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**Introduction**

In November 2006 South Africa's first report to the UN Committee against Torture (the Committee) was considered, marking another step in South Africa's participation in a global human rights framework (Republic of South Africa, 2005). Following the consideration of the initial report the Committee released its Concluding Remarks in which it recognised the progress made in South Africa, but also raised a number of concerns in respect of measures taken to implement the obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (UN Committee against Torture, 2006). The Committee requested urgent feed-back by November 2007 on a number of issues but the South African state had not submitted this information at the time of writing, despite a reminder sent by the Committee to the South African Ambassador (UN Committee against Torture, 2008). Under article 19 of CAT South Africa's next periodic report is due by 31 December 2009 and, if submitted, will probably be considered in 2010. It should be kept in mind that South Africa's initial report was due in 1999, a year after ratification, but was eventually submitted in 2005.

In May 2007, the Committee adopted a new optional procedure which consists of the preparation and adoption of a List of Issues (LOI) by the Committee to be sent to States parties prior to the submission of a periodic report. The intention is that the State party would report specifically on the LOI and need not deal with all possible issues under each article of CAT. The Committee adopted this procedure to bring more focus to periodic reports and make reporting more efficient and effective. The procedure will be implemented on a trial basis for reports due in 2009 and 2010. At a meeting in May 2007 the Committee discussed the new procedure with states parties and most states parties have already agreed to utilise the new procedure (UN Committee Torture).

Together with a number of other States parties, South Africa's LOI recently became available on the website of the Committee (UN Committee against Torture, 2008). The LOI is important for human rights advocates in South Africa from civil society and the national human rights institutions as it reflects the views of the international community in respect of South Africa's compliance with its obligations under CAT. South Africa's performance in this regard has not been up to the required standard, as reflected by late reporting, incomplete reporting and ignoring requests from the Committee for more information. In preventing and combating torture, the struggle against impunity begins with the state setting an example

to its officials in its relationship with the international community and specifically with the UN treaty monitoring bodies. In strengthening this relationship, much remains to be done and the next periodic report, as guided by the LOI, presents an excellent opportunity to address some of the problems from the previous round of reporting. This newsletter will highlight some of the key questions raised in the LOI and comment on some of these.

In respect of several issues raised by the Committee, as will be discussed below, there will indeed be progress to report on but on many others there will unfortunately be very little substantive progress to reflect on. The Committee has stated in its Concluding Remarks as well as in the Guidelines on Reporting that it seeks detailed factual information and that a description of the overall constitutional and legislative framework is not sufficient (Muntingh, 2008, p. 33). The LOI gives clear guidance on submitting such detailed and factual information.

### **Progress on legislation and policy development**

Article 4 of CAT requires states parties to criminalise torture and adopt a definition of torture fully consistent with the definition in Article 1. The Committee therefore requests information on progress made in meeting this important obligation. Despite three drafts of a bill to this end having been circulated for comment informally by the Department of Justice and Constitutional Development (DoJCD) to selected stakeholders since 2003, this bill has not been finalised and not been submitted to Parliament. The Committee, probably anticipating the current situation, enquires furthermore as to the 'specific norms' under which perpetrators are prosecuted and also as to other measures taken to combat impunity.

Reflecting on the version of the bill criminalising torture to which the Committee had access to (the second version), information is requested on measures taken to implement the principle (article 15) that evidence obtained through torture cannot be invoked as evidence in any proceedings. This issue remains absent from the third version of the Bill. A recent positive development came from a judgment in the Supreme Court of Appeal in *Mthembu v S* in which the court dealt with the issue comprehensively and concluded that "To admit [the testimony obtained under torture] would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'." [para 36] (*Mthembu v S*, 2008).

Other issues raised in respect of legislative and policy development concerns progress made on implementing the SAPS Policy on the Prevention of Torture and accompanying Standing Orders; Child Justice Bill; Correctional Services Act (111 of 1998); Refugees Act (1998); Domestic Violence Act (1998); and the Immigration Act (2004). The Committee is also interested to hear about measures, including legislative, taken to prevent and prohibit the production, trade and use of equipment specifically designed to inflict torture and other cruel, inhuman or degrading treatment.

