

TREATY BODY MONITOR

International Service for Human Rights



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COMMITTEE AGAINST TORTURE 37TH SESSION, 6 - 24 NOVEMBER 2006 SOUTH AFRICA, INITIAL REPORT

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Information submitted to the Committee

South Africa submitted its initial report¹ to the Committee Against Torture (the Committee) in part-fulfilment of its obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).² South Africa ratified the Convention in August 1998. As this was South Africa's initial report, the Committee did not forward a list of issues to the State.

Alternative reports were submitted to the Committee by several NGOs.³ These reports focused on issues including: prosecuting crimes of the past; the South African Police Services response to torture; the treatment of refugees and other foreign nations; corporal punishment and the protection of children's rights; root causes affecting the whole spectrum of violence in South Africa, including torture and other forms of ill-treatment; the South African prison system; and the criminalization of torture. Additionally, NGOs⁴ presented

¹ CAT/C/52/Add.3, available at <http://www.ohchr.org/english/bodies/cat/cats37.htm>

² Entered into force 26 June 1987, in accordance with Article 27 (1).

³ The Center for the Study of Violence and Reconciliation (CSVR); Children's Rights Project of the Community Law Centre (University of Western Cape, South Africa); The World Organization Against Torture (OMCT); Global Initiative; and the Civil Society Prison Reform Initiative (CSPRI).

⁴ Including Amnesty International, the World Organization Against Torture, CSPR and CSVR.

information orally to the Committee which covered the same issues. During oral presentations Amnesty International spoke about the concern for Article 3 of the Convention and the trend of rendition with the risk of torture. The representative from Amnesty International referred to a specific case involving a man who was given over to Pakistan and had not been heard of since.

The dialogue between the South African delegation and the Committee was fluid and organized. The first meeting included opening statements by both the Chairperson from the Committee and the delegation representative.⁵ After these statements the Committee presented questions. During the second meeting the delegation responded to these questions and supplied written responses to their concerns. Overall, the Committee was very pleased with the responses by the delegation which covered all their concerns.

Themes and Issues⁶

Status of international obligations

The Committee asked the delegation to state the status of international obligations under domestic law. The delegation responded that the Constitution was the supreme law in South Africa and that any statutory or common law inconsistent with the Constitution was unconstitutional and invalid, and that this principle also applied to customary international law and treaties.

Definition of torture

The Chairperson of the Committee asked the delegation to provide a definition of torture as he could not find any definition in the domestic criminal code which related to Article 1 of the Convention. The delegation admitted that torture is not yet defined as a criminal offence in South Africa but informed the Committee that a *Combating of Torture Bill* has been prepared and is in the process of being considered by the Parliament. Currently, when someone commits an act of torture they may be charged with the common law offence of assault, assault with the intent to do grievous bodily harm and indecent assault or attempted murder.

The delegation also reminded the Committee of the provisions relating to torture in its Constitution. Specifically, Article 12 provides for the right to freedom and security of a person, including not being subjected to torture.⁷

The Committee made several comments on how South Africa should formulate a definition of torture. These comments were appreciated by the delegation and it declared that the elements mentioned by the Committee would be taken into account when drafting a definition of torture. Minister Charles Nqakula stated that the matter would be discussed and an appropriate definition would be incorporated into the Bill currently under discussion in South Africa.

Rendition and expulsion

The Chairperson addressed the issue of rendition which was brought to the attention of the Committee by Amnesty International when referencing a case involving a man named Rashid Khalid.⁸ The Chairperson

⁵ Minister Charles Nqakula, Ministry of Safety and Security, Pretoria, Head of Delegation.

⁶ For a press release of the proceedings, please see

[http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/DF87FEA01C737E4FC125720A0053DC74?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/DF87FEA01C737E4FC125720A0053DC74?OpenDocument)

⁷ Article 12(d) of South African Constitution entered into force on 4 February 1997.

⁸ Rashid Khalid, a Pakistan national, was arrested and detained by the South African Police Services and Department of Home Affairs on 31 October 2005. Mr Khalid was handed over to the Pakistani officials by the South African authorities. While in South

noted that the prohibition of torture is absolute and wanted to be assured that this is complied with. Therefore, the delegation was asked if South Africa takes the view that security reasons or terrorist links constitute a justification for extradition to a country where an individual might be tortured.

In response to the Committee's direct question concerning the case of Mr Rashid, the delegation informed the Committee that Mr Rashid had been visited by a representative of the Ministry of Safety and Security from South Africa and was indeed currently in Pakistan.

The delegation informed the Committee that in terms of the *Refugees Act*, no one was refused entry, expelled, extradited or returned to any country, or subjected to any similar measure if, as a result of such refusal, expulsion, extradition, return or other measure, such persons were compelled to return to a country where they feared prosecution on ground of race, religion, nationality, political opinion, or if their life, physical safety or freedom would be threatened.

Additionally the delegation informed the Committee that the Department of Home Affairs is the body that deals with deportation issues while the Department of Justice and Constitutional Development deals with matters involving extradition

TRC and amnesty

The Committee commented on the Truth and Reconciliation Commission (TRC). The Chairperson said he understands the usefulness in the idea but on the other hand he had doubts that full disclosure would be sufficient to adequately deal with those responsible for the culture of torture and also for the compensation of the victims and their families.

