theory relevant to the study since it calls for equal protection of the citizen's rights, and in particular the rights of detainees which its foundation has been cemented and solidified by the rights theory. The rights theory is adequate since it provides and lays foundation for the protection of the rights of humans which has its roots in nature by virtue of being humans.

The positive theory was confirmed by Marx when he regarded the law of nature approach to human rights as idealistic and a historical. Marx saw nothing natural or inalienable about human rights. He regarded the notion of rights as a bourgeois. Concepts such as law, justice, morality, democracy and freedom were considered historical categories whose content was determined by the material conditions and social circumstances of a people.

Under the positivist theory, the source of human rights and their protection is found only in the enactments of a system of law with sanctions attached to it. This approach by the positivists rejects the attempts to discern and articulate an idea of law transcending the empirical realities of existing legal systems. The theory negates, in essence, the philosophical basis of human rights. The theory encourages the belief that law must be obeyed no matter how immoral it may be, or however it disregards the world of the individual or groups. The fact that philosophy has been used to justify obedience to iniquitous laws has been a central focus for much of the modern criticisms of the doctrine.

This study adopts the rights theory since it argues for equal protection of citizens. The rights theory justifies the study's argument for the need to protect the rights of arrested persons in South Sudan. It is the protective nature that makes the rights theory relevant to this study and that's why it has been chosen. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendents of natural rights.

This is because the theory gives absolute protection to the state and its institutions but the state is the first entity which is blamed for most human rights violations and abuses and in particular the rights of the arrested persons, therefore entrusting them with absolute protection alone without the participation of other relevant institutions is somewhat difficult.

1.9 CONCEPTUAL FRAMEWORK

1.9.1 Introduction

This study discusses the concepts of human rights, torture and the duty to protection by the state. The study examines how freedom from torture can be achieved without violating the rights of the arrested persons. The study identifies the concepts of human rights, torture and the duty to protection by the state which will serve as the reference point for analyzing the conceptual framework. The section is therefore presented in the following key concepts: who is an arrested person?; the right of an arrested person under South Sudan Constitution 2011. This will provide an avenue and a starting point to discuss the conceptual framework in a clear articulated manner.

1.9.2 Who is an Arrested Person?

The rights of arrested persons are protected under article 12 which states that ‘every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for specific reasons and in accordance with the procedures prescribed by law’, and article 18 states that ‘no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Arrest is a form of state constraint applied to a person, during which the person is placed under detention, is imprisoned and is deprived of his/her liberty to move freely. Therefore, an arrested person is sometime referred to as a detainee while awaiting trial or a prisoner when convicted. For the purpose of this study, an arrested person or a prisoner means any person awaiting trial, convicted or juvenile who are unable to get out of the claws of the arresting authority.

An arrested person has right to remain silent, right to communicate with an advocate, not to be compelled to make any confession, to be brought before court within reasonable time not later

than the 24 hours rule,⁴⁶ and right to defense,⁴⁷ right to a fair hearing⁴⁸ and right to humane treatment which is the fundamental right to human dignity and integrity of the person.⁴⁹

1.9.3 The Right of an Arrested Person under the South Sudan Transitional Constitution, 2011

The constitution stipulates that ‘all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of South Sudan shall be an integral part of this Bill’.⁵⁰ It further provides that ‘rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of the government and by all persons.’⁵¹

The constitution provides under article 18 that ‘no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.⁵² It stipulates further under article 190 that ‘no derogation from the rights and freedoms enshrined in this bill shall be made.’⁵³

The bill of rights shall be upheld, protected and applied by the Supreme Court and other competent court; the human rights commission shall monitor its application in accordance with this constitution and the law’.⁵⁴ Thus, the protection of the right of an arrested person from torture is solidly guaranteed under the constitution 2011. Hence, the right of the arrested persons can be fully ensured and thoroughly protected if all the stakeholders whether public or private takes part in awareness campaign to stop practices and acts that amounts to torture in South Sudan.

This can be addressed only if the government rise up to its obligations to protect and promote human rights in the country and by allowing civil society organizations and human rights institutions take part in all attempts to ensure and protect human rights and in particular the right to freedom from torture.

⁴⁶ Ibid, article 19(4).

⁴⁷ Ibid, article 19(7).

⁴⁸ See Article 19(3).

⁴⁹ Ibid Article 18.

⁵⁰ Transitional Constitution of South Sudan article 9(3).

⁵¹ Ibid Article 9(2).

⁵² Ibid Article 18.

⁵³ Ibid Article 10.

⁵⁴ Ibid Article 10.

1.10 Research Methodology

The methodology employed in this study is mainly library and desk review research (a qualitative research). The primary sources consulted are journal articles on human rights, law reports and textbooks, Dissertations on human rights, scholarly articles written by various scholars on human rights and torture which is one of the rights protected under various international human rights instruments. Some reliance is also put on internet sources as they are readily accessible and usually provide the most recent information in the protection of the rights of arrested persons in other jurisdiction for materials which could not be found in textbooks with information relevant to the study.

The other relevant publications and reports on human rights and torture published by human rights institutions and international organizations working in South Sudan such as Amnesty International, Human Rights Watch, Association for the Prevention of Torture, Sudan Organization Against Torture, African Center for Justice and Peace Studies, international Federation for Human Rights, South Sudan Human Rights Commission, South Sudan Human rights Society for Advocacy, and United Nations Mission in South Sudan human rights department.

The availability of these sources materials have been the inspiration behind the successful completion of this research work. This requires robust methodology in addressing the challenges and gaps that exists in the legislative framework with regards to the protection of the rights of the arrested persons in South Sudan. However, through a comparative analysis, the study will identify necessary reforms that have been employed in other jurisdiction that will be useful in improving and ensuring adequate protection of the right of arrested persons in South Sudan.

1.11 Chapter Breakdown

This study is composed of five chapters namely:

Chapter One: provides an introduction to the study. It includes background information to the study, problem statement, and objectives of the study, research questions, and justifications of the study, limitations of the study, scope of the study, hypothesis, theoretical and conceptual framework, basic assumptions, and research Methodology.

Chapter Two: Literature Review. This chapter examines literature that is available on the subject matter of the study. The literature review is done along thematic areas flowing from the objectives of the study. These thematic areas includes examining the adequacy of existing legislative framework, identify gaps that exists in the protection of the rights of the arrested person.

Chapter Three: A Critique of the Adequacy of the Legislative Framework against Torture in South Sudan. The chapter gives an exposition of the international instruments on the protection of arrested person's rights from torture. It will examine the United Nations Convention against Torture (UN CAT) and it's Optional Protocol (OP-CAT), the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol (OP-ICCPR), the Universal Declaration of Human Rights (UDHR), African Charter on Human and Peoples Rights, African commission on Human and Peoples Rights (the African commission), the Special Rapporteurs, Robben Island Guidelines (RIG), the Constitution of South Sudan, 2011, and identify the challenges encountered in protecting the rights of the arrested persons in South Sudan and the gaps that exist in the legislative framework.

Chapter Four: Comparative Analysis of the Best Practices from Other Jurisdictions: This chapter looks at the best practices from other jurisdictions for the protection of arrested persons from torture in comparative context. The countries selected for comparative analysis are Ethiopia, Kenya and Uganda. The analysis will entail an analysis of the relevant legislations governing the protection of the arrested persons from torture in the selected countries.

Chapter Five: Conclusion and Recommendations. The Conclusion will be based on the discussion cutting across the study. The recommendations of the study shall include legislative, policy, administrative and research recommendations.

2.0 CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

The term torture has been defined differently by various scholars. According to O’Byrne, torture is the imposition of physical suffering upon others through violence, for various reasons usually pertaining to the extraction of information or confession of guilt, or simply for the pleasure of being cruel’.⁵⁵ Power describes torture as ‘the systematized use of violence to inflict pain in order to extract information, to break resistance, or simply to intimidate’.⁵⁶

The Convention against Torture provides a more robust definition of the concept of torture. Article 1 of the Convention against Torture (UN CAT) defines torture 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.⁵⁷

This study adopts the definition of torture provided under the Convention against Torture (UN CAT). This is because the definition covers the use of torture against arrested persons.

Torture has been recognized as one of the worst violations of human right. States have a duty, under international law, to take all necessary measures to prevent, protect and punish it as well as afford effective remedies to the victims.⁵⁸ Any serious violation of human rights represents a debasement of the political process as well as a deprivation for those whose rights are violated.

Torture constitutes a human rights violation under various human rights treaties. It is however, one of the most challenging and most controversial issues of human rights to deal with. Despite being stringently outlawed, torture continues to be practiced in many countries throughout the

⁵⁵Darren O’Byrne, *Human Rights: An Introduction* (2011) 164.

⁵⁶Ibid.

⁵⁷Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/RES/39/46), Adopted 10th December 1984, entered into force 26th June 1987

⁵⁸Carla Ferstman, ‘Reparation for Torture?’ (2006) 16 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 184.

world.⁵⁹ The underlying assumption is that, although the prohibition of torture has become part of customary international law, the practice of torture remains widespread.⁶⁰

In addition to the prohibition contained in Article 5 of the UDHR, Article 7 of ICCPR and the 1975 UN declaration on the Protection of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Declaration),⁶¹ there is CAT and OPCAT which categorically outlawed torture and criminalizes it.

The CAT obliges the states parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture.⁶² Such measures include making torture punishable as a crime of a 'grave nature', extraditing alleged torturers or instituting criminal proceedings against them regardless of their nationality or where the crime is committed.⁶³

According to a study conducted in 2012 by Human Rights Watch, although the constitution is a fundamental law in the protection of the arrested person's rights, there are still many challenges which hinder the full protection of the rights of the arrested persons in South Sudan despite the provisions of the Constitution and other legislations.⁶⁴

The report will also assesses the impact of both international and regional human rights law on the domestic legal system in South Sudan.⁶⁵ However, the issue of torture has been a heated debate in the world for a long time. It has been a subject of many writers in books, articles and reports. A Reynaud elaborates succinctly on international and regional concerns for the protection of the rights of arrested persons in prison.

He argues that at both levels, arrested persons should be treated as human beings.⁶⁶ He goes further and discusses the fundamental functions of the prisons and argues that the traditional

⁵⁹Matthew Lipman, 'The Protection of Universal Human Rights: The Problem of Torture' (1997) 1 Universal Human Rights 28.

⁶⁰Malcolm Evans and Rod Morgan, 'Torture: Prevention V Punishment' in Craig Skott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford University Press 2001) 134.

⁶¹ Declaration on the Protection of all Persons from being subjected to Torture and Other Cruel, inhuman or Degrading Treatment or Punishment, GA Resolution 3452 (XXX) Adopted 9 December 1984, entered into force on 26th June 1987.

⁶² Article 2 of the UN Convention against Torture.

⁶³ Articles 4, 5, 7 of the UN Convention Against Torture.

⁶⁴Human Rights Watch (n 34) pp 87-88.

⁶⁵ibid.

⁶⁶Alin Reynaud, *Human Rights in Prisons* (Council of Europe Press 1986) 21.

function of the prison is to protect the society by neutralizing offenders and reeducate them back to the society.⁶⁷Reynaud focused on the European instruments on the protection of the arrested person's rights from torture and made copious reference to the Universal Declaration of Human Rights (UDHR).⁶⁸ Though Reynaud's work is mainly based on the European system of human rights, it provides and offers useful insights for this study on how the rights of the arrested persons are protected from torture. However, the difference between Reynaud's work and this study is that, Reynaud focuses mainly on the European system on the protection of the right of the arrested persons from torture while this study focus on the protection of the rights of the arrested persons from torture in South Sudan.

The study therefore assesses the impact of international human rights law on the domestic legal systems in South Sudan throughout the study. The study aimed at establishing the challenges faced by institutions in applying international human rights law in various countries and identify gaps that exist in the protection of human rights, particularly the protection of the right of the arrested persons to freedom from torture.

This chapter therefore identified and reviews relevant literature on human rights and torture from different perspectives. The study identifies thematic areas within human rights, like the historical development of human rights in South Sudan, the concept of human rights and torture, the purpose of torture, and the responsibility to prevent and protect arrested persons against torture, prohibition of torture in international law, prohibition of torture as an absolute and non-derogable right, the non-refoulment principle, the CAT and ICC jurisdiction on torture and CAT and other human rights instruments on torture around which literature is reviewed, reflecting the concerns of this study.

2.2 The Historical Development of Human Rights in South Sudan

Human rights themselves are not a new phenomenon or a new morality. They have a history dating back to antiquity. The rights of man as expression of political philosophy are traceable to the writings of early naturalists. The clamour of human rights dated back to colonial day that is before South Sudan attained independence from Sudan in 2011. Numerous pre-independent

⁶⁷ibid.

⁶⁸ibid.

conferences on human rights helped a lot in the development of the concept of human rights in South Sudan. There were times when writings of publicist had great impact on law and on the society within which the law operated. According to these philosophers, every individual within society possesses certain rights which are inherent and which cannot be wantonly taken away and for which man is beholden to no human authority.

Jurisprudentially, the concept of human right has its philosophical ancestry in the natural law school that is why the expression 'human right' had been used synonymously with natural rights. A pronouncement of human rights includes an assertion of the importance of the corresponding freedoms that are identified and privileged in the formulation of the rights in question. For example, the human right of not being tortured springs from the importance of freedom from torture.

Prof. Maurice Cranston while defining human rights in the context of natural law and natural rights said that: 'The twentieth century name for what has been traditionally known as natural right or in more exhilarating phrase of right of man'⁶⁹ natural law is predicated on the assertion that there are objectives or moral principles which depend upon the nature of the universe and which can be discovered by reason. In other words, the theory of natural law is based on the reasoning that the rule of human conduct is a deduction from the human nature of man as it reveals itself in reason and independent of any man-made enactment.

It can be said that natural law which human rights proceeded on is a rational basis for moral judgment. It should however be contended that the doctrine of natural law was responsible for many revolutions that have taken place in the past in most civilized states.⁷⁰

Furthermore, historically the fundamental rights provisions in the 2005 Interim Constitution were contained in part two of the Bill of Rights of that constitution. The full text of the Bill of Rights of the previous constitutions is similar in every respect to what is contained now in the Transitional Constitution of South Sudan 2011 which is the product of independence. The rights in the interim constitution of Southern Sudan 2005 were repeated verbatim in the current constitution.

⁶⁹Osita Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (CIDJAP 1999).

⁷⁰ibid.

The constitution prohibits torture and all forms of cruel, inhuman or degrading treatment or punishment. In the words of Niki Tobi, the Justice of the Court of Appeal, ‘the word torture etymologically means to put a person to some form of pain which could be extreme’. It also means to put a person to some form of anguish or excessive pain. This means that there are no chances of police or soldiers hurting or humiliating anyone using methods such as torturing prisoners or subjecting them to beatings or other pain in order to make them confess or to punish them. Therefore, fundamental human right is a crucial aspect in every citizen’s life and must not be meddled with by any person as entrenched in part two of the 2011 constitution and other international provisions irrespective of whoever the person is.

The government has all it takes to make sure that the rights of its citizens are adequately protected. It has to make sure the rights of its citizens is one of the corner stone of its domestic policy and must be looked into seriously not taken with levity so that any aggrieved person whose right has been flagrantly infringed upon will be able to seek redress boldly in the court of law. The rights of an arrested person as enshrined in article 18 of the transitional constitution need to be adequately ensured and protected.

2.3 The Human Rights Principle and Torture

The phrase ‘human rights’ are qualified as civil or legal, absolute or inalienable and fundamental or universal right. When we talk of inalienable right, it means a right is an integral part of an individual (dignity of human) which cannot be taken away because the taking away of such rights would be tantamount to torture and inhuman treatment.

The black Law Dictionary defines rights as: ‘Something that is due to a person by just claim, legal guarantee or moral principles, and that which is proper under the law, morality or ethics, legally enforceable claim that another will do or not do a given act and a proper privileged or immunity secured to a person by law’.⁷¹ The Concise Law Dictionary also defines right as: “An interest, recognized and protected by law respect for which is a duty and disregard for which is a wrong”.⁷²

⁷¹Bryan Garner, *Black’s Law Dictionary 7th Edition* (West Group 1999) 1323.

⁷²Percy Osborn and Sheila Bone, *Osborn’s Concise Law Dictionary* (Sweet and Maxwell 2001) 338.

Some argue that the quest for human rights has been present at every stage of human history,⁷³ while others see the discipline as a more recent phenomenon.⁷⁴ The concepts and ideas of profound thinkers of the time such as Aristotle, Cicero, Grotius, Montesquieu and prestigious jurists found their reflections in many documents with institutional character which emphasized a well deliberate conception of human rights. The United Nations' conception of human rights accords to its principles and norms a certain priority over competing considerations of human rights.

The Universal Declaration of Human Rights associates human rights with 'the highest aspiration' of the common people and proclaims itself to be a 'common standard' for all. It is well known that this claim raises questions about the validity of universal principles in a culturally diverse world. However, it can be argued that the conscious process of internationalizing human rights began with the adoption of the UDHR in 1948. The UDHR was drafted by the UN Commission on Human Rights in 1947 and 1948.