An important matter raised in the Committee's Concluding Remarks concerns the establishment of jurisdiction through legislation over acts of torture in cases where the alleged offender is present in any territory under the State party's jurisdiction, either to extradite or prosecute him or her, in accordance with the provisions of the Convention. The issue is also linked to the members of South African peacekeeping missions in other countries who have committed acts of torture and ill treatment. With regard to these incidents the Committee is also enquiring as to measures of redress taken. At present there will be little to report on in this regard as legislation criminalising torture has not been finalised.

### **Strengthening oversight**

The Committee is particularly interested in oversight institutions such as the Independent Complaints

Directorate (ICD) and the Judicial Inspectorate for Correctional Services (JICS) and refers to statements made by the South African delegation in 2006 informing the Committee that the ICD "has specific investigation powers regarding allegations of torture, has received more financial and human resources, its independence has been guaranteed, and amendments to its structure was being considered to reinforce and broaden its powers." The Committee is equally interested in the activities and results of the visits undertaken by Independent Correctional Centre Visitors (ICCV). While the ICCV system is fairly well-developed to undertake proactive visits to prisons and record complaints from prisoners, it regrettably remains the situation that the ICD does not undertake such visits to police holding cells. As the Lindela Repatriation Centre has been a long standing concern, the Committee enquires if an oversight and monitoring mechanism has been established for this facility. Linked to this, the Committee enquires as to the intentions of South Africa to ratify the Optional Protocol to the CAT (OPCAT) after it signed the Protocol in 2006. At the time of writing, South Africa had still not ratified OPCAT nor does it seem there is much interest from government to do so in the immediate future. Other areas requiring improved oversight are mental health and other welfare institutions where people are deprived of their liberty and the Committee enquires as to the existing monitoring mechanisms in this regard. Existing weaknesses in the legislative frameworks covering these institutions have been described in recent literature (Muntingh & Fernandez, 2008).

### **Foreign nationals in South Africa**

Given recent events in South Africa and southern Africa, the Committee is particularly interested in the situation of foreign nationals in South Africa and their treatment by the police, in prisons and at the Lindela Repatriation Centre. In this regard the plight of Zimbabwean refugees is of specific concern and the Committee seeks information on what measures have been undertaken to ensure that these refugees are not subjected to torture and ill treatment when returned to their country of origin. Reading between the lines, it must be assumed that the Committee is aware of the fact that the South African government has been deporting Zimbabwean nationals *en masse* and that little regard has been given to the principle of non-refoulement articulated in article 3 of CAT.

Two long standing cases that have attracted much media attention, those of Rashid and Mohamed are again raised by the Committee. In the Concluding Remarks the Committee requested feed-back on these two cases by November 2007 but this was never given and thus questions around these two cases are raised again. A positive development in the case of Rashid is that his detention at the Cullinan police station has been declared unlawful and consequently his deportation to Pakistan (*Jeebhai and Others v Minister of Home Affairs*, 2009).

### **Promoting CAT**

It remains unfortunately the case that CAT remains a fairly unknown human rights instrument in South Africa despite the obligation under Article 10 to ensure that, at least, all law enforcement personnel are thoroughly trained on the prohibition of torture and ill treatment. In view of the important obligation under article 10 as well as recommendations made in the Concluding Remarks, the Committee raises a number of pertinent issues in this regard enquiring about:

- ? improved access to legal aid for victims of torture;
- ? measures taken to promote the use of the individual complaints procedure under article 22; and
- ? the training of judges, magistrates, prosecutors, medical personnel and law enforcement officers on the absolute prohibition of torture.

Given that South Africa has eleven official languages and that English is not a first language for many South Africans, the Committee rightly asks: How has the Convention been disseminated in the appropriate

languages to groups made vulnerable?

### **Investigations of deaths in custody and torture**

The Committee expresses with good reason concern about the high number of deaths in custody and consequently requests information on "the impartial investigation" of such deaths as well as other acts of torture and ill treatment when law enforcement officials are implicated. More importantly, the Committee asks information on how many perpetrators have been brought to justice. Indicating that the Committee takes an interest in particular cases is there request for information on the deaths of three inmates at Krugersdorp prison in April 2007 and the progress that has been made. The most recent information is that after more than two years that three of the six warders charged have been convicted of murder (Busani, 2009). Given allegations that non-citizens are frequently victimised by law enforcement agencies, the Committee is interested in information about the investigation of such cases.