The delegation stated that the TRC process was not meant to undermine the international principle of prosecuting those responsible for gross violations of human rights.⁹ Concerning the prosecution of those who have not yet appeared before the TRC, the National Prosecuting Authority (NPA) is looking at possible prosecution. The NPA is in the process of developing a mechanism to address this.

The delegation also addressed the issue of compensation to victims and their families. In doing so they stated that over 18,000 victims have been compensated by the TRC¹⁰ and only 650 outstanding cases presently exist.¹¹

Prisons

The Committee's Country Rapporteur for South Africa, Mr. Xuexian Wang, addressed the issue of overcrowding in South African Prisons. He was alarmed that the number of deaths in prisons had risen to more than 2000 in 2004, many due to pneumonia and tuberculosis. He also noted that there is almost no monitoring in detention centres. He inquired whether the delegation could respond to the allegations of widespread police violence.

Africa Mr Khalid admitted that he had entered South Africa illegally with a fraudulent permit. Amnesty International informed the Committee that there was much secrecy involved in his transfer and that he had not been seen since he left South Africa. Amnesty International received information that he remains 'disappeared' and in early November 2006 his name appeared in an indictment in Pakistan which accused him of certain crimes relating to the London bombings.

⁹ International law obliges States to prosecute those responsible for gross human rights violations (including killing, abduction, torture or severe ill treatment of any person). Section 20(7) of the *Promotion of National Unity and Reconciliation Act* constituted a breach in the four *Geneva Conventions* which require State Parties to enact legislation to provide effective penal sanctions for persons committing grave breaches of the provisions.

¹⁰ Over 90 percent of these victims and/or families have been compensated R. 30,000 each.

¹¹ These outstanding cases are due to problems in tracing and locating victims. The delegation noted that it will start a public awareness program to locate these victims or their families and they will be compensated when located.

The delegation admitted that overcrowding in prisons was a problem for South Africa and that this had a negative impact on the rights of the inmates.¹² This problem is a priority for the Justice Crime Prevention and Security Cluster (JCPS), which is examining the current management of pretrial detention, case flow management and reviewing the criminal justice system

The Committee also questioned the delegation about maximum security prisons and of the type of criminals that were there. The delegation responded that maximum security prisons have become a fixture of their prison system. They are specifically designed for criminals that committed murder, rape or aggravated robbery

Independent Complaints Department (ICD)

The Committee noted the extreme usefulness of the Independent Complaints Department (ICD). It was interested however in recent developments where a police official had made critical comments on national television about the ICD, and the more general problem that the South African police officials tend not to respect or approve its existence.

The delegation reminded the Committee that the ICD was created from a stipulation in the Constitution that required the establishment of an independent complaint mechanism to investigate allegations of police misconduct. The delegation continued to state that no one interferes with the ICD and it is one of the structures that South Africa uses to practice its democracy. Oversight of the ICD is performed by parliament and the delegation said that more funds and resources have been allocated for this year to help it function properly.

The 'Jolly Report'

In response to concerns from the Committee regarding the misconduct of correctional service officials¹³ the delegation referred to the newly released Jolly Report.¹⁴ This report is currently being analyzed by the President. Interim recommendations have already been implemented, and the Department of Correctional Services has adopted an action plan to address all the recommendations in the report.

The Commissioner for the correctional facilities addressed the Committee and told them that they were dealing with issues of training, particularly preparing police officers not to commit acts of torture or other inhuman actions. The Commissioner informed the Committee of a number of recommendations that the Commission had submitted and which have already been implemented by South Africa, including: review of policy, especially in regards to recruitment; development of an outside objective body which works on integrated human resource strategy; outsourcing options to avoid corruption in recruitment; revision of code of conduct and disciplinary code; development of departmental investigations unit and whistle blower policy; training in ethics and corruption at all levels.

Peace keeping missions and applicability of the Convention

Ms Gaer brought forth the topic of the applicability of the Convention in the context of military personnel. She noted that torture is not defined as a military offence and was curious to know what happens when

¹² South Africa's current prison capacity stands at 114,000 inmates. The total number of inmates is 160,000.

¹³ Specifically the Committee referred to an incident at St Albans prison facility in Port Elizabeth where a guard was attacked by inmates and then correctional officers overreacted to the attack. There is an ongoing internal investigation and therefore the delegation could not comment on it further.

¹⁴ The Jolly Report totals more than 3500 pages and was brought forth by the Commission of Enquiry appointed by the State President in 2001. The report investigated alleged incidents of corruption, violence and intimidation in the Department of Correctional Services.

incidents of torture or ill-treatment occur outside the borders of the State, specifically in peacekeeping operations. This is of particular importance on account of South African troops in UN peacekeeping missions and the notorious cases of sexual abuse in the Democratic Republic of Congo.

The delegation admitted that there have been allegations against members of the South African National Defense Force (SANDF) who are deployed for peace keeping missions. The delegation stated that South Africa has asked the United Nations (UN) to help identify individuals involved in sexual misconduct for possible prosecution. Currently, there are two cases where South African soldiers are under trial for sexual misconduct in peace keeping missions.¹⁵

Conclusion and next steps

The Committee noted that the assessment of South Africa's report had been very fruitful and was furthered by productive dialogue. The Chairperson thanked all the members from the delegation for appearing and informed them that after consideration of the written replies submitted by South Africa the Committee would prepare conclusions and recommendations. These concluding observations were published on 7 December 2006.¹⁶