The declaration is one of the first major achievements of the UN. The UDHR was adopted by a resolution of the UN General Assembly and thus not a legally binding document.⁷⁵ Nevertheless, the Declaration has gained considerable authority as a general guide to the content of fundamental human rights and freedoms as understood by the members of the international community. It also provides an important link between the concepts of human rights in different parts of the world. The declaration, which some have called the international Magna Carta of mankind,⁷⁶ represents an expression of a collective desire to value, among others, preserves human dignity, life and development.

Together with the 1966 Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights which represents the basic standards for the protection of human rights regardless of race, religion, gender or class, and together, they constitute the International Bill of

⁷³Micheline Ishay (ed), *The Human Rights Reader: Major Political Essays and Documents from Ancient Times to the Present* (Routledge 2007) xiii.

⁷⁴ibid.

⁷⁵Leah Levin, *Human Rights; Questions and Answers* (5th edn, UNESCO Publishing 2009) 17.

⁷⁶Paul Lauren, *The Evolution of International Human Rights: Visions Seen (Pennsylvania Studies in Human Rights)* (Third, University of Pennsylvania Press 2011) 237.

Rights.⁷⁷ Thus, what began as mere common aspirations is now hailed as an authoritative interpretation of the human rights provisions of the UN Charter and established customary international law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights. It is now generally held to have crystallized into a binding instrument.⁷⁸

The UDHR was intentionally linked to the UN charter since it shares a common aspiration. As its fundamental premise, it affirms that the recognition of the innate dignity of all members of the human family and the equality and inalienability of their rights is the foundation of liberty, justice and peace of the world. However, all the subsequent international instruments on human rights declare this truth anew, recognition and affirming that human rights stem from the inherent dignity and worth of the human person.

The declaration is clear, it acknowledges the rights which it proclaims but does not confer them since they are inherent in the human person and in human dignity. Therefore, the defence of the universality and indivisibility of human rights is essential for the construction of a peaceful society and for the overall development of individuals, peoples and nations.⁷⁹ Human rights are thus inhering in the human person, across cultures, across civilizations and across centuries. They are based on respect for the dignity and worth of all human beings and seek to ensure both freedom from fear and freedom from want.

Rooted in ethical principles and usually inscribed in a country's constitutional and legal framework, they are essential to well being of every human being. Premised on fundamental and inviolable standards, they are universal and inalienable. The rights enshrined in the International Bill of Rights and other instruments adopted by the UN over the past century have served as a road map for humanity to understand its place and identity on our planet. They are inextricably linked to us and we carry them as a treasured inalienable belonging.⁸⁰

⁷⁷ The International Bill of Rights, (1996) UN Fact Sheet No. 2 (Rev. 1) available at <<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>> accessed 4 February 2015.

⁷⁸ John Humphrey, *No Distant Millennium: The International Law of Human Rights* (Unipub 1989) 154-156. See also articles 31 and 32 of the 1964 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980.

⁷⁹ Vienna Declaration and Programme of Action, 1993, UN GA Doc A/CONF.157/23, 12 July 1993, provides in para 1 (5) that all human rights are universal, indivisible and interdependent and interrelated.

⁸⁰ Jorge Taillant, 'A Rights Based Approach to Development', *World Social Forum Seminar on Globalization and Human Dignity* (2002) <<http://wp.cedha.net/wp-content/uploads/2011/05/A-Rights-Based-Approach-to-Development.pdf>> accessed 10 February 2015.

The purpose of human rights is therefore to protect the full range of rights required for people to have a full, free, safe, secure and healthy life and thus live a dignified life.⁸¹ However, a dignified life cannot be led if the basic and essential ingredients of such life are not met. Some of these ingredients other than civil and political rights are work, food, housing, health care, education and culture, collectively referred to as Economic, Social and Cultural Rights.

Hence, for human rights to be fully realized, a comprehensive process directed towards the full realization of all human rights and fundamental freedoms is essential. Therefore, the concept of human rights is the result of the long evolution of philosophical, political, legal and social reflection, inseparably connected to the social-democratic traditions.

Thus, as legal phenomenon, human rights have been originated by the natural law doctrine starting from the idea that humans, by their own nature have rights that are previous and primary to the ones assigned by the society and admitted by natural law.

2.4 Safeguards for Protecting Rights of an Arrested Person from Torture

The constitutional safeguard for protection of the right of an arrested person from torture under the South Sudanese criminal justice system has its foundation enunciated under the transitional constitution 2011⁸² which is the fundamental law of the land.

The constitutional safeguards are meant to ensure the arrested persons' right to protection from torture and against abuses of rights as stipulated in the constitution. The courts should ensure that justice is accorded to the arrested persons and justice must not only be done but must be seen to have been done to the arrested persons' rights in case of infringement of his right to freedom from torture. The courts are duty bound to uphold, enforce and enjoy the observance of this fundamental rights as enshrined in constitution and the law. The human rights institutions and civil society must work hand in hand with great passion for humanity to ensure that right of an arrested person is being safeguarded to the fullest by seeing to it that arrested persons are adequately protected.

⁸¹ The Committee on Economic, Social and Cultural Rights, UN Fact Sheet No. 16 (Rev. 1), at 3, available at <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> accessed 10 February 2015.

⁸² Article 18 of the Transitional Constitution of the Republic of South Sudan, 2011

Any civilized society must uphold the tenets of protection mechanism that justice is indeed meant to be a three way traffic specifically justice to the victims of torture, justice to the state and justice to the arrested person because all the full weight of the laws fall on the side of an arrested person. Accordingly, international human rights instruments in general and those exclusively dedicated to the arrested person's rights can be invoked by arrested person so long as they have been ratified by South Sudan.

The constitution subject to article 190 stipulates that 'no derogation from the rights and freedoms enshrined in this Bill shall be made.'⁸³ The Bill of Rights shall be upheld, protected and applied by the Supreme Court and other competent court; the Human Rights Commission shall monitor its application in accordance with this constitution and the law.⁸⁴ These key concepts on human rights, and the right to freedom from torture are relevant and related to this study on the account that human rights shields many other rights and freedoms enunciated under various international and regional human rights instruments as well as the domestic laws. It is the corner stone from which all rights and fundamental freedoms stems from because torture is one of the rights and freedoms under human rights and which is protected by many international and regional human rights instruments.

2.5 The Crime of Torture: Its Purpose and Elements

The different purposes that an act of ill-treatment must fulfill to be considered as torture or cruel, inhuman and degrading treatment or punishment include extracting a confession; for obtaining from the victim or the third party an information; or for punishment; for intimidation and coercion or for discrimination. The act of torture in CAT refers to the deliberate infliction of severe pain or suffering upon a person for a reason or reasons which can be either mental or physical in nature and caused by ether a single isolated act, or a number of such acts.⁸⁵ The most common methods of torture used are beatings, often using objects such as hoses, sticks, iron bars or guns to sensitive parts of the body such as the head, eyes and genitals.⁸⁶ Other forms of torture

⁸³Article 10of the Transitional Constitution of South Sudan 2011.

⁸⁴ Ibid articles 10 and 190.

⁸⁵Lene Wendland, *A Handbook on State Obligations under the UN Convention Against Torture* (Association for the Prevention of Torture 2002) 76.

⁸⁶ibid.

include burning with hot metal poles or cigarettes, slashing of the skin with sharp blades, and electric shocks.⁸⁷

The extent to which an individual could endure pain or suffering is subjective and it depends on the characteristics of the victim and the circumstances of each case.⁸⁸ The drafting of CAT reveals that the list of purposes was meant to be indicative rather than all-inclusive.⁸⁹ The use of the words ‘for such purposes’ do not constitute an exhaustive list, and should be regarded as merely illustrative.⁹⁰

It has been observed by Cooper that the terms ‘torture’, ‘inhuman’ and ‘degrading treatment’ or ‘punishment’ are often considered to be in a hierarchy.⁹¹ Firstly, torture is the most severe; followed by inhuman treatment or punishment; and then degrading treatment or punishment. The protection of physical integrity offered under Article 8 of the European Convention on Human Rights performs a sort of mopping up exercise.⁹²

Cooper however, critique the concepts and relied on the approach of the committee; namely, that the expression torture, inhuman and degrading treatment or punishment reflects not so much a hierarchy of severity of ill-treatment as different types of ill-treatment, more or less closely linked.⁹³ Hence, perpetrators of torture need not be persons acting in an official capacity but also groups and individuals acting within the jurisdiction of the State Party with its open or tacit consent.⁹⁴

The HRC has distinguished among perpetrators acting in their official capacity, outside their official capacity, or in a private capacity.⁹⁵ This includes law enforcement personnel, medical personnel, police officers, and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment.⁹⁶ It will satisfy the

⁸⁷International Federation of Human Rights Sudan Organization Against Torture (n20).

⁸⁸Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff Publishers 1999) 18.

⁸⁹*ibid.*

⁹⁰Wendland (n 114).

⁹¹John Cooper, *Cruelty: An Analysis of ‘Article 3’* (Sweet and Maxwell 2002) v.

⁹²*ibid.*

⁹³*ibid.*

⁹⁴Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity 2001).

⁹⁵John Dean, ‘The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales’s Confirmation Hearings’ (*FindLaw*, 2005) <<http://writ.news.findlaw.com/dean/20050114.html>> accessed 28 February 2015.

⁹⁶*ibid.*

requirement of the definition of torture when committed by the police, security forces⁹⁷ and members of the army⁹⁸ as well as by paramilitary and other armed groups.

In the decision of *Elmi v. Australia*,⁹⁹ the Committee against torture found that warring factions operating in Somalia which had set up quasi-governmental institutions and which exercised certain prerogatives that are comparable to those normally exercised by the legitimate governments, can fall within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1 of CAT.¹⁰⁰ It also includes private persons and foreign soldiers within the State Party’s territory.¹⁰¹ In its early jurisprudence, the HRC had included bi-national commandos in the definition of authors of acts of torture.¹⁰²

However, from the jurisprudence of the HRC, it seems apparent that in order for any act to amount to torture, all the three elements must be present. A person who is severely ill-treated is not tortured if the perpetrators do not have a specific intention when they inflict pain on the victim.¹⁰³

In addition, a person who is ill-treated for political reasons but who is not subjected to severe ill-treatment is not considered to have been tortured.¹⁰⁴ If the invocation is successful, the perpetrator will go unpunished creating rooms for impunity and continued infliction of torture on the vulnerable group, particularly the arrested persons. Thus, elements to be taken into account for qualifying an act as torture include nature of the act, intention of the perpetrator, purpose and involvement of public officials or assimilated. Apparently, the perpetrator will have a leeway to

⁹⁷Human Rights Committee, ‘Human Rights Committee, Comments on Egypt, U.N. Doc. CCPR/C/79/Add.23 (1993)’ (*Human Rights Committee*, 1993) <<http://www1.umn.edu/humanrts/hrcommittee/G9318243.htm>> accessed 28 February 2015.

⁹⁸*ibid.*

⁹⁹*Alsadiq Sheik Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999) Paragraph 65, available at <<http://www1.umn.edu/humanrts/cat/decisions/120-1998.html>> accessed 28 February 2015.

¹⁰⁰ The HRC has interpreted the scope of article 7 of the ICCPR to extend to acts committed by private persons. HRC General Comment 20 of 10 April 1992 (replaces General Comment 7 of 30 July 1982), paragraph 2.

¹⁰¹Dean (n 122).

¹⁰²*Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981 (31 March 1983), U.N. Doc. Supp. No. 40 (A/39/40) at 169 (1984), available at <<http://www1.umn.edu/humanrts/undocs/session39/110-1981.htm>> accessed 28 February 2015.

¹⁰³*Jorge Villacrés Ortega v. Ecuador*, Communication No. 481/1991, U.N. Doc. CCPR/C/59/D/481/1991 (8 April 1997) accessed 28 February 2015.

¹⁰⁴ *ibid.*

inflict torture and if called upon to account, will easily invoke and rely on lack of intention to inflict torture as a defence.

2.6 The Responsibility to Prevent and Protect Arrested Persons against Torture

It is pertinent to stress from the outset that CAT is the only legally binding convention at the international level that deals exclusively with the eradication of torture.¹⁰⁵ It obliges state parties to take specific and general measures to prevent torture and other cruel, inhuman or degrading treatment or punishment.

CAT became the first binding international instrument exclusively dedicated to the struggle against one of the most serious and pervasive human rights violations of our time. It declares that torture is prohibited absolutely even during emergencies or armed conflicts. The dedication of international human rights law outlawing such acts is also evidenced by the existence of instruments focusing on the prevention of torture.¹⁰⁶

CAT imposes significant obligations on states to take measures to prevent and to facilitate redress to victims and survivors.¹⁰⁷ With regards to the responsibility to protect against torture and other cruel practices, the international community has developed standards to protect people against torture that apply to all legal systems.¹⁰⁸ Because the prohibition of torture is so fundamental, even if a state has not ratified a particular treaty prohibiting torture, it is in any event bound on the basis of general international customary law.¹⁰⁹

A moral commitment to the dignity of the human person is sometimes fleshed out in terms of human rights. Just because they are human, people have rights to many things, including the right not to be tortured.¹¹⁰ No one is ever 'subhuman' or 'human debris'.¹¹¹ However, it is trite to say that the understanding of human dignity is the existence of a set of human rights. Among the

¹⁰⁵Wendland (n 114) p 7.

¹⁰⁶ Like, for instance, the European Convention for the Prevention of Torture and Inhuman or degrading Treatment or Punishment, 26 November 1987; Inter-American Convention to prevent and Punish Torture, 9 December 1985.

¹⁰⁷ Wendland (n 114).

¹⁰⁸Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Human Rights Centre University of Essex 2003) available at < https://www.essex.ac.uk/combatingtorturehandbook/english/combating_torture.pdf.> accessed 28 february 2015 .

¹⁰⁹ibid.

¹¹⁰ Article 5 of the Universal Declaration on Human Rights (UDHR).

¹¹¹ Ibid.

most widely recognized of these rights in both legal and moral theory is the right to bodily integrity; that is, the right not to have intentional physical and psychological harm inflicted upon oneself by others. The ban on torture is one expression of the right to bodily integrity.¹¹²

The observation of Peter Kooijmans, former Special Rapporteur on torture of the UN Human Rights Commission reveals the horrifying nature of torture. He lamented that torture is never an isolated phenomenon. It exposes the very terrible acts and practices of torture in the past and in the present. He expressed the view that:

“It does not start in the torture chambers of this. It begins much earlier, whenever respect for the dignity of all fellow human beings and the right to have this inherent dignity recognized are absent’.¹¹³

Kooijmans described torture in hidden or isolated places as: ‘the most intimate human rights violations, as it takes place in isolation and is very often inflicted by a torturer who remains anonymous to the victim and who regards the victim as a faceless object.’¹¹⁴

Jean-Jacques Gautier, who devoted himself fully to the struggle against torture, was firmly convinced that the only effective safeguard against torture would be a system of inspection through regular visits to all places of detention.¹¹⁵ Consequently, he founded the Geneva-based Swiss Committee against Torture (now renamed the Association for the Prevention of Torture).

At the request of this committee a group of experts prepared in May 1997 a first draft of a convention concerning the treatment of Persons Deprived of their Liberty. According to this draft, the State Parties to the convention would establish a supervisory commission which would be empowered to send the territories of these states on a regular basis, delegates authorized to visit, without prior notification, any centre for interrogation, detention or imprisonment. Thus, there is a strong legal argument to be made for an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of

¹¹² Ibid.

¹¹³ Peter Kooijmans, ‘The Role and Action of the UN Special Rapporteur on Torture’ in Antonio Cassese (ed), *The International Fight Against Torture* (La Lutte Internationale Contre La Torture 1991) 65.

¹¹⁴ Peter Kooijmans, ‘Report of the Special Rapporteur T Mr. P. Kooijmans. pursuant to Commission on Human Rights Resolution 1991/38’ (1991) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G91/142/75/PDF/G9114275.pdf?OpenElement>> accessed 28 February 2015.

¹¹⁵ Ibid.

fundamental rights.¹¹⁶ In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall state involvement only serves to sustain impunity through the exceptionalization of the actions of an individual perpetrator as distinct from the state itself.¹¹⁷

Thus, actions against individual perpetrators rarely expose the broader patterns of abuse underlying the acts of the individual by anything more than implication unless the case involves specific crimes such as crimes against humanity. In 2001, the international Law Commission rightly pointed out that “every internationally wrongful act of state entails the international responsibility of that state”.¹¹⁸

2.7 Torture under International Law

As explained by Former UN High Commissioner for Human Rights, Mary Robinson “the only long-term guarantor of security is through ensuring respect for human rights and humanitarian law”.¹¹⁹ Therefore, following the September 11 attacks in the US, the Committee against Torture issued a statement where it remained States Parties to CAT of the non-derogable nature of the obligations contained in CAT.¹²⁰

Like other scholars, Sheldon Krantz and Lynn A Branham, focus on the American human rights jurisprudence. They give a clear evaluation on how the American legal system protects the rights of the arrested persons.¹²¹ They both critically analyze the rights of the arrested person’s access to courts, search and correspondences. They argued that the rights of the arrested persons have been

¹¹⁶Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *The Yale Law Journal* 1237; Diane Orentlicher, ‘Addressing Gross Human Rights Abuses: Punishment and Victim Compensation’ in Louis Henkin and John Hargrove (eds), *Human Rights: An Agenda for the Next Century* (American Society of International Law 1994) 69.