### **Crimes committed under apartheid**

The Committee is concerned about persons who were responsible for the institutionalisation of torture under apartheid and who have not been held accountable, especially those individuals who had not made a full disclosure before the Truth and Reconciliation Commission (TRC). According to the Committee it creates a situation of impunity. The Committee is equally concerned about the wide discretionary powers of the National Prosecution Authority (NPA) and its apparent tardiness in prosecuting these individuals. Within the context of widespread and systematic human rights violations that have occurred worldwide since 1948, the prosecution of these individuals must remain an important objective in strengthening global human rights standards.

### **Restitution**

Article 14 of CAT deals with compensation and restitution and the Committee is interested in measures taken to give effect to the requirements. Although much has been said in recent government policy documents about the rights of victims, the Service Charter for Victims of Crime in South Africa only makes reference to compensation for loss or damage of material goods under sections 297 and 300 of the Criminal Procedure Act or alternatively instituting a civil claim (Department of Justice and Constitutional Development, p. 3). The Service Charter for Victims of Crime in South Africa also claims to be compliant with the spirit of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (United Nations, 1985). There is, however, little evidence of this when comparing the Service Charter to the UN Declaration as the Service Charter substantively ignores principles 18-21 of the Declaration which deal with victims of abuse of power. For victims of torture it remains a difficult, lonely and painful task to seek redress.

### **Measures taken under article 16**

With reference to article 16, the Committee raises several issues on which it requests more information. With reference to conditions of detention, it is particularly concerned about prison overcrowding and meeting the minimum standards of humane detention. The Committee also requests more information on prisoners' access to anti-retroviral therapy. With reference to children in detention facilities, the Committee seeks information on the separation of adults and children. On a more general level, the Committee seeks information on measures taken to reduce violence against women and children and also on steps taken to criminalise trafficking in women and children. Information on steps taken to ensure that the ban on corporal punishment in schools and welfare institutions is strictly adhered to is also requested by the Committee.

## Conclusion

The LOI may indeed have been significantly shorter if the information that was requested in November 2006 was indeed submitted. The failure to do this is not only embarrassing but also prevents that a dialogue with momentum develops between the South African government and the Committee. Perhaps more damaging is the impression it must have left with the Committee about how it is regarded by the South African government. The next round of reporting will hopefully provide an opportunity to mend some of the cracks.

The LOI is, however, not only a list of demands for information but also contains an invitation to the South African government to explain the reasons for difficulties it is experiencing in fully implementing the provisions of CAT and the previous recommendations made by the Committee. This is an important opportunity for both government and civil society to develop some sense of agreement on what the main stumbling blocks are, but it will be important to avoid blaming and rather focus on seeing solutions through cooperation.

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**SA Prisons at a glance**

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| <b>Category</b>                     | <b>Dec '08</b> | <b>March '09</b> | <b>Incr/Decr %</b> |
|-------------------------------------|----------------|------------------|--------------------|
| Functioning prisons                 | 237            | 237              | 0.00               |
| Total prisoners                     | 164,957        | 165,230          | 0.17               |
| Sentenced prisoners                 | 114,673        | 115,753          | 0.94               |
| Unsentenced prisoners               | 50,284         | 49,477           | -1.60              |
| Male prisoners                      | 161,475        | 161,574          | 0.06               |
| Female prisoners                    | 3,482          | 3,656            | 5.00               |
| Children in prison                  | 1,691          | 1,663            | -1.66              |
| Sentenced children                  | 847            | 860              | 1.53               |
| Unsentenced children                | 844            | 803              | -4.86              |
| Total capacity of prisons           | 114,782        | 114,822          | 0.03               |
| Overcrowding                        | 144%           | 144%             |                    |
| Most overcrowded                    |                |                  |                    |
| Umtata Medium                       | 313%           |                  |                    |
| King William's Town                 |                | 250%             |                    |
| Least overcrowded                   |                |                  |                    |
| Mapumulo                            | 27%            |                  |                    |
| Van Rhynsdorp                       |                | 31%              |                    |
| Awaiting trial longer than 3 months | 22,287         | 23,271           | 4.4                |
| Infants in prison with mothers      | 166            | 181              | 9.0                |



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