¹¹⁷Cohen (n 121).

¹¹⁸ Article 1, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in International Law Commission, ‘Report of the International Law Commission Fifty-Third Session (23 April- 1 June and 2 July-10 August 2001’ (2001) <<http://www.un.org/documents/ga/docs/56/a5610.pdf>> accessed 28 february 2015.

¹¹⁹Gabriela Echeverria, ‘TERRORISM, COUNTER- TERRORISM AND TORTURE: INTERNATIONAL LAW IN THE FIGHT AGAINST TERRORISM’ (*REDRESS*, 2004)3 <<http://www.redress.org/downloads/publications/TerrorismReport.pdf>> accessed 28 February 2015.

¹²⁰ CAT/C/XXVII/Misc. 7, Statement of the Committee Against torture, 22/11/2001; CAT., 28 April 1997, available at <<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/c25a521171ce37ecc1256b20004cc4c4?Opendocument>> accessed 28th February 2015.

¹²¹Lynn Branham and Sheldon Krantz, *Sentencing, Corrections, and Prisoners’ Rights in a Nutshell* (West Publishing Group 1994) 111.

numerously violated by the prison staff. They deal initially with the state policy of torturing arrested persons by the police and prison's staff.¹²²

As Sheldon and Branham focuses on the American human rights jurisprudence, this study critically analyzes the arrested persons' right to protection from torture in South Sudan.

It is pertinent to note that also the jurisprudence of the European Court of Human Rights has similarly ruled out the possibility of a balancing act between the interests of national security and the interest of the individual to be protected against torture.¹²³ In the case of *Soering v The United Kingdom*, the court established that:

“The absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the convention shows that article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.¹²⁴

Like many other scholars, Michael Tonry and J Petersdia also discuss the collateral consequences of imprisonment of children on the community. They elaborate clearly on the management of prisons and argue that inter-personal violence is as a result of overcrowding of the cells.¹²⁵

Rodley Nigel elaborates on various international instruments that deal with the treatment and protection of the arrested persons from torture and other detention conditions.¹²⁶ He argued that arrested persons are not supposed to be subjected to torture and other ill treatments and they should not be discriminated against by virtue of having been arrested.¹²⁷

Nigel argued that the continuous violation of the arrested person's rights is as a result of limited involvement of the civil society organizations in the fight against torture by joining the debate on the corrections and reforms which has caused degeneration to general weak civilian oversights in lifting such inhumane treatment which violates human rights.¹²⁸

¹²²ibid.

¹²³ See *Chahal v. The United Kingdom* (1997) 23 EHRR 413.

¹²⁴ Ibid.

¹²⁵Michael Tonry and Joan Peresdia, 'Prisons, Crime and Justice Review' (1999) 26 University of Chicago Press 121.

¹²⁶Nigel Rodley, *Treatment of Prisoners under International Law* (Oxford University Press 2004) 70.

¹²⁷ibid.

¹²⁸Muntingh Luka, 'South African Constitutional Court Rules on Inmates' Rights to Vote' (2004) 66 Correction today 15.

It is clear that Rodley's work discussed minimally on the international instruments that deals with protection and treatment of the arrested persons from torture and other detention conditions, this study intent to investigate and bridge the gaps that exist in the available legislations in South Sudan on the protection and treatment of the arrested persons.

On the same note, Lukas argues that arrested persons remain part of the society although temporary segregated, they need to be treated with human dignity as citizens and any act fallen below the minimum standard will put the society on a slippery slope of creating second class citizens.¹²⁹ Lukas pointed out in his work with regards to the status of the arrested persons as part of the society who should be treated with human dignity as citizens.

On the same vein, Imibekhai Clement also made a broad account focusing on Justice, Development and Peace Commission in Benin and Nigeria.¹³⁰ He argued that churches and other Non-governmental organizations have been playing crucial assistance in the social, moral and spiritual wellbeing of the victims of torture.¹³¹

Imibekhai's argument provides insightful paradigms on the importance of the role of the civil society organizations, non-governmental organizations and churches in addressing this challenging trend in protecting the rights of the arrested persons in South Sudan. Imibekhai's work focuses on the role of the Civil Society Organizations, Non-Governmental Organizations, and Churches in addressing rights of the arrested persons.

Heyns writes that, in Africa the commission often finds violations of article 5 on the basis of torture being widely practice and this could be attributed to the fact that the African Charter does not define torture.¹³² Heyns pointed out instances where the African Commission has found violations of article 5 of the African Charter on torture.

¹²⁹ibid.

¹³⁰Imibekhai Clement, 'Non-Governmental Organization and Prison Support Services in Nigeria: A Case Study of the Justice, Development and Peace Commission' (2002) 53 *Journal of Correctional Education* 89.

¹³¹ibid.

¹³²Christoff Heyns, 'Civil and Political Rights in the African Charter: Articles 8–14' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and People's Rights: The System in Practice 1986-2006* (Cambridge University Press 2008) 151.

In her book entitled ‘human Rights in Africa, From OAU to the AU’, Murray does not cover torture at all though she did recognize the impact of torture and admit its common practice in many African countries.¹³³

Ouguergouz also deals with some aspects of torture in Africa and in particular the jurisprudence of the African Commission on Human and Peoples’ Rights but in a rather brief way.¹³⁴

Amnesty International and Human Rights Watch have also made elaboration on the problems of torture in South Sudan where the police and prison staffs violates rights of the arrested persons by using torture as a mean of getting information.¹³⁵

Amnesty international and Human Rights Watch reports deals with the general conditions of the arrested persons in the prison. The two reports argued that despite the stringent prohibition of torture under international, regional and national legislations, torture is still very rampant in South Sudan.¹³⁶ Hence, in line with the absolute character of the ban on torture, an order from the superior or a public authority may not be invoked as a justification for torture. This is a general rule of international law. This has however found expression in domestic laws.

The South African Constitution, 1996 for instance provides for this rule in its section 199(1), (5) and (6). Section 199(5) is specific: “the security services must act, and must teach and require their members to act, in accordance with the constitution and the law, including customary international law and international agreements binding on the Republic”. Moreover, section 199(6) provides: “No member of any security may obey a manifestly illegal order”.

2.8 CAT and ICC Jurisdiction on Torture

Rather than being a norm setting human rights treaty along the lines of, for example ICCPR, CAT belongs primarily to the category of international criminal law instruments. The International Criminal Court (ICC) is a permanent court which tries individuals accused of committing genocide, war crimes, crimes against humanity and possibly in the future, the crime

¹³³Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press 2004) 150.

¹³⁴Fatsah Ouguergouz, *The African Charter on Human and Peoples’ Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers 2003) 60.

¹³⁵Amnesty International, *Torture in 2014: Thirty Years of Broken Promises*(n8).

¹³⁶*ibid.*

of aggression. The definition in the Rome Statute of the ICC, crimes is broadly consistent with those elaborated by international law, though the statute also reflects some progressive development in defining certain crimes, notably gender related offences.¹³⁷

The crime of torture falls within the jurisdiction of the ICC when it is committed in the context of crimes against humanity i.e. when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹³⁸

The term ‘war crimes’ denotes grave breaches of the Geneva Conventions, namely torture or inhuman treatment of, including biological experiments upon, persons protected under the provisions of the related Geneva Convention in the context of armed conflicts.¹³⁹

Contrary to the definition of torture in the ICC Statute, the definition in CAT is not concerned with the context in which torture as defined in Article 1 of CAT occurs. While CAT is concerned with the establishment and exercise of jurisdiction over torture in national laws, the ICC is an independent international body with jurisdiction over a range of the most serious international crimes.

Hitherto, the central attribute of the ICC is that it will be complementary to national criminal jurisdictions in cases where national courts are unable to prosecute individual perpetrators or state agencies accused of committing torture. Thus, national tribunals will continue to have primary jurisdiction over criminal offences falling under the Statute and the ICC will hear cases only where national tribunals are unable or unwilling to do so.¹⁴⁰

It is possible to imagine a situation where torture committed in the context of a conflict also falls within the definition of torture in both CAT and international humanitarian law. In such a case, national tribunals could have a choice between prosecuting a suspect according to laws establishing jurisdiction under CAT or according to the norms of individual criminal responsibility under international humanitarian law.

¹³⁷ Ibid.

¹³⁸ Rome Statute (n 7) Article 7.

¹³⁹ Ibid, Article 8 paragraph 2(2).

¹⁴⁰ Ibid, preamble, article 1.

Article 25 of the ICC Statute establishes individual criminal responsibility for any person who commits a crime within the jurisdiction of the ICC.¹⁴¹ The Statute also addresses command responsibility and the full range of possible defences.¹⁴² In some circumstances, a state may find it in its interest to allow a prosecution to go forward before the ICC, considering the matter too dangerous to be handled domestically and preferring trial before a distant international tribunal.¹⁴³

In most cases, the state may well wish to retain control over such prosecutions. To allow its own nationals or aliens charged with the commission of crimes on its territory to be prosecuted by a distant international tribunal would deprive the state of control and suggest the inadequacy of its domestic legal system.¹⁴⁴

2.9 CAT and other Human Rights Instruments

The protection of human rights has come to achieve greater prominence and acts that were formerly seen as inhuman and degrading in whatever form are becoming classifiable as torture. Therefore, it is important to mention that torture and other forms of ill-treatment could take any form. Thus, Changing standards within society mean that what was not considered torture twenty years ago will be considered so now because human rights instruments banning torture and other ill-treatment particularly CAT are living instruments, and they serve the time and society in which they operate.¹⁴⁵ More importantly, the changing attitudes of the society towards the basic respects of individual integrity and fundamental human rights have had the effect of widening the categories of torture.

The dynamic nature of the Convention prohibiting torture is succinctly illustrated and analyzed in the case of *Cakici v. Turkey*¹⁴⁶ and *Selmouni v. France*.¹⁴⁷ In the *Cakici*'s case, the appellant was in detention, he was beaten and one of his ribs broken, his head was split open and he had

¹⁴¹ *ibid* article 25 of the Rome Statute.

¹⁴² *Ibid*, Articles 26-39 and 31-33.

¹⁴³ See 'Ex-Chad Ruler Is Charged By Senegal With Torture' *The New York Times* (February 2000) <<http://www.nytimes.com/2000/02/04/world/ex-chad-ruler-is-charged-by-senegal-with-torture.html>> accessed 2 March 2015.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid*.

¹⁴⁶ *Cakici v. Turkey* [1999] ECHR 43.

¹⁴⁷ *Selmouni v. France*, (2000) EHRR, 403.

received electric shock treatment in the course of his interrogation. The court held that the use of electric shocks falls within the range of treatment constituting torture since the treatment was for the purpose of obtaining information or to punish.

As in the case of Selmouni, one of the allegations concerned the insertion of a small truncheon into the applicant's anus. The latter was made to kneel down while the officer pulled him by the hair, the second hit him repeatedly with baseball bat and others kicked him. One officer showed him his penis, asking him to suck it and then urinate over him.

While the French national court accepted that he had been assaulted and regarded the act as a very serious wrong but the ECHR was of the opinion that torture still required very serious and cruel suffering and concluded the pain and suffering were sufficiently severe to constitute torture because the torture inflicted was for the purpose of making him confess. Thus, in order to determine whether a degrading act had taken place, the seriousness, cruelty or suffering was of less importance than sense of humiliation and debasement of the victim, which had to reach a certain level.

To this end, Nowak rightly points out that an extra criterion must be brought into play in order to assess whether there has been a breach of ban on torture in view of the fact that every punishment involves certain elements of degradation.

2.10 Conclusion

The study was aimed at assessing and establishing the challenges faced in protection of the rights of the arrested persons as well as the adequacy of the available legislative frameworks on the protection of the rights of the arrested persons from torture in South Sudan.

The study found that lack of training of the police and prison guards was one of the factors hindering effective implementation of the provisions on the rights of the arrested persons in South Sudan.

The normative effect which exceptionalizes torture is when, in fact, it remains distressingly common. Any justification for torture by states or individual perpetrators will dignify the offence and degrade the victims. The approach of international human rights law and humanitarian law alike ought to be the position of all governments and states parties, South Sudanese or otherwise.

It is right to say that the definition of torture is relevant for the following reasons; firstly, to determine individual responsibility for the crime of torture.

Secondly, state responsibility for violations of the prohibition of torture, thirdly, the prevention of torture, and fourthly, reparation for and rehabilitation of torture victims.¹⁴⁸ Moreover, the obligation under international human rights law prohibits torture and other forms of cruel or inhuman or degrading treatment or punishment; and the relationship between these concepts needs to be borne in mind.¹⁴⁹

There is a consensual agreement among various scholars and institutions that the protection of the rights of arrested persons poses a challenging trend and therefore needs proper attention to collectively address. Therefore, the inadequacy, weakness or gaps that exists in legislative framework and limited studies in South Sudan shows that there is a great concern about rampant use of torture and the effects it caused to the society.

The next chapter discusses the critique of the adequacy of legislative frameworks governing the protection of the arrested person's rights from torture in South Sudan. This exposition will look at both the strengths and weaknesses of each of the selected legislative frameworks governing the protection of the rights of the arrested persons from torture.

¹⁴⁸Association for the Prevention of Torture, *The Definition of Torture: Proceedings of an Expert Seminar* (Association for the Prevention of Torture 2001) 27.

¹⁴⁹*ibid.*

CHAPTER THREE: A CRITIQUE OF THE ADEQUACY OF THE LEGISLATIVE FRAMEWORK AGAINST TORTURE

3.1 Introduction

This chapter covers the critique of the adequacy of the legislative frameworks governing the protection of the rights of the arrested persons from torture. It will deal with main human rights treaties dealing with the right to freedom from torture. The chapter will also aims at dealing with an exposition of the challenges encounter in the protection of the rights of the arrested persons from torture in South Sudan. It will identify the gaps that exist in the legislative framework governing the protection of human rights in South Sudan. It also cover and examine the role played by various institutions such as the Judiciary, South Sudan Human Rights Commission, Human Rights Treaty Bodies i.e. the Committee against Torture, and the role played by Customary Law and Informal Justice System as major means of Dispute Resolution in South Sudan.

3.2 The Universal Declaration on Human Rights (UDHR)

The Universal Declaration on Human Rights (UDHR) is the founding document that came up with elaborated human rights to give effect to the human rights objective set forth under the United Nations Charter.¹⁵⁰ Article 5 of the UDHR prohibits torture, cruel, inhuman or degrading treatment or punishment.¹⁵¹ Though it is a declaration which has no binding effect, it is the first human rights instrument ratified by almost all the states of the world.¹⁵²

The UDHR has assumed the status of customary international law in which the inhumane treatment or punishment of the arrested persons is the violation of this instrument.¹⁵³ At the regional level, the African Charter on Human and Peoples' Rights prohibit torture under its article 5 which supplement the provision of the UDHR.¹⁵⁴

¹⁵⁰ *ibid*

¹⁵¹ Article 5 of the Universal Declaration of Human Rights (UDHR) available at <http://www.un.org/en/documents/udhr/> accessed March 5 2015.

¹⁵² Gulilat (n 209)

¹⁵³ Dominguez Redondo, 'Role of the UN in the Promotion and Protection of Human Rights' in Rahman Chowdhury and Hossain Bhuiyan (eds), *An Introduction to International Human Rights Law* (Martinus Nijhoff Publishers 2010) 128.

¹⁵⁴ See article 5 of the UDHR.

At the national level, South Sudan promulgates its Constitution 2011,¹⁵⁵ which outlawed the practice of torture under article 18 and passed the Child Act, 2008¹⁵⁶ to domesticate the provisions of both the ACHPR and ACRWC. Although South Sudan has enacted few laws that recognize the right to freedom from torture, there is however no specific statute that provides for mechanisms to implement substantive rights enshrined in the constitution and the Child Act.

With some gains South Sudan has made in passing substantive laws that outlawed torture and recognize the right to protection from torture, the absence of public awareness and lack of proper training for the security forces raises serious concerns and made it difficult to ensure the protection of the rights of the arrested persons.¹⁵⁷

The gap which exists here is that although South Sudan has enacted few laws that recognize the right to freedom from torture, there is no specific legislation that provides for punitive measures in protecting the rights of arrested person from torture. Hence, the lack of such legislation made it difficult to adequately protect the rights of the arrested person in South Sudan.

The challenge with UDHR is that it is a declaration which has no binding effect and this opens the doors for states not to respect its provisions on detained persons and this is one of the weaknesses of the UDHR. This is one of the weaknesses of the Declaration since it has no binding force on the states.

3.3 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The major international instrument dedicated wholly to the fight against torture is the Convention against Torture and Cruel, Inhuman or Degrading Treatment of Punishment (CAT).¹⁵⁸ A majority of African countries have ratified CAT. This could be interpreted to mean that these countries realized that torture is such a serious problem in the continent and that there is need to fight and eradicate it.¹⁵⁹ CAT lays down some important steps which states parties

¹⁵⁵ See article 18 of South Sudan Constitution, 2011.

¹⁵⁶ See section 21 (a) and (b) of the South Sudan Child Act, 2008.

¹⁵⁷ Human Rights Watch (n 34).

¹⁵⁸ Adopted and open for signature, ratification and accession by the General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987 (n 5).

¹⁵⁹ Only Angola, Central African Republic, Eritrea, Liberia, Mauritania, Rwanda, Tanzania and Zimbabwe still did not ratify CAT.

should take in efforts to eradicate torture. It obliges a state party to take effective legislative, judicial and administrative measures to prevent acts of torture.¹⁶⁰

It emphasizes the absolute nature of the right to freedom from torture by providing that no exceptional circumstances, whether a state of war or a threat of war, internal political instability or any public emergency, may be invoked as a justification of torture.¹⁶¹ An order from superior officer or a public authority may not be invoked as a justification of torture.¹⁶² This treaty requires states parties not to expel, return or extradite a person to a country where there is a substantial danger that he may be tortured.¹⁶³

The convention also requires states parties to criminalize all acts of torture and to have jurisdiction to try torture cases whenever and wherever it has been committed.¹⁶⁴ Another very important aspect of the CAT is that it makes torture an extraditable offence and requires states to cooperate and give assistance in respect of criminal proceedings in the case of torture.¹⁶⁵ It requires states parties to educate all personnel responsible for the custody, interrogation or treatment of any person deprived of their liberty that torture is prohibited.¹⁶⁶

States parties are obliged to keep under systematic review interrogation rules, methods and practices and to ensure that public authorities immediately investigate allegations of torture.¹⁶⁷ However, individuals who allege that they have been subjected to torture have the right to forward their complaints and have their cases investigated promptly and are entitled to fair and adequate compensation in case they were really subjected to torture.¹⁶⁸

The convention also prohibits courts from relying on any statement that has been extracted from the accused through torturous methods and means.¹⁶⁹ The convention also established a Committee against Torture (the Committee)¹⁷⁰ with jurisdiction to carry out inquiries into the

¹⁶⁰ Article 2(1) of the ICCPR

¹⁶¹ Article 2(2) of the ICCPR

¹⁶² Article 2(3) of the ICCPR

¹⁶³ Article 3

¹⁶⁴ Article 4, 5 and 7

¹⁶⁵ Article 8 and 9

¹⁶⁶ Article 10

¹⁶⁷ Article 11 and 12

¹⁶⁸ Article 13 and 14.

¹⁶⁹ Article 15.

¹⁷⁰ Article 17.

alleged violations of the treaty by the states parties,¹⁷¹ entertain inter-state communications¹⁷² and individual communications.¹⁷³ The Committee carried out its investigations in four different countries under article 20 including Arab Republic of Egypt, in which Amnesty International notified the committee of the systematic practices of acts of torture.¹⁷⁴

The strength of the Convention is that it does not allow courts to rely on any statement that has been extracted from the arrested persons through torturous means and methods which the persecuting authorities used as evidence in the court in order to persecute the accused.

The strength of the convention is that it establishes the committee with jurisdiction to carry out inquiries into the alleged violations of the treaty by the States Parties, entertain inter-state communications and individual communications. It also requires states parties to criminalize acts of torture and to have jurisdiction to try torture cases wherever and whenever it has been committed.

3.3.1 The Optional Protocol to CAT

In addition to CAT, a very important treaty that indicates the prospects of combating the use of torture in detention facilities is the Optional Protocol to CAT (OP-CAT). The objective of OPCAT is to establish a system of regular visits to be undertaken by international and regional bodies to places where people deprived of their liberty are being kept in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

A subcommittee is to be established and states are required to cooperate with it for the implementation of the Protocol.¹⁷⁵ The mandate of the Committee is to visit places of detention and make recommendations to States Parties concerning the protection of the arrested persons against torture.¹⁷⁶

¹⁷¹ Article 20, Rules 69-84 of the Rules of Procedure of the Committee against Torture adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth and twenty-fifth sessions, CAT/C3/Rev.4.

¹⁷² Article 21 and Rules 85-95.

¹⁷³ Article 22 and Rules 96-115.

¹⁷⁴ Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Martinus Nijhoff Publishers 2001) 159.

¹⁷⁵ Articles 2, 12 and 14.

¹⁷⁶ Article 11(a).

The Subcommittee has mandate to make recommendations and observations to the state parties with a view of strengthening the capacity and mandate of the national preventive mechanisms for prevention of torture.¹⁷⁷ The Subcommittee has mandate to cooperate for the prevention of torture in general with relevant United Nations organs as well as regional and national institutions or organizations working towards strengthening of the protection of all persons against torture.¹⁷⁸

It is argued that strengthening national preventive mechanisms would be a strong step towards the fight against torture. This is because national institutions like the Human Rights Commissions and Non-Governmental Organizations are on the ground and possess the capacity to visit detention facilities in any part of the country including rural areas where members of the committee may not reached and at a cheaper cost.

The weakness of the Optional Protocol to CAT is that it mandates Subcommittee to make recommendations and observations to the States parties with which most of the acts that amount to torture are being perpetuated by its agents. This gives the states parties an upper hand and a leeway to water down any step or initiative to prevent and protect arrested persons from being tortured by security agents who are acting on the directives of their superiors in the name of protecting national security of the state.

3.4 The International Covenant on Civil and Political Rights (ICCPR)

Some African countries signed this treaty before it came in force, others signed it at later stage¹⁷⁹ and some have just ratified the treaty.¹⁸⁰The International Covenant on Civil and Political Rights (ICCPR),¹⁸¹ which is binding upon member states has provisions which make a significant contribution on the protection of the rights of the arrested persons.

¹⁷⁷ Article 11.

¹⁷⁸ Ibid.

¹⁷⁹ African countries which signed this treaty as early as 1967 and 1968 long before the treaty came into force include Liberia, Guinea and Tunisia.

¹⁸⁰ On 17 February 2005, Mauritania became the 154th State Party to the ICCPR.

¹⁸¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23rd March 1976 in accordance with article 49.

The ICCPR expressly provides under Article 7 that: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁸² It is worth noting that the Human Rights Committee (HRC),¹⁸³ in its General Comment 20 of 10 March 1992, has interpreted Article 7 in broad terms which reflect steps that African countries which are Parties to the treaty can take to eradicate torture. This interpretation is vital in many ways.

First, it makes it clear that Article 7 should be read together with other relevant articles of the treaty if it aims to protect both the dignity and the physical and mental integrity of the individual is to be fully achieved.¹⁸⁴

Second, the HRC clarifies that the prohibition in Article 7 is complemented by the positive requirements of Article 10, paragraph 1, of the Covenant which stipulates “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹⁸⁵

And third, this clarification is vital in a sense that those who are deprived of their liberty are more vulnerable to torture and the requirement to treat them with humanity strengthens their protection.¹⁸⁶

The extension of the applicability of Article 7 to protect pupils, children, and patients in teaching and medical institutions¹⁸⁷ applies with great force in many African countries where schools and institutions frequently mistreat pupils in the name of instilling discipline.¹⁸⁸

¹⁸² Article 7 of the ICCPR

¹⁸³ HRC established under article 28 of the ICCPR with mandate to monitor the implementation of that treaty.

¹⁸⁴ The HRC expressly puts it that the aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual, para 2 of the General Comment 20.

¹⁸⁵ Para 2 as above

¹⁸⁶ Most cases and reports of torture indicate that those in detention are more vulnerable. The HRC also indirectly observes this in para 11. The HRC also requires States to read article 7 in conjunction with article 2(3) (see Para 14).

¹⁸⁷ Paragraph 5.

¹⁸⁸ In Kenya, Uganda, South Africa and Zambia governments have made legislative moves that outlaw corporal punishment and the judiciary has been supportive of this especially in South Africa and Uganda. See GO Odongo ‘Kenyan Law on Corporal Punishment by Parents; (2005) Corporal Punishment of Children in the Spot Light: Article 19(a) publication of the Children’s Rights Project of the Community Law, University of the Western Cape, vol.1, No.1) 6 who argues that corporal punishment is still being practiced in Kenya.

Article 4 of the ICCPR provides that the right to freedom from torture is an absolute right, which must never be suspended even in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.¹⁸⁹

The provision of Article 190(a) of the Transitional Constitution of the Republic of South Sudan, 2011, is in line with Article 4 of the ICCPR, which stipulate that “there shall be no infringement on the right to life, prohibition against torture, prohibition against slavery, the right of non-discrimination on the basis of race, sex, religious creed, the right to litigation or the right to fair trial”.¹⁹⁰

In its General Comment 5 of 31st July 1981, the HRC stated that the protection of human rights especially the non-derogable rights like the right to freedom from torture should be prioritized in cases of a state of emergency or war.¹⁹¹ As provided under article 10 of the Transitional Constitution of South Sudan, 2011, the protection of human rights especially the non-derogable rights particularly the right to freedom from torture is prioritized under the Constitution and that is the strength of both the ICCPR and the Constitution of South Sudan, 2011.¹⁹²

3.4.1 Optional Protocol to the ICCPR

The Optional Protocol to the ICCPR is a supplementary to the ICCPR. The Optional Protocol to the ICCPR¹⁹³ gives the HRC jurisdiction to entertain communications from individuals claiming to be victims of violations of the rights set forth in the covenant provided the state recognizes the competence of the HRC to receive and consider communications.¹⁹⁴

The right to freedom from torture being one of the rights protected under the covenant, its violation has led to many communications being filed against various African States.¹⁹⁵ The HRC has in some cases found violations and ordered respective States to compensate the victims

¹⁸⁹ Article 4 of the ICCPR

¹⁹⁰ Article 190(a) of the Transitional Constitution of South Sudan, 2011

¹⁹¹ See HRC General Comment 5 of 31 July 1981.

¹⁹² Article 10 of the Transitional Constitution of South Sudan, 2011.

¹⁹³ International Covenant on Civil and Political Rights, 1966, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976.

¹⁹⁴ Preamble to the Optional Protocol and article 1.

¹⁹⁵ In *Marcel Mutezi v DR Congo*, Communication no. 962/2001, CCPR/C/D/962, the DRC was held to have violated article 7 of the ICCPR (see para 5.3)

of torture¹⁹⁶ and in others found no violations.¹⁹⁷ The HRC requires that communications be filed after the authors have exhausted all the domestic remedies. Authors of the communications are required to adduce sufficient evidence to the HRC that they have been victims of torture.¹⁹⁸

The HRC seemed to be interested more in medical evidence to be adduced if the author is to substantiate an allegation of torture which in one way or the other dignify torture and degrades the victim who is left helpless.¹⁹⁹

It is important to note that communications that are filed against a State Party for the acts that were committed before it became a party to the treaty are not admissible unless it can be shown that the effects of the violation still continue to affect the concerned victim.²⁰⁰

Hitherto, it is vital that the HRC or any other judicial body presiding over a case in which allegations of torture have been made should be conscious that torture, especially psychological torture has long lasting effects on the victims.

Hence, to dismiss the case or communication on the ground that no enough evidence of the continued effects needs intervention of the psychiatrists, social-workers, and trauma counselors. It is unfortunate that most of the African countries do not appear before the HRC to defend communications filed against them. This brings into question their commitments to the protection of the protection and promotion of the rights in the covenant illustrates how the lack of an enforcement mechanism is hurting the full and effective implementation of the treaty.²⁰¹

¹⁹⁶*Albert Womah Mukong v Cameroon*, Communication No. 458/1991, CCPR/C/51/D/458/1991, the HRC held that detaining the author incommunicado in inhuman conditions amounted to cruel, inhuman and degrading treatment and Cameroon was found to breached article 7 of CCPR (see para 9.4)

¹⁹⁷*Bernard Lubuto v Zambia*, Communication No. 390/1990, CCPR/C/55/D/390/1990, the HRC dismissed the allegations of torture on a ground that the author has not adduced sufficient evidence (para 4.3).

¹⁹⁸ Article 5(2)(b) of the Optional Protocol to the ICCPR. in *Famara Kone v Senegal*, Communication No. 386/1989, CCPR/C/52/D/386/1989, the Communication was held inadmissible on the ground that the author had not exhausted domestic remedies (para 5.3)

¹⁹⁹ In *Primo Jose Essono Mika Miha v Equatorial Guinea*, the HRC relied heavily on the medical evidence adduced by the author to hold the State to have breached article 7.

²⁰⁰*A. I. E (name deleted) v Libya Arab Jamahiriya*, Communication No. 457/1991, CCPR/C/43/D/457/1991

²⁰¹*Nina Mutabe and another v Zaire*, Communication No. 124/182, CCPR/C/22/D/124/1982, Zaire never submitted any clarification despite the constant reminders by the HRC.

3.5 African Charter on Human and Peoples' Rights (ACHPR)

The African Charter on Human and Peoples' Rights²⁰² has been ratified by all the African States. This is unlike the other instruments discussed above such as the CAT, ICCPR and CRC. It is noteworthy that not all the countries in America and Europe have ratified the American Convention on Human Rights and the European Convention on Human Rights respectively.²⁰³

The right to freedom from torture is protected under article 5 of the African Charter which provides that:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment or punishment shall be prohibited.²⁰⁴

It is crucial to note here that Article 5 of the African Charter is not limited only to the right to freedom from torture, inhuman or degrading treatment or punishment but also covers respect of the dignity inherent in a human being.²⁰⁵ This is because torture aims at breaking down the individual to the level of losing their human dignity and the right to freedom from torture is inseparable from the guarantee of human dignity.²⁰⁶

Another unique feature about African Charter is that it puts torture in the same category as slavery and slave trade and categorizes them as forms of exploitation and degradation.²⁰⁷ Hence, the African Charter has very strong prohibition provisions on torture and other inhuman treatments of people deprived of their liberty, if these provisions are observed and categorically implemented, may help eradicate torture in the African continent.

The strength of the Charter is that it puts torture in the same category as slavery and slave trade and categorizes them as forms of exploitation and degradation. It has a very strong prohibitive provision on torture and other inhuman treatments of the people deprived of their liberty.

²⁰² African Charter on Human and Peoples' Rights, also known as the Banjul Charter adopted on 27 June 1981 and entered into force 21 October 1986.

²⁰³ Mujuzi Ddamulira, 'Safeguarding the Right to Freedom from Torture in Africa: The Robben Island Guidelines' (University of Pretoria 2005) 43.

²⁰⁴ Also known as the Banjul Charter adopted on 27 June 1981 and entered into force on 21 October 1986.

²⁰⁵ See article 5 of the UN Charter.

²⁰⁶ *Ibid*, Chapter III (3.2.1).

²⁰⁷ *Ibid*.

Thus, it is incumbent upon the African States, if they have courage to combat and eradicate torture, to implement to the letter all the provisions on torture and other inhuman treatments of the people deprived of their liberty.

3.6 The African Commission on Human and Peoples' Rights (The African Commission)

The African Commission on Human and Peoples' Rights (The African Commission) is established under Article 30 of the African Charter with the mandate to promote human and peoples' rights by collecting documents, undertaking studies and research on African problems in the field of human and peoples' rights.²⁰⁸

The African Commission is empowered to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms.²⁰⁹ It is on this basis that African governments may based their legislation and to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.²¹⁰

In an attempt to fulfill these duties with regards to freedom from torture, the African Commission together with the Association on Prevention of Torture (APT) drafted and adopted the Robben Island Guidelines (RIG) and ensures their distribution in some African countries.²¹¹

The African Commission has liaised with some institutions, especially the prison authorities on how torture can be prevented in places of detention and also with various human rights institutions in Africa.²¹² The Commission has the mandate to entertain both inter-state²¹³ and individual communications.²¹⁴

²⁰⁸Article 45. The Committee on the Rights and Welfare of the Child that is established under article 32 of the African Charter of the Rights of the Child has the same mandate as the African Commission.

²⁰⁹Article 45 (1) (b) and (c).

²¹⁰Ibid.

²¹¹Commissioner Angela Mero distributed the RIG and the resolution leading to their adoption to the Ministries of Foreign Affairs, Justice and Interior, Parliaments and Women NGOs in Lusophone countries.

²¹²Heyns (n 171); See also A Motala, 'Non-Governmental Organizations in the African System' in Rachel Murray and Malcolm Evans (eds), *The African Charter on Human and People's Rights: The System in Place 1986-2000* (Cambridge University Press) 246-279.

²¹³Articles 47-54.

²¹⁴Articles 55-59.

Like the inter-American and European systems of human rights, the inter-state procedure is rarely resorted to by the African Countries notwithstanding the fact that some countries grossly violate the provisions of the African Charter.²¹⁵

However, many individual communications have been filed by both individuals and NGOs to the African Commission alleging the violation of the right to freedom from torture.²¹⁶ These communications indicate the extent to which the right to freedom from torture is violated in Africa, the brutality of the methods used,²¹⁷ the misunderstanding of the meaning of torture by complainants,²¹⁸ and the failure by the African Commission to define torture (to date the African Commission has not defined what torture is though it has held in numerous communications that the right to freedom from torture has been violated).²¹⁹ These communications also indicate the standard of proof of torture and an instance where the African Commission declared as inadmissible a communication which clearly alleged torture on the ground that it was couched in an insulting and disparaging language.²²⁰

Hence, the protection of human rights should take precedence over technical legal issues which may be beyond the understanding and appreciation of non-experts in the African human rights system and South Sudan in particular. Thus, it is important to mention here that South Sudan Human Rights Commission has a lot of work to do in order to ensure how people deprived of their liberty could be protected from human rights violations and abuses.

The commission has to learn a lot from the jurisprudence of the African Commission on Human Rights in order to incorporate some of the best practices the commission has undertaken in the human rights protection in the continent.

²¹⁵ Countries like Sudan which have violated human rights in Darfur should have been taken to the Commission by some African States.

²¹⁶ Ddamulira (n 272).

²¹⁷ In Communication 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties/Nigeria, International Pen alleged that Ken Saro Wiwa was kept in leg irons and handcuffs and subjected to beatings and held in cells which were airless.

²¹⁸ In Communication 147/95 and 149/96 Sir Dauda K Jawara/The Gambia, the complainants alleged the detaining of persons incommunicado and preventing them from seeing their relatives amounted to torture (para 56) and this was rightly rejected by the commission.

²¹⁹ The African Commission has not attempted to define the meaning of the term torture. In Communication 225/98 Huri-Laws/Nigeria, the commission relied on standards laid down in the case of Ireland v The United Kingdom (para 41) of the 14th AARACHPR, ANNEX V.

²²⁰ The commission has always required medical evidence to back up the allegations for it to find a violation. In Communication 215/98 Rights International/Nigeria the communication (para 7) included medical evidence that the victim (Mr. Charles B Wiwa) had been tortured and the commission admitted it and found a violation.

3.7 Special Rapporteurs and Torture

The African Charter does not provide for the institution of Special Rapporteur but because this institution has been effective under the United Nations human rights system, the African Commission on Human and Peoples' Rights decided to appoint Special Rapporteur on Prisons and Conditions of Detention (SRP), 1996 in order to strengthen its protectional roles of human and peoples' rights.²²¹

The role of the SRP is to inspect and report on prison conditions in order to protect the rights of those held in detention therein, research on prison conditions, communicates with African governments regarding the state of their Penal systems, entertains individual complaints about prison conditions and reports to the commission on yearly basis.²²²

The African Commission has appointed five SRs on thematic issues including one SR on extra-judicial executions, one on prisons and other conditions of detention, one on women's rights, one on human rights defenders in Africa and one on refugees and internally displaced persons.²²³

It is important to point out that, of the five SRs, the study covers the work of the SR on Prisons and Prison Conditions in Africa (SRP). This is because it is those who are under arrest that are most vulnerable to torture. This is one of the areas of focus of the SR on Prisons and Prison Conditions in Africa. The SRP is mandated to examine the situation of prisons and prison conditions in Africa and to ensure the protection of persons in detention or in prisons. This is based on many human rights treaties, declarations and codes of conducts including CAT and the African Charter.²²⁴ It can nevertheless, be argued that this institution has not been effective

²²¹Rachel Murray, 'The Special Rapporteurs in the African System' in Rachel Murray and Malcolm Evans (eds), *The African Charter on Human and People's Rights: The System in Practice 1986–2006* (second, Cambridge University Press 2008). The SRP is empowered to: examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them; advocate adherence to the African Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the African Charter and with international law and standards.

²²²Gulilat (n 209).

²²³The nomination of the last two Special Rapporteurs is reported in the 17th AARACHPR 2003-2004 (para 34) and they are Commission Bahame Tom Mukirya Nyanduga (Special Rapporteur on Refugees and Internally Displaced Persons in Africa) and Commissioner Jainaba John (Special Rapporteur on Human Rights Defenders in Africa).

²²⁴Murray, 'The Special Rapporteurs in the African System' (n 296); Ougergouz. (n 179) pp 498-501. The SRP has carried out a number of prison visits to various African countries, the SRP has been to Zimbabwe (10th

enough in preventing torture in Africa. This is because the SRP has many issues to focus on during its visits to the prisons and places of detention yet very limited time to concentrate on investigating allegations of torture.²²⁵

It is also noteworthy that any investigation of torture would need at least the involvement of a physician and a psychologist to verify if the allegations correspond with the medical examination or a psychological assessment.²²⁶ It is to be noted that the future of the SRP is very uncertain due to the fact that in 2003, Penal Reform International, a Paris-based NGO and the backbone of the SRP withdrew its financial support which gravely affects the activities of the SRP almost to a standstill.²²⁷

3.8 The Robben Island Guidelines (RIG)

Realizing that there was a need to develop a torture-specific instrument in Africa, and that the prevention of torture is multidimensional, the Association for the Prevention of Torture (APT) made an oral presentation at the 29th Session of African Commission in Tripoli, Libya.²²⁸

The APT informed the Commission that the APT was going to organize a workshop that would reflect on measures and strategies and would draw up a draft of a Plan of Action for the Prevention of Torture in Africa.²²⁹ In the presentation, APT proposed the objectives of the workshop, the number of participants as well as the date and venue of the workshop.²³⁰

AARACHPR Annex VII); Mozambique, Madagascar and Mali (11th AARACHPR paras 30-31); Kenya, Cameroon, Zimbabwe (once again) and Uganda (12th AARACHPR para 26-27); Mali (once again), The Gambia and Benin (13th AARACHPR para 26); Mozambique (once again) (14th AARACHPR para 22); Malawi, Namibia, and Uganda (once again) (15th AARACHPR para 30); Cameroon (once again) and Benin (once again) (16th AARACHPR para 25); and Ethiopia and Malawi (once again) (17th AARACHPR para 28).

²²⁵ Ddamulira (n 272).

²²⁶ The European committee for the Prevention of Torture, for instance ensures that medics and psychologists form part of the teams that visit places of detention. See Rodney Morgan and Malcolm Evans, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (Oxford University Press 1999) 13.

²²⁷ The official reason for withdrawal of financial support by Penal Reform International was not given in the 17th AARACHPR. Also see 17th AARACHPR (para 27-28).

²²⁸ See Oral Presentation by the APT available at <<http://www.apr.ch/africa/oralapr29.htm>> accessed on 14 September 2014.

²²⁹ Ibid.

²³⁰ APT had the goal of drafting a plan of action for the prevention of torture and ill-treatment in Africa, it proposed 15, including the Chair of the Commission, 3 members of the Commission, the Secretary of the commission, a representative of the General Assembly of OAU as it was then, as well as other international experts notably a representative of the international Committee of the Red Cross, the United Nations Committee against Torture,

The African Commission, in a letter dated 16th January 2001, informed the APT that it was in agreement with the proposal for APT to hold a workshop and urged APT to follow up the matter.²³¹ At its 32nd Ordinary Session,²³² the African Commission adopted the Resolution on the Guidelines and Measures for the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.²³³ Hence, in a letter dated 1st November 2002, the African Commission informed the APT that a resolution has been passed on the Robben Island Guidelines.²³⁴

The Guidelines in its Preamble take note of article 55 of the United Nations Charter, article 5 of the UDHR, article 7 of the ICCPR and article 2(1) and 16(1) of the UNCAT.²³⁵ The RIG approaches the question of torture in three ways including; prohibition, prevention and responding to the needs of the victims of torture.²³⁶

To prohibit torture as provided in the Guidelines, African States are required to take six measures: ratification of regional and international instruments;²³⁷ promotion and support of cooperation with international mechanisms (including African Commission and UN Human Rights Treaty Bodies and the UN Special Rapporteur on Torture);²³⁸ criminalization of torture;²³⁹ and non-refoulement.²⁴⁰

The RIG also requires states parties to combat impunity for both nationals and non-nationals who commit torture and to establish complaints and investigation procedures to which all persons can bring their allegations of torture forward.²⁴¹ The Guidelines required the states also to establish basic procedural safeguards for those deprived of their liberty,²⁴² to establish safeguards during the pre-trial process,²⁴³ take steps to ensure that detention conditions comply with international

the inter-American Human Rights Commission and the European Committee for the Prevention of Torture. It had proposed 12-14 December 2001; it had also proposed Johannesburg, South Africa as the venue.

²³¹ See African Commission letter dated 16th January, 2001

²³² Held in Banjul, The Gambia, from 17th -23rd October 2002

²³³ See Annex VI to the 16th AARACHPR.

²³⁴ ACHPR/SEM/3 ANNEX IV

²³⁵ See Preamble to the RIG.

²³⁶ Ddamulira (n 272).

²³⁷ See Part I A (1 a-d).

²³⁸ See Part I B (2-3).

²³⁹ Part I C (4-14).

²⁴⁰ Part I D (13).

²⁴¹ Part I F (17-19).

²⁴² Part II A (20 a-d).

²⁴³ Part II B (21-32).

standards,²⁴⁴ establish mechanisms of oversight,²⁴⁵ law enforcement officers to refrain from using torture,²⁴⁶ and to educate and empower civil society to disseminate information relating to the prohibition of torture.²⁴⁷

The guidelines also stressed the need for the States to ensure that families and communities who have been affected by torture and ill-treatment received by one of its members can also be considered as torture victims.²⁴⁸ As the RIG derives its provisions substantively from CAT, it leaves a lot to be desired. In the first place, it is not binding on the States as it is a mere declaration and not a treaty instrument on torture. Its enforcement mechanism is very weak.

A follow-up committee was set up but it has only five members with the mandate to organize, with support of interested partners, seminars to disseminate the RIG; to develop and propose to the African Commission strategies to promote and implement the RIG at national and regional levels; to promote and facilitate the implementation of RIG within member States; and to make a progress report to the African Commission at each which is clearly a too much work for only five members.

The RIG does not give the Follow-UP Committee ‘real power’, such as authorizing it to visit places of detention nor do members of the Follow-UP Committee enjoy any immunity²⁴⁹ when carrying out their work. This means that there is a need to establish a committee that has the same powers and privileges as that in the European system. This can only be achieved by having that committee established by a treaty and not a declaration and therefore it is argued that there is a need for Africa to establish a treaty on torture and not a mere declaration.

²⁴⁴ Part II C (33-37). In particular they should comply with the UN Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res. 663 C (XXIV) 31st July 1957 as amended by UN ECOSOC Res. 2076 (LXII), 13th May 1977.

²⁴⁵ Part II D (38-44).

²⁴⁶ Part II D (45-46).

²⁴⁷ Part II E (47-48).

²⁴⁸ Part III (49-50 a-c). This part attempts to draw a distinction between the primary and secondary victims of torture.

²⁴⁹ Members of the European Committee for the Prevention of Torture enjoy immunity when carrying out their activities, see article 16 of the European Convention on Torture

3.9 The Transitional Constitution of South Sudan, 2011

States Parties to the international human rights instruments are obliged to take steps to realize enforcement of the rights which they undertake to protect by making legislative, judicial and administrative measures. The common method is always and has been the entrenchment of the rights under the constitution by criminalizing the acts through criminal laws and prepares policies and programs for enforcement of these rights.

This study investigates accordingly the South Sudan's legislative frameworks including the constitution vis-à-vis the adequacy of the available legislations on the protection of the rights of the arrested persons from torture. The section discusses the Transitional Constitution of the Republic of South Sudan, 2011 and other relevant legislations. The transitional Constitution of the Republic of South Sudan, 2011 is the first such legal instrument in the history of human rights system in South Sudan which came up with some human rights stipulations which prohibit the use of acts that amounts to torture.

The Constitution provides that South Sudan is founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedoms.²⁵⁰ The Constitution further stipulate that the Bill of Rights is a covenant among the people of South Sudan and between them and their government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy.²⁵¹

The Constitution further stipulates that the 'rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons'.²⁵²

The constitution provides also that 'all rights and freedoms enshrined in international human rights treaties; covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill'.²⁵³ It is important to note also that the said constitution

²⁵⁰Article 1(5) of the Transitional Constitution of the Republic of South Sudan (TCSS), 2011.

²⁵¹Article 9 (1) of the TCSS, 2011.

²⁵²Article 9 (2).

²⁵³ Ibid, article 9(3) of the TCSS, 2011.

provides also that ‘this Bill of Rights shall be upheld by the Supreme Court and other competent court and monitor by the Human Rights Commission’.²⁵⁴

The constitution further stipulates that ‘subject to article 190 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made.’²⁵⁵ The Bill of Rights shall be upheld, protected and applied by the Supreme Court and other competent court; the Human Rights Commission shall monitor its application in accordance with this constitution and the law’.²⁵⁶

It is vital also to pinpoint further another strong constitutional provision which state that ‘No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.²⁵⁷ Under its foreign policy, the Republic of South Sudan pledges for enhancement of respect for human rights and fundamental freedoms regionally and internationally.²⁵⁸

The constitution further strongly provides that, during the state of emergency, the president may by law or orders, take any measures that shall not derogate from the provisions of this constitution except as provided herein:

To suspend part of the Bill of Rights; however, there shall be no infringement on the right to life, prohibition against slavery, prohibition against torture, the right of non-discrimination on the basis of race, sex, religious creed, the right to litigation or the right to fair trial.²⁵⁹

It is safe to argue here that the Transitional Constitution, 2011 adopted the monist approach on the incorporation of international law. Article 9(3) of the Constitution stipulates that “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of South Sudan shall be an integral part of this Bill”.²⁶⁰

Thus, international instruments, if any that are ratified by the Republic of South Sudan are subject to enforcement before domestic courts without the need for further act of parliament for domestication.²⁶¹ Accordingly, international human rights instruments in general and those

²⁵⁴ Ibid, article 9(4) of the TCSS, 2011.

²⁵⁵ Article 10 of the Transitional Constitution of the Republic of South Sudan, 2011

²⁵⁶ Article 10.

²⁵⁷ Article 18.

²⁵⁸ Article 43(c).

²⁵⁹ Article 190(a).

²⁶⁰ Article 9(3).

²⁶¹ Id, article 9(3) of the TCSS, 2011.

exclusively dedicated to the arrested person's rights can be invoked by arrested persons so long as they have been ratified by South Sudan.²⁶²

The Transitional Constitution prohibits acts and practices which amount to torture but according to the US Department of States: Bureau of Democracy and Human Rights 2012 report indicate that law enforcement agencies continue to torture and beat political opponents, journalists and human rights activists and workers.²⁶³

As States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace, South Sudan has not yet ratified any core international or regional human rights treaty.²⁶⁴ However, South Sudan is bound by the provisions of international human rights law which have attained customary status in international law and include many if not all of the rights set out in the Universal Declaration of Human rights.

3.10 The Role of the Judiciary in the Protection and Enforcement of Human Rights in South Sudan

International human rights law requires that the judiciary be independent of the executive and legislative branches of government: first as a specific facet of the right to fair trial; and second, as a means by which all individuals can seek protection for their human rights and obtain effective remedies for any violation thereof, from any other authorities of the state.

The independence of judiciary is also inherently connected with the principle of separation of powers. The principle of separation of powers, which is the cornerstone of the rule of law, is reaffirmed in a number of international instruments, particularly with regards to judiciary. To these ends, states must guarantee respect for judicial independence by enshrining the principle of

²⁶² Ibid.

²⁶³ United States Department of States: Bureau of Democracy Human Rights and Labour (n 27).

²⁶⁴ In May 2013, the Council of Ministers approved a 'human rights package' of the following international and regional treaties: International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; African Charter on Human and Peoples' Rights, 1981; Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; International Convention on Elimination of all Forms of Discrimination against Women and optional Protocols, 1979; International Convention on All Forms of Racial Discrimination, 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The National Legislative Assembly has since approved ratification of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the child, which are pending the ascent of the President.

judicial independence in the constitution or the written laws of the country. Judges must be independent and impartial. To be independent, judges must be free to decide cases “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The right to adjudication by an independent and impartial tribunal “is an absolute right that is not subject to any exception”. Beyond affirming independence of the judiciary as a concept and principle enshrined in law, states must have in place safeguards and guarantees aimed at securing the independence of judges in actual practice; this include procedures and criteria for appointment and promotion of judges; irremovability of judges and security of tenure; remuneration and protection of judges.

Thus, in the course of the civil war, the SPLM developed a parallel judicial system to that of the Central Government in Khartoum. It had a structure of county magistrates, county judges, regional judges and a court of appeal. However, following the independence and the subsequent entry into force of the Transitional Constitution 2011, the judiciary of South Sudan was established as an independent institution, made up of a Supreme Court as the highest court, courts of appeal, high courts (one in each of the 10 states), county courts and other courts or tribunals as deemed necessary to be established in accordance with the constitution and the law.²⁶⁵

The Transitional Constitution affirms that judicial power is “derived from the people and exercised by the courts in accordance with customs, values, norms and aspirations of the people and in conformity with the constitution and the law.”²⁶⁶

The Supreme Court is located in Juba; the three branches of the courts of appeal are located in the cities of Juba, Malakal and Rumbek; the branches of the High Courts are located in the ten States capitals. As to county courts, only a fraction has been established in practice with the result that in many counties there are no county courts. Pursuant to the Transitional Constitution, the Supreme Court, presided over by the Chief Justice, is “the custodian” of the constitution and the State Constitutions.²⁶⁷ It has powers of original jurisdiction to decide on disputes that arise

²⁶⁵ See Section 123 of the Transitional Constitution of South Sudan, 2011.

²⁶⁶ Section 122(1) of the Transitional Constitution of South Sudan, 2011.

²⁶⁷ Section 126(1) of the Transitional Constitution of South Sudan, 2011.

under the Transitional Constitution itself and state constitutions, at the instance of individuals, legal entities or governments.

Among other things, the Supreme Court has the competence to interpret constitutional provisions and adjudicate on the constitutionality of laws, with powers to set aside or strike down laws or provisions that are inconsistent with the Transitional Constitution or the constitutions of the states; it has criminal jurisdiction over some members of the executive and legislature depending on the subject matter, it may act as a final court of appeal; it reviews instances where the death penalty is imposed; and importantly, it is responsible for upholding and protecting human rights and fundamental freedoms.²⁶⁸

The Judiciary Act, 2009 regulates “the establishment and governance of the Judiciary of Southern Sudan, and any other issues related thereto”.²⁶⁹ It provides for the establishment of the Courts of Appeal, High Courts, County Courts and Payam Courts.²⁷⁰ The Judiciary Act in fact predates the Transitional Constitution, and some of differences exist between the two texts. Among the most significant discrepancies is that while Judiciary Act makes reference to Payam Courts, they are not envisioned in the court structure described in the Transitional Constitution.²⁷¹

3.11 The Role of Human Rights Commission in the Protection and Enforcement of Human Rights in South Sudan

In accordance with the provisions of the 2005 Interim Constitution of Southern Sudan, the Southern Sudan Legislative Assembly, with the assent of the President of the Government of Southern Sudan adopted in 2009 the Southern Sudan Human Rights Commission Act. Chapter VI of the Transitional Constitution 2011 is devoted to the establishment of the Human Rights Commission, in which according to the Supreme Law, the Chairperson, Deputy Chairperson and

²⁶⁸ Section 126(2) of the Transitional Constitution of South Sudan, 2011.

²⁶⁹ Section 3 of the Judiciary Act, 2009.

²⁷⁰ The Payam Courts are the “lowest government courts”. They have the most limited territorial competence among the statutory courts. Some have the authority to impose prison sentences of up to three years and fines of up to 2,500 South Sudanese Pounds (SSP), while others can only impose fines up to 300 SSP, depending on whether they are presided over by the second-class or third-class judges according to the classification established by the Code of Criminal Procedure Act, 2008, Chapter II, sections 13-14.

²⁷¹ Section 7(e) of the Judiciary Act, 2009.

Members of the commission shall be appointed by the president with the approval of the National Legislative Assembly by a simple majority of all members present and voting.

The Human Rights Commission plays a great role by liaison and well connection with Ministries, civil society and UN agencies which reflects their commitment to fulfill their constitutional mandate of protecting and enforcing human rights and fundamental freedoms.

The Human Rights Commission has ten offices in ten states of South Sudan, all composed of two monitors. The commission is also composed of thematic desks, such as “Education”, which is one of the priority actions of the commission.

The commission organizes trainings for army and security officers and enters into Memorandum of Understanding (MoU) with Ministry of Education to train children on human rights issues. The commission also recently established a Gender Desk which is also a part of its mandate to fulfilling gender issues. As part of its mandate, the National human Rights Commission should provide the national review commission with a position paper on the reviewing process with regards to human rights and fundamental freedoms.

The commission has to produce more systematic reports on thematic issues and situations of serious human rights violations and create a website where its mandate, reports and complaints procedures can be made available to the public. The human rights commission has to collect more and comprehensive data on the number of complaints received and to propose internships to individuals qualified in human rights law.

The South Sudan Human Rights Commission (SSHRC), along with the Supreme Court, is the guardian of the rights and freedoms enshrined in the constitutional Bill of Rights. As a constitutionally-mandated body under the Transitional Constitution, the SSHRC is charged with monitoring the enforcement of constitutional rights and national compliance with international human rights treaties to which South Sudan is a party.

The SSHRC is tasked with performing a number of further additional functions, including: investigating human rights violations, whether on its own initiative, or on a complaint made by any person or group of persons, against any violation of human rights and fundamental freedoms; visit police jails, prisons and related facilities with a view to assessing and inspecting

conditions of the inmates and make recommendations to the relevant authority; establish a continuing programme of research, education and information to enhance respect for human rights and fundamental freedoms; recommend to the National Legislative Assembly effective measures to promote human rights and fundamental freedoms; create and sustain within the society awareness of the provisions of the constitution as the fundamental law of the people of South Sudan; educate and encourage the public to defend their human rights and fundamental freedoms against all forms of abuse and violation; and monitor compliance of all levels of government with international and regional human rights treaties and conventions ratified by the Republic of South Sudan.

In accordance with Transitional Constitution, the SSHRC is required to publish periodic reports on its findings and submit annual reports to the Legislative Assembly on the state of human rights and freedoms in South Sudan.

Under the Transitional Constitution, the SSHRC has the power, in the discharge of its functions, to summon any person, organization or public official at any level of government to “appear before it or produce any document or record relevant to any investigation by the commission”, and it may request a government representative or nay person or organization to take part in the commission’s deliberations if and when necessary.

Pursuant to the Human Rights Commission Act, 2008, the law that currently regulates its functioning, the SSHRC must report to the Minister of Justice upon conclusion of any investigation that reveals potential criminal conduct. The minister is then responsible for deciding whether or not the case should be investigated further or brought before the judiciary but where the facts have no criminal dimension; the commission must try to mediate the matter. But it is important that some amendments of the Human Rights Commission Act be made concerning conferring of prosecutorial powers to the commission.

3.12 The Role of Customary Law and Informal Justice System as Major Systems of Dispute Resolution in South Sudan

The Local Government Act provides rules that govern local government in the general sense and traditional authority, including rules on the administration of justice under customary law. Section 6(1) of the Local Government Act defines local government as the third level of

government, which consists of a number of autonomous local government councils to be established in accordance with this Act.²⁷²

The Act distinguishes three tiers of local government namely: (1) the level of County, City, and Town Councils; (2) the level of Payam and Block Councils – coordinative administrative units; and (3) the level of the Boma and Quarter Councils – the basic administrative units and three types of local councils: (a) Rural Councils; (b) Urban Councils; and (c) Industrial Councils.

The Local Government Act 2009 (the LGA) provides for four levels of customary law courts namely: Town Bench courts and “A” courts or Executive Chief’s Courts, “B” Courts or Regional Courts and “C” Courts.²⁷³ The LGA specifies that customary courts must do justice without discrimination²⁷⁴ and in an independent manner, “without interference, fear or favour”.²⁷⁵

The Transitional Constitution recognizes the “institution, status and role of Traditional Authority, according to customary law”, and provides that courts shall apply customary law subject to the Constitution itself and the written law.²⁷⁶ Pursuant to the Constitution, the Supreme Court is the “court of final judicial instance in respect of any litigation or prosecution under the national or state law, including statutory and customary law”.²⁷⁷

Under the LGA, customary law courts have “judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities”. The LGA further specifies that “A Customary Law Court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent Statutory Court”.²⁷⁸ But in practice, the customary courts have reportedly adjudicated criminal matters including homicide that fall outside of their jurisdiction. This is because most litigants do not understand the formal distinction between civil and criminal cases.

²⁷² Section 6(1) of the Local Government Act, 2009.

²⁷³ Section 97 local Government Act 2009 (hereinafter: “LGA”). “A” courts should be found at Boma level, while: “B” and “C” courts are envisioned at payam and county level respectively. Boma indicates the lowest level of local government, corresponding to a chief’s area; payams constitute intermediate administrative level of local government between the country and the Boma.

²⁷⁴ Section 98(3) of the LGA.

²⁷⁵ Section 103(1) of the LGA.

²⁷⁶ Section 167 of the Transitional Constitution, 2011.

²⁷⁷ Section 126(2)(b) Transitional Constitution, 2011.

²⁷⁸ Section 98(1)-(2) LGA.

The SSLS recently reported that “in at least one case, a customary court has sentenced an accused murderer to death” and that “due to lack of oversight and monitoring mechanisms in customary and statutory courts, it is difficult to know precisely how many times customary courts have issued death sentences”,²⁷⁹ even though criminal procedure law explicitly states that only statutory courts may do so.²⁸⁰ The LGA further provides for the establishment of Customary Law Councils in every county, to act as the highest customary law authority in that county.²⁸¹

The Act charges each customary law council with the obligations to protect, promote and preserve the traditions, customs and values of the communities, as well as to regulate, maintain, monitor and ensure the proper administration of customary law.²⁸²

However, the vast majority of day-to-day criminal and civil cases in South Sudan are adjudicated by the traditional courts according to customary law, and therefore, outside the system of statutory courts.²⁸³ At county level where county courts are meant to operate, justice is in practice almost always administered by a local chief acting as a “customary court”.

In a recent report, the SSLS offers a range of explanations for the predominant recourse to customary courts, including both rural customary courts and town bench courts, instead of statutory courts. The SSLS points to the higher cost of statutory courts proceedings, considering both the “occasional imposition of high court user fees” and the fees charged by lawyers who are not involved in proceedings before customary courts; traditions and greater familiarity with procedures before customary courts rather than statutory courts; and lack of access to statutory courts due to their limited numbers around the country and the difficulties related to the transport from one place to another. The SSLS also argues that “customary courts are also durable and better equipped to function in areas prone to insecurity.”²⁸⁴

The relationship between statutory and customary courts is complicated by public perceptions of the two systems. A common complaint is that statutory courts are particularly vulnerable to

²⁷⁹ David K. Deng, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 21.

²⁸⁰ Section 8(4)(a) of the Criminal Procedure Act, 2009.

²⁸¹ Section 93 of the LGA, 2009.

²⁸² Section 95(1)-(2) of the LGA, 2009.

²⁸³ See David K. Deng, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 20.

²⁸⁴ *Ibid.*, p. 23.

bribery, and that the system of statutory courts disadvantages the poor. People frequently express a preference for negotiated, flexible settlements by the chief's courts over a rigid application of written law. Thus, obtaining an accurate assessment of public perception of the functioning of the South Sudanese justice sector and the statutory or customary courts system is further made difficult by the lack of comprehensive information.

Hence, the practices that amount to torture flogging which is a popular spectacle that was widely used in garrisons towns such as Wau and Juba, where whips are a prominent object on court tables. Flogging is administered over thin clothing, on the back and buttocks. It is clearly very painful, but above all inflicts humiliation, and is largely reserved for thieves, teenagers, drunk and abusive defendants. However, for informal/traditional justice systems to become an effective partner in the legal pluralist system of South Sudan, it must be developed and strengthened in relation to its current position. This can be achieved through a number of different reform approaches such as:

First, developing customary law through ascertainment, recording, and harmonization among various customary regimes taking into consideration constitutional provisions; as well as harmonization of the customary justice system with the formal state legal system;

Secondly, raising the capacities of the traditional leaders by increasing their knowledge of how the formal legal system operates as well as educating and training the sitting state and national judges and practicing lawyers about customary law and how the traditional justice system works;

Thirdly, rehabilitation of the working conditions of both the customary and formal state systems; *fourthly*, provide legal orientation or training on key legal instruments that affect the functions of traditional authorities;

Fifthly, support traditional authorities with resources from government and international agencies to improve the infrastructure; *Sixthly*, employ and train support staff of the court to provide recording systems; *Seventhly*, strengthening and establishment of formal justice systems in areas where they are not established to guide traditional courts; *Eighthly*, documenting customary laws.

3.13 Challenges Encounter in Protecting the Arrested Persons from Torture in South Sudan

As a new State emerging out from years of bitter conflict and underdevelopment, South Sudan faces a vast number of human rights challenges which pose a threat to the peace, security and stability of the country and the region. Human rights institutions, practitioners, jurists and civil society organizations in South Sudan are confronted by numerous various human rights challenges.

First among these is the low level of education of the majority South Sudanese in the country. This makes the promotion and protection of human rights, in particular, the right to freedom from torture a mammoth task. These institutions, practitioners, jurists and civil society groups have to prepare very simplified materials and radio programmes in order to effectively disseminate and communicate with the people. This task requires a considerable amount of resources which most of these institutions, practitioners, jurists and civil society groups don't have.

Secondly, lack of funding. Human rights and their promotion and protection are not a priority in South Sudan's government programmes. Therefore, majority of human rights institutions do not get the levels of funding which will allow them to operate optimally. In most cases, the main human rights projects of these institutions are funded by development partners and donors who are sometimes forced to meet the administrative and operational costs of these institutions, thus when the projects end and the donors leave, the institutions are stranded.

The third major challenge is the lack of political will by politicians to promote and protect human rights. In South Sudan, it is the politicians in power who are the forefront when it comes to supporting violations of human rights. They are therefore not in position to support any initiatives to sensitize people about their rights. They find a multitude of ways to block the funding of human rights institutions which they presumed to be their threat. Thus politicians in South Sudan are most cases, the spoilers of many human rights initiatives to promote and protect human rights in the country.

Fourthly, bad and inadequacy of legislations in South Sudan is a serious hindrance to the promotion and protection of human rights. The existence of ambiguous law on the functions and

powers of national human institution(s) demoralize even the most spirited team of commissioners and other functionaries of such institutions. Therefore, for human rights institution to function well, the need for independent punitive facilitative legislation is essential as recommended by this study.

Fifthly, incompetent, biased and politically aligned human rights officials is a serious problem to the promotion and protection of human rights in the country. Therefore, the system of appointment of human rights officers should assist with ensuring these institutions get the best staff if human rights are to be properly promoted and protected. These are the people who will be able to maintain their neutrality and independence even in the toughest situations and under intense pressure to do otherwise.

Sixthly, the other challenge is the limited capacity. Most of the institutions, NGOs and practitioners and jurists are based in capital Juba finding it hard to increase their capacity which is compounded by a lack of access to capacity-building programmes. Areas where institutions, practitioners and jurists most often identified a need to increase their capacity are investigating and documenting violations, legal matters, fundraising, managing the psychological stress that comes with their difficult job and increasing their security.

Seventhly, another challenge relates to difficult access to legal support. Many human rights defenders are trained as paralegals and advocates do not have the legal expertise to take cases all the way to court. They find it hard to access affordable legal support and many are unable to proceed with cases as a result. This calls for international and regional legal support for the extreme cases of human rights violations and acts of torture committed in the country when national institutions are unable to bring to book the perpetrators of those human rights violations.

Eighthly, the other stiff challenge encountered in the protection and promotion of human rights in the country relates to insecurity. Human rights practitioners suffer routine security problems and often find it hard and even difficult to carry out their work safely. For example in areas of greater upper Nile States, Lakes and Warrap states which have seen and experience rebellions and inter-communal fighting has high insecurity in the country and that makes the protection and promotion of human rights in the country difficult if not impossible.

Ninthly, there is another challenge which relates to failure to implement constitutional rights. A number of people have complained that their constitutional right to freedom from torture which is guaranteed by the constitution has not been implemented and numerous violations by security agencies. Many human rights practitioners and activists have been subjected to torture which is against the provisions of the constitution and other international and regional human rights instruments.

Tenthly, the other challenge is the difficulty at national level to implement little available legislation which applies to the rights of the arrested persons. This goes back to lack of policy framework for the development to operationalise human rights policies which consequently amount to lack of uniformity in policies.

Eleventh, the other challenge relates to criminal justice matters disjointed coordination of activities within and across relevant CJS departments and lack of joint planning and process optimization in the CJS circles as well as lack of single record that contains accurate information on torture.

3.14 Gaps in the Legislative Framework in the Protection of Human Rights in South Sudan

With its undoubted strength, the South Sudan's Legislative framework has major gaps and a range of limitations compared to international and regional treaties ratified by Sudan and to which South Sudan is obliged by international law (the law of succession of states).

South Sudan has taken important but incomplete steps to establish a legal framework for the promotion and protection of human rights. Notably, the National Legislative Assembly passed the Human Rights Commission legislation in 2006, but important pieces of legislations remains unenacted. Under article 5(c) of the Transitional Constitution of South Sudan 2011, "customs and traditions of the people" are recognized as one of the sources of law in South Sudan.

The Constitution recognizes the application of customary law in courts, subject to the constitution and the law, as stated in article 167(3). The application of customs, traditions and norms contravene human rights principles enshrined in the Bill of Rights of the Transitional Constitution of South Sudan.

South Sudan is yet to ratify main international human rights instruments such as UNCAT, ICCPR, ICESCR, the CEDAW and the International Convention on the Elimination of All Forms of Racial Discrimination. Ratification of international human rights instruments will constitute an important step towards the creation of a climate conducive to the protection of human rights generally.

The government must be committed to the ratification of all the main international human rights treaties to lay foundation for a national legal framework designed to protect human rights. On civil and political rights, the Bill of Rights lacks basic definitional provisions of torture as set out by the article 1 of the UNCAT, article 2 of IACHR, and article 7(2) of the Rome Statute respectively.

The prohibition of torture enunciated under the constitution's Bill of Rights is mentioned merely as a cover and therefore fails to include important definitional grounds of what torture is about. Therefore the study identifies the following gaps existing in the legislative framework in the protection of human rights in South Sudan.

3.14.1 Lack of Knowledge of Constitutional and International Human Rights Guarantees

Influenced by its predecessors, the Interim National Constitution of Sudan (INC), 2005 and the Interim Constitution of Southern Sudan (ICSS), 2005, part two of the Transitional Constitution of South Sudan 2011 incorporates a Bill of Rights that contains far-reaching guarantees pertaining to civil, political, economic, social and cultural rights. Notable, of these is the right to freedom from torture, inhuman, cruel or degrading treatment or punishment enunciated under article 18 of the Transitional Constitution of South Sudan, 2011. Despite the extensive catalogue of rights guaranteed by the constitution, there is no explicit provision under the national law which stipulates that all rights contained in the Bill of Rights can be enforced in a court of law.

In fact, the legal framework does not provide for effective remedies for individuals whose rights have been violated. In addition, there is very little knowledge not only among the citizens but also among South Sudanese lawyers and judges who were predominantly trained in Arabic on the substance of these laws.

Access to printed legal materials even the current laws remains severely limited where groups or individuals have no or little public awareness of human rights standards. This has created a wide gap on the protection of human rights and has resulted into violations knowingly or unknowingly of the basic rights and fundamental freedoms enshrined under constitution in the country.

3.14.2 Inadequate Legal Framework

In South Sudan, existing national laws are often not in conformity with international and regional human rights treaties. Several laws still have to be adopted or amended in order to uphold human rights standards effectively. One of the biggest concerns is that South Sudan still has no law regulating the National Security Service that defines or limits its powers of arrest and detention. This is a major gap in the legal system and calls into question the lawfulness of any interference by the National Security Service with citizen's rights and freedoms.

In addition, the weakness in the justice system and a lack of effective judicial oversight over the conduct of security forces give rise to serious human rights concerns as a result of numerous human rights violations by security forces in the country. This indicates that the country still lacks an adequate legal framework governing the protection of human rights and fundamental freedoms in compliance with international human rights standards and norms.

In the absence of laws regulating media in the country, editors and journalists are especially vulnerable to harassment, intimidation, assaults, arbitrary arrest, censorship and torture and ill-treatments in the conduct of their media activities.

The current laws on Penal Code and Criminal Code Acts are also in need of thorough revision. Laws regulating criminal procedures have to be more precise in order to avoid giving rise to interpretation that infringes upon the rights of every South Sudanese citizen to protection from torture, liberty and security of the person, due process and a fair trial.

The South Sudanese Criminal law does not contain a criminal offence of torture in line with the internationally recognized article 1 of the UN Convention against Torture. However, effectively combating the legacy of torture in South Sudan, and the structural factors contributing to its persistence, requires fundamental norms needs good laws that criminalizes torture.

A legislative reform, such as the adoption of an anti-torture law, is an important component of these broader reforms. Many aspects of South Sudan's laws fall short of international standards, and thereby facilitate torture and undermine it if not negate accountability and reparation for this serious violations of human rights.

3.14.3 Insufficient Implementation of Existing Human Rights Guarantees

Even though the Transitional Constitution of South Sudan 2011 contains an extensive catalogue of human rights guarantees, these rights are often not fully implemented in practice and to the letter. Laws are often misunderstood and lead to cases of misapplication of the laws. Furthermore, judges and prosecutors who studied in Arabic and who are the majority fail to ensure that legal processes take place in accordance with domestic law and in respect of the right to a fair trial.

In practice there is almost complete absence of cases of torture that have been prosecuted which result into compensation or other forms of reparation being awarded to the victims of torture. The law does not provide for an explicit right to reparation for torture. This has been facilitated by lack of adequate protection and short statutes of limitation in combination with systemic shortcomings that undermine effective access to justice render existing constitutional remedies ineffective opening an opportunity for impunity.

In addition, there are no effective national human rights institutions or administrative mechanisms providing at least some forms of reparation for torture survivors in the country. As a result of this miscarriage of the application of laws, prisons and other detention centers are full of individuals who wrongly for one reason or the other find their way into prison by being arrested without warrant, detained without being charged, tortured in order to obtain information the security wants and with no prospect of a trial.

Not only this, also a series of interrelated factors contribute to this impunity: lack of a criminal offence of torture, lack of victim and witness protection, immunities for officials, and absence of a system aimed at holding officials accountable for wrongdoing by means of prompt, impartial and effective investigations and prosecutions for perpetrators of torture. This situation has frequently led to impunity, including serious human rights violations, as legal remedies are neither clear nor effective.

In addition, there is a lack of adequate protection of victims, witnesses and human rights defenders which undermines the prospect of safely bringing complaints relating to torture to courts. This implementation gap by the authorities concerns resulted into many human rights violations in the country and South Sudan has what it takes to reform and reviews all the legislations in order to enhance, promote and protect human rights and fundamental freedoms in the country.

3.14.4 Weak Judicial System in South Sudan

A strong and effective legal framework is not only crucial in promoting and protecting rights and freedoms in the country but to achieve peace and stability as well. Likewise, the strong and effective judiciary is not only crucial for the system of checks and balances, but also to achieve peace in South Sudan. Currently the justice system is still weak and ineffective and is frequently plagued by a shortage of qualified lawyers and judges as well as professional police force.

This is exacerbated by the fact that most judicial officers studied in Arabic and when the region broke away from Sudan, and with transition from Arabic as official language to English, all these judges became unable to deliver judicial services that people mostly needed.

Lack of recruitment of judicial officers for the last eight years has aggravated the already fragile and fledgling situation resulting into backlog of cases which could take three to four years just to obtain a judgment. Apart from being under-staffed, the judiciary suffers from a lack of basic training, infrastructure, transport and equipment which severely affects the administration of justice in the country. This gap has been exacerbated by the absence of laws which regulate protection of human rights hence resulting into grave violations and abuses of human rights and fundamental freedoms against the provisions of the constitution which is fundamental law of the land.

3.14.5 Overlapping of Statutory Law and Customary Law

While South Sudan operates a plural system with statutory and customary courts; the traditional justice system covers more than 80 per cent of the country's legal system. Customary courts are accepted forums of dispute resolution in South Sudan which are generally more accessible and familiar to the population. However, the criminal jurisdiction and the sentencing power of

customary courts remain unclear and their exercise of judicial powers is not sufficiently overseen by the formal justice system.

Procedures and rulings of customary courts often raise serious human rights concerns as they are frequently not in compliance with international and regional human rights standards and norms in which customary law is not always in compliance with the human rights guarantees contained in the Transitional Constitution of South Sudan 2011.

This practice of customary laws which are not in compliance with the provisions of the Constitution as well as principles of international human rights standards has created a gap between the sets of judicial systems in South Sudan. The presence of this gap in the formal legal system has created dysfunctionality of judicial system that all the people of South Sudan vested their hopes on in matters of administration of justice as well as access to justice.

It is pertinent to point out that if the proper functioning of the judicial system is to be adequately ensured, it is incumbent upon the government of South Sudan to amend and repeal all the laws that are inconsistent and contravene the provisions of the constitution and the international human rights standards.

This is the gap that the study seeks to bridge by making recommendations for the repeal of all laws and sections which are inconsistent with the principles of international human rights law as well as the provisions of the Constitution which is the fundamental law of the land.

3.14.6 Ratification of International Human Rights Instruments

South Sudan is not a party to several international and regional human rights treaties including the ICERD; the ICCPR, CRC and its Optional Protocol, ICESR and CAT and the ACHPR. But by virtue of Article 9(3) of the Transitional Constitution, 2011, these treaties form part of South Sudan's Bill of Rights. South Sudan is therefore, obliged to take measures aimed at preventing torture, responding to allegations of torture by means of prompt, impartial and effective investigations and prosecutions, and providing effective remedies and reparations.

Over the last decade, national, regional and international actors have identified a series of problems in the South Sudanese legislative and institutional framework and practice in relation

to the prohibition of torture. However, the government of Southern Sudan has not taken measures to effectively combat torture.

No anti-torture policy or coordinated efforts are in place that tackles the causes of torture through legislative and institutional reforms or adequate responses in individual cases. Such a policy if adopted would need to be based on South Sudan's obligations under international law and its constitution. To this end, it would include the adequate prohibition of torture in South Sudanese law, the provision of safeguards as well as measures to ensure accountability and reparation for the victims.

South Sudan would also benefit from the ratification of treaties to which it is not yet a party, particularly the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol thereto, which provides for additional monitoring of the prohibition of torture.

Even though it is disputed under international law whether a successor state is bound by the obligations of international human rights treaties that were binding on the predecessor state, South Sudan has opted to accede and not to succeed to international human rights treaties ratified by the Sudan. As a result, until now South Sudan has only acceded to the Geneva Conventions in July 2012 and recently signed the ACHPR.

Generally speaking, the South Sudanese constitution follows a very inclusive approach with respect to the application of international human rights treaties. Article 9(3) of the TCSS stipulates "all rights and freedoms enshrined international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill".

Accordingly, international human rights treaties which have been signed and ratified by South Sudan are directly applicable under national law and take up the level of constitutional law within the domestic legal hierarchy. But this has not been the case. South Sudan has not yet ratified or even sign any international human rights instrument as well as regional human rights treaties. This has created a gap on the promotion, protection and implementation of human rights and fundamental freedoms.

Thus, lack of enactment of necessary legislations covering human rights promotion and protection remains at a distance creating legislative gap on the protection of all human rights envisaged in the transitional Constitution 2011 and the international and regional human rights instruments.

This study therefore recommends an urgent enactment, adoption and ratification of all the important and main human rights instruments promoting and protecting human rights in the country.

Chapter Four: Comparative Analysis of the Best Practices from Other Jurisdictions

4.0 Introduction

This chapter aims at analyzing the best practices drawn from other jurisdiction for the protection of arrested persons from torture in comparative context. The countries selected for comparative analysis are Ethiopia, Kenya and Uganda respectively. The analysis will entail the examination of relevant legislations governing the protection of the arrested persons in the three countries. It also aims to looking at the role of the institutions established to protection and enforce human rights in those countries.

4.1 Comparative Analysis from other Jurisdiction: Ethiopia

Ethiopia has taken policy, legislative and institutional measures with a view to promote and protect the rights, freedoms and duties enshrined in the African Charter on Human and Peoples' Rights. The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) is the foundation of the country's democratic system of governance in the country.

The Constitution, as the Supreme Law of the land and as the basic legal framework for the protection of human rights in Ethiopia, sets forth the affirmative commitments of the country to the cause of human rights. Article 9 of the constitution recognizes and provides that international agreements ratified by Ethiopia form an integral part of the law of the land; this resembles the provisions of article 9(3) of the Transitional Constitution of South Sudan 2011 which stipulates the same.

Article 13(2) goes a step further to align the national human rights systems with international system by requiring the interpretation of national human rights provisions to be in line with international human rights instruments.

Accordingly, the basic civil, political, economic, social and cultural rights of citizens have been and are given full recognition in Ethiopia. Ethiopia has ratified a series of human right treaties as a part of its commitment to the promotion, protection, respect and fulfillment of human rights, including the ACHPR in May 1998.

In fact, by view of the constitution, all ratified human rights treaties form part of an integral part of the law of the land. The translation of international human rights instruments into different national languages has helped enhance awareness of the international human rights instruments. This is one of the best practices that promotes and protects human rights of the citizens at the national level. The government of Ethiopia adopted a National Human Rights Action Plan (NHRAP) in 2003 to improve the protection of fundamental human and democratic rights in a comprehensive and structural manner.

The main objective of the NHRAP is to develop a comprehensive and structural mechanism to advance the respect, protection and fulfillment of the human rights and fundamental freedoms guaranteed by the constitution. The action plan is based on a review of the present human rights situation in the country, identification of potential problem, and the provision of feasible and practical solutions. The NHRAP is comprehensive in scope and action, addressing in detail civil and political, economic, social and cultural rights.

The Ministry of Justice is responsible for implementation of the National Human Rights Action Plan. The Government of Ethiopia issued an improved criminal justice policy in 2010 to ensure and strengthen adequate human rights protection. One of the policy objectives of this plan is building a criminal justice system that strengthens respect for individual rights and fundamental freedoms.

The Ethiopian Human Rights Commission was established by Proclamation No. 210/2002 pursuant to article 55(14) of the FDRE Constitution with the objective of educating the public in awareness of human rights and to ensure rights are protected, respected and fully enforced as well as taking necessary corrective measures where they are found to have been violated.

The Commission has undertaken numerous activities that have brought changes in the human rights field. It has translated basic human rights instruments into several of the most widely-spoken languages in the nation. It has responded to thousands of enquiries and most recently has been deeply involved in the organization of the national human rights action plan. Although there are reports and concerns about human rights incidences amounting to violations of such rights as enunciated in the Federal Constitution, still there are best practices which a young

country like South Sudan who is struggling to meet, ensure, and strengthen its human rights polices and records to learn and borrow.

This study conclusively remarks and highlights that human rights issues are placed at the centre of policies and laws which reflect the commitments of the government to ensure adequate protection of human rights. Thus, the above discussions are some of the best practices which South Sudan should borrow and apply in order to reform and strengthen its human rights protection mechanisms. There is a lot South Sudan has to learn and borrow from Ethiopia and incorporate such practices into its human rights policies in order to promote and protect human rights and fundamental freedoms.

4.2 Comparative Analysis from Other Jurisdiction: Kenya

Since the accession to ICCPR by Kenya, there have been significant changes to the legal environment in Kenya, not least of which has been the promulgation of the 2010 Constitution. Kenyans ratified a new constitution in August 2010 through a national referendum. It is the Supreme law that provides for an elaborate legal, policy and institutional framework to ensure substantive protection and promotion of fundamental rights including the express prohibition of torture and provides avenues for redress.

The new constitution contains a progressive Bill of Rights that provides effective mechanisms for enforcement and protection of fundamental rights. Article 21(1) states: “it is the fundamental duty of the state and state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights”.²⁸⁵ Article 21(4) of the Constitution specifically requires that: “The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms”.²⁸⁶

However, in line with article 2.3(b) of the ICCPR²⁸⁷ read together with article 2(5) and (6) of the Kenyan Constitution, 2010²⁸⁸ means that the ICCPR is now part of Kenyan law, the protection of the rights provided for under the Covenant should be enforceable in Kenyan courts.

²⁸⁵ Article 21(1) of the Constitution of Kenya 2010

²⁸⁶ Article 21(4) of the Constitution of Kenya 2010

²⁸⁷ Article 2.3(b) of the ICCPR

²⁸⁸ Article 2(5) and (6) of the Constitution of Kenya 2010

As the ICCPR rights are reflected in the Bill of Rights of the Constitution which is borrowed largely from the Covenant, article 22 of the Constitution confirms the enforceability of the same by providing a broad scope of individuals as well as associations, who may institute court proceedings for redress. Thus, it is important to note that the new constitution ushered in a new era which has been embraced by the Judiciary and the Covenant's provisions can be invoked and applied to enhance respect for human rights and eliminate incidences of torture.

The Human Rights Commission was established to operationalise the provisions of the Constitution and the Kenya National Human Rights Commission Act, 2011. The functions of the commission shall be to promote respect for human rights and develop a culture of human rights in the Republic, promote the protection and observance of human rights in the public and private institutions, monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated, on its own initiative or the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs; act as the principal organ of the state in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special groups protected under the law relating to equality and non-discrimination and among other things formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the constitution.

For purposes of investigating any matter pertaining to an inquiry, the commission shall summon and enforce the attendance of any person for examination; require the discovery and production of any document; and subject to the constitution and any written law, requisition any public record or copy thereof from any public officer. Thus, this is clearly enunciated also under the Section 95 of the national Police Act which prohibits the police from subjecting any person to torture or to cruel, inhuman, or degrading treatment and makes improvements in sanctions stating that those engaged in torture may be punished with a prison term not exceeding 25 years.

Hence, South Sudan has provisions in its legal system that aim at prohibiting torture and ill-treatment. However, the provisions were not geared towards the domestication of CAT and therefore fall short of the expectations and obligations imposed on state parties to CAT. The provision that prohibit torture is found under article 18 of the Transitional Constitution 2011 which forms the basis for the prohibition of torture. The provisions under the constitution are not sufficient because the merely declared a right but felt short of protecting arrested persons from torture.

The constitutional principle does not have any accompanying remedies and are thus impotent. The constitution does not defined torture hence it remains a declaration of statement of intention that has not been applied. As the constitution states under article 9(3) that all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the South Sudan shall form an integral part of this Bill. It is thus clear that the Convention against torture has direct effect of law and thus there is need to urgently enact a legislation to give effect to the Convention since it carries obligation under international law of states succession.

As South Sudan is not a signatory to any major human rights instruments but carry an international obligation under international law to abide by all the treaties and conventions ratified by the Republic of Sudan where South Sudan broke away from. It is therefore important that South Sudan dully fulfill her international commitments by enacting legislation to criminalize torture and other acts which violates human rights. Therefore, South Sudan must learn and borrow such practices in order to strengthen and protect human rights of its people.

4.3 Comparative Analysis from Other Jurisdiction: Uganda

Like Ethiopia and Kenya, Uganda has signed many international and regional treaties on human rights. This makes it a requirement for Uganda to include human rights in the national laws. In line of this, Uganda has included human rights in the Constitution of the Republic of Uganda, 1995, as well as established institutions to protect and promote human rights, like the Uganda Human Rights Commission (UHRC). The Constitution makes it an obligation for all organs, agencies of government, all security agencies, including police and all persons to respect, uphold and promote human rights. The Human Rights Commission was established in November 1996, to protect and promote human rights in Uganda.

The Commission was established to operationalise the provisions of the Constitution of Uganda 1995 and the UHRC act respectively. The UHRC's vision is of a society that respects human rights and fulfills civic obligations. Its mission is to protect and promote fundamental human rights and freedoms in Uganda.

The UHRC is mandated among other things, implement programmes of continuous awareness creation on rights and responsibilities in order to enhance respect for human rights. The UHRC is mandated to investigate, at its own initiative or on a complaint made by any person or group of person, the violation of any human rights. In order to fulfill this mandate, the UHRC designs several programmes for various sections of people in Uganda. In view of this, UHRC has embarked on training members of security agencies, including UPF to enhance their capacity in the protection and promotion of human rights.

The UHRC has been given teeth by the Article 53(1) of the Constitution; it can act like a court of law to summon or order any person to attend before it and produce any document or record relevant to any investigation by the commission, question any person in respect of any subject matter under its investigation, direct any person to disclose any information within his or her knowledge relevant to any investigation by the commission, and commit persons for contempt of its orders.

The Constitution under Chapter 4 provides for human rights and freedoms including the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. Under Uganda legal system, torture is specifically prohibited under article 24 of the Constitution of Uganda 1995 which states that: "no person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment".²⁸⁹ Article 44 also makes the freedom from torture, cruel, inhuman or degrading treatment or punishment non-derogable which means it cannot be limited whatsoever.²⁹⁰ Security officers are obliged under article 221 to observe and respect human rights and freedoms in the performance of their functions.²⁹¹ Article 20(2) of the Constitution also stipulates that "The rights and freedoms of the individuals and groups Shall be respected, upheld and promoted by all organs and agencies of Government and by all

²⁸⁹ See Article 24 of the Constitution of the Republic of Uganda, 1995

²⁹⁰ See Article 44 of the Constitution of the Republic of Uganda, 1995.

²⁹¹ Ibid, article 221.

persons”.²⁹² However, the Prevention and Prohibition Act, passed in April 2012, is the law that operationalises the constitutional provisions that prohibit torture. The law provides under section 2 that individual persons and non-state actors shall be held individually responsible for acts of torture. The law proposes under sections 5 and 6 a maximum sentence of 15 years imprisonment on conviction of the crime of torture and life imprisonment where there are serious circumstances. The freedom from torture is also provided for under the Police Act which allows a Magistrate to order an investigation where a person alleges torture. Torture is also made an offence under the Anti-terrorism act 2012 with a penalty of up to five years imprisonment.

The Penal Code Act also prohibits acts of torture which is criminalized as assault or causing grievous bodily harm. In light of the above analysis, Uganda seems to present one of the best human rights practices which have complied with the provisions of CAT and other international human rights instruments. It also offers a best chance for South Sudan to learn, adopt and incorporate into its human rights policies those steps taken by the Republic of Uganda in protecting and promoting human rights in the country.

This study concludes that South Sudan has an opportunity to learn and borrow such practices from Uganda and other countries with the same practices and makes them its own in order to strengthen its human rights policy and protect fundamental freedoms.

4.4 Best Practices South Sudan can learn from

Although South Sudan is not a signatory to major human rights instrument, it carries an international obligation under international law to abide by all the treaties and conventions ratified by the Republic of Sudan where South Sudan got her independence from. It is important that South Sudan dully fulfill her international commitments by enacting legislation to criminalize torture and other acts which violates human rights and more importantly the right to freedom from torture. South Sudan can learn and borrow such best practices from other jurisdictions such as Ethiopia, Kenya and Uganda in order to strengthen and protects the rights of the arrested persons from torture. These three countries present some of the best human rights practices and policies which have complied with the provisions of CAT and other international

²⁹² Ibid, 20(2).

and regional human rights instruments. These best practices should include enacting anti-torture legislation to protect the rights of the arrested persons from torture in South Sudan.

South Sudan should also ratify all international and regional human rights instruments which are dedicated to the protection of human rights if the rights of the arrested persons are to be fully protected and ensured in the country. This offers a best chance for South Sudan to learn, borrow, adopt and incorporate such human right policies and practices taken by these countries in protecting and promoting human rights in their countries.

South Sudan has an opportunity to learn and borrow such practices from other countries with the same practices and makes them its own in order to establish and strengthen its human rights policies and protect fundamental freedoms in the country. South Sudan can learn and borrow such best practices such as that of Kenya National Human Rights Commission which has both investigative and prosecutorial powers in the protection of human rights violations.

4.5 Conclusion

Up to date, collaboration between the UN and regional mechanisms is still inefficient and does not occur on a regular and institutionalized basis. However, there is a widely shared view that the regional and universal systems are complementary and that the potential of the protection at the regional level may further develop as a result of exchange of experience and cooperation between the existing systems. Therefore, the strengthening of regional systems is one of the key avenues to take in order to increase the level of protection of human rights and fundamental freedoms worldwide. At the regional level, the UN is one of the key actors engaged in improving existing human rights mechanisms and creating such where none exist. Additionally, inter-regional collaboration would bring a large number of benefits for both the UN and the regional systems. Obviously, the exchange of expert knowledge and information is already benefiting both the regional and UN mechanisms. But better cooperation and coordination would have further benefits and advantages. The risk of thematic overlaps between the mandates of the UN special procedures and regional ones could be diminished and the already limited resources and capacities unburdened. This would facilitate the smooth collaboration and coordination between the regional and NHRIs as well making them benefiting from the experiences obtained from the UN and the regional human rights protection mechanisms.

Chapter Five: Conclusion and Recommendations

5.0 Conclusion

The prevalence of torture in South Sudan is a long standing concern. In the wake of the end of Interim Period and following the separation of Southern Sudan from Sudan in 2011, the human rights situation has deteriorated, characterized by armed conflicts, inter-communal violent and rising tribal militias. Recourse to torture continues unabated in which there is a series of well documented cases of torture committed by National Security agents and other Security Organs targeting political opponents, human right defenders, vocal students and members of marginalized communities.

However, as the discussion above has shown that many African countries are parties to various international human rights instruments that aimed at protecting the right of the arrested persons from torture, South Sudan is under obligation under international law to honour the treaties and human rights instruments ratified by Sudan in order to protect and enforce human rights and fundamental freedoms in the country. Victims of torture in some African countries have all along resorted to international protection mechanisms for redress given the failure to address human rights violations.

In Africa, there is no treaty yet that specifically addresses the problem of torture. The RIG as discussed above are not binding and States may not take them seriously despite the fact that torture is widely practiced in many African countries and South Sudan in particular.

At the international and regional levels, prohibition against torture holds a specific status under international human rights law. It is a non-derogable right and therefore cannot be justifiably violated under any circumstances. A state of war, a threat of war, internal political instability or other public emergency are not grounds to justify torture.

Further, prohibition of torture constitutes a peremptory norm of customary international law, from which states can never derogate. All countries are therefore required to comply at all times with unconditional prohibition of all forms of torture and ill-treatment. Human rights are universal and their respect is a must by any state. It is therefore incumbent upon the State of South Sudan to respect, protect and fulfill human rights.

Victims of torture in some African countries resorted to international protection mechanisms like the Committee against Torture and HRC for redress. These mechanisms have not been very successful as few complaints have been lodged against some African countries. In the case of the Committee against Torture, complaints have been lodged against Tunisia notwithstanding the fact that many African countries, State Parties to CAT, still commonly practice torture on a large scale.

In Africa, although the ACHPR prohibits torture under article 5, there is no treaty yet which specifically addresses the problem of torture like CAT. However, as Sudan is a party to UDHR, ICCPR and ACHPR, South Sudan therefore carries with it the obligation under international law to treat arrested persons in accordance with provisions of international human rights law. In addition, the 2011 constitution protects arrested persons under article 18 as well as various sections of the Child Act, 2008.

In a nutshell, the practice of acts which amounts to torture is widespread in South Sudan and therefore, far below international human rights standards. The practice of acts amounting to torture clearly violates articles 5, 7 and 5 of the UDHR, ICCPR and ACHPR respectively.

The inadequacy of legislative framework governing the protection of the rights of the arrested persons from torture encourages the widespread use of torture in the name of protecting and consolidating national security as well as keeping law and order in the country.

The lack of specific legislation on the prevention and prohibition of torture in South Sudan created a window of opportunity by giving the security sectors upper hand when dealing with and determining the fates of the citizens in an attempt to keep and restore national security of the state.

The lack of political will and inability of the government and all stakeholders bestowed with the protection of human rights in the country has created a somewhat clumsy human rights situation hence leaving the protection of human rights and in particular the rights of the arrested persons at the mercy of the security sector. Therefore, South Sudan can learn and borrow lessons from jurisdiction which have reformed their human rights protection mechanisms. South Sudan is no exception and therefore in enacting a legislation to prohibit torture, the proposed law in this study must prohibit torture absolutely.

This study concludes that many African countries are parties to various international human rights instruments that aim at protecting the right to freedom from torture. In the next section, the study makes specific legislative, policy, administrative and research recommendations to reform its ineffective policies in South Sudan.

5.1 Recommendations

In order to reform the current human rights system in South Sudan and to allow and adopt good human rights standards and best practices, the study makes the following legislative, policy, administrative and research recommendations on how to enhance and protect human rights and in particular the rights of arrested persons;

5.1.1 Legislative Reforms

The National Legislative Assembly needs to effect legislative enactments as follows:

1. The study recommends that the National Assembly should enact a specific law to regulate the acts and practices related to arrested persons in South Sudan. This law could be known as ‘Torture Prevention Act’. The agencies to be involved in implementing this recommendation shall include the Ministry of Justice as drafting authority, the South Sudan Law Review Commission, and the National Legislative Assembly.
2. The National Legislative Assembly should amend the Penal Code Act so that arrested persons are not subjected to torture in an attempt to extract information.
3. The government of the Republic of South Sudan should formally acknowledge that South Sudan succeeds to all the human rights treaties to which Sudan is a party.
4. The government of the Republic of South Sudan should take necessary steps to ensure the prompt ratification, without reservations, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol).
5. The adoption of a new constitution in the process of which all South Sudanese people, without exception participated. That constitution should be inclusive of civil and political

rights recognised in the ICCPR in order to cover the substantive gaps in the Bill of Rights. This constitution should also be inclusive of economic, social and cultural rights recognized in the ICESCR; this requires a comprehensive review of the economic, social and cultural rights contained in the Transitional Constitution 2011. The proposed constitution should conceive of, and recognize, children as right holders. The proposed constitution should take into consideration the spirit and specifically set out the contents of international and regional children's rights treaties to which Sudan is a party and in which South Sudan carries an obligation under international law, such as the convention on the Rights of the Child and the African Charter on the Rights and Welfare of the child.

5.1.2 Policy Reforms

The study makes the following policy reforms recommendations;

1. The Ministry of Justice and Ministry of Interior should issue clear instructions to the police and prison guards to stop torturing the arrested persons during and after arrest.
2. The Ministry of Interior, Ministry of Justice and Judiciary should take steps to ensure that police, prosecutors, judges and prison officials implement the standards in the Child Act, 2008 particularly those relating to torture.
3. The prison Service should prohibit the use of chains and leg irons in its standing orders and regulations. It should end the practice of applying other forms of restraints as punishment because these acts amount to torture and ill-treatment.
4. The study recommends for an immediate establishment of the juvenile court as enunciated in the Child Act, 2008. The court will help ensure the protection of children rights in South Sudan.
5. The Prison Service should prohibit corporal punishment in its standing orders and regulations. It should ensure the enforcement of the prohibition by adopting a zero-tolerance policy against its use, holding prison staff accountable for using corporal punishment and providing prison officers with additional training in the prohibition of corporal punishment.
6. The South Sudan Human Rights Commission should increase prison visits and police cells monitoring in order to inspect them. It should investigate and publish reports on any acts of torture and ill-treatment as well as other human rights violations. The South

Sudan's security apparatus, including the SSNPS and SPLA, must be reformed and restructured to ensure that they operate under Constitutional order and in accordance with international best practices. The reforms efforts should include a vetting process that ensures these institutions are led and staffed by suitably qualified and well trained personnel who would be able to apprehend alleged perpetrators of serious human rights violations, in particular those who torture arrested persons in ghost houses.

7. The study recommends the implementation of a comprehensive law reform process to ensure the compliance of domestic laws with international human rights standards.
8. As one the policy reforms, the study recommends an adoption of a program of national reconciliation and transitional justice to heal the wounds and deal with the past violations of human rights, in particular the victims of torture.
9. The study recommend also the strengthening of national mechanisms with a view to better ensuring implementation of human rights obligations and respect for the rule of law through legal and institutional reforms.
10. The study recommends to carefully reviewing the provisions in relation to de facto state of emergency declared in Upper Nile Region due to armed conflict to address the derogation regime with a view to ensuring effective protection of human rights.
11. The study recommends also the need for the Constitutional Court and other Courts to recognize the binding effect of the constitution in their jurisprudence; and also liberally interpret the directive principles in the constitution as integrally related to the Bill of Rights.

5.1.3 Administrative Reforms

The prevalence of torture in South Sudan is a long standing concern. In the wake of the end of interim period and following the separation of Southern Sudan from Sudan in 2011, the human rights situation has deteriorated, characterized by armed conflicts. Recourse to torture continues unabated and there is a series of well documented cases for torture by national security agents and others targeting political opponents, human right defenders, students and members of marginalized communities. In light of the above consideration, the following administration recommendations can be taken by the specific government departments to enhance and ensure full protection of the rights of people deprived of their liberty from torture in South Sudan;

1. Effective and Quick Service Delivery in Torture Cases

As several steps have been taken by the judiciary in collaboration with other international organizations to improve services to the members of public, the reforms for effective and quick delivery in torture cases should include the followings:

- a. Expeditious administration of justice to all irrespective of their status. In this respect, cases of torture just like other civil and criminal cases should be given attention and expeditious disposal as quick as possible without unnecessary delays.
- b. Promote and protect the purpose and principles of the Transitional Constitution of South Sudan, 2011. The Bill of rights under Constitution provides under Article 18 that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The courts are therefore mandated to observe this principle and be guided by it during the trial of accused and arrested persons in which information have been extracted by use of force to make the suspects confess under extortion, threats and beatings. Such evidence shouldn't be admissible in the court of law since information obtained through the use of force isn't admissible in the court of law whatsoever.
- c. Removing the power of the National Security to arrest and detain individuals and enact the National Security Service act to ensure adequate custodial safeguards, including the prohibition of arbitrary arrest and detention, and acts of torture from the beginning of proceedings and the right to be brought before a judge within 48 hours.
- d. Removing barriers to accountability for torture by perpetrators, whether the police, the army, the national security and enacting security laws that provides adequate protection against threats, harassments and assaults on victims and witnesses of acts that amount to torture and human rights violations.
- e. Promote a culture of accountability within the NISS, the police and the army by adopting codes of conduct prohibiting torture and ill-treatment, the breach of which is subjected to disciplinary sanctions, and making human rights training an integral part of their curricula.

- f. Establish by law, an independent oversight body vested with mandate, powers and sufficient resources to investigate all allegations of torture and ill-treatment in line with best practices and guidelines.
- g. Making torture a criminal offence in line with the definition of torture in article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has been widely recognized in international law, stipulate punishments commensurate with the seriousness of the offence.
- h. Put in place the reforms to strengthen the judiciary especially as it relates to human rights trainings for judges on human rights issues in order to ensure that the conditions of arrest, preliminary interrogation and detention of suspects comply with the principles of the Robben Island Guidelines.
- i. Adopts a holistic approach to prison congestion and conditions of detention in the prisons, ensuring that the Prison Service get adequate resources, including funding to improve living conditions and access to health care in prisons and places of detention across the country.

2. Public Legal Education by the Government and Civil Society Organizations

The study recommends an outright general public legal education on torture and other ill-treatments to the members of the public at large in order to create awareness of the problem of torture and responsibility to report any act that amount to torture to the police as well as collecting and preserving evidence to be presented to the court whether committed by public officials or private individuals. In this regard both the civil society groups and the government can form an alliance or partnership towards public legal education on issues of torture and ill-treatment in the society.

5.1.4 Research

The study recommends the following steps to be taken:

1. Initiate collaborative, comprehensive and integrated research on human rights, in particular on torture and ill-treatment and find out the impact of torture. Such research will help formulate policy guidelines for the relevant government agencies for the necessary implementation of human rights provisions enunciated in the constitution.

2. The study recommends the need to document and examine effects of torture by the government, civil society organizations and human rights institutions in South Sudan.
3. There is need to conduct a comprehensive study on the implications and effects of torture on the victims. This study will help human rights practitioners, jurists and the entire society in protecting the rights of the arrested persons from torture and other ill-treatment.
4. The study also recommends for the need to put more advocacy against the violations of human rights, in particular on torture so that people understands their rights and be able to spot out how the government and powerful individuals in South Sudan have been trampling down these rights

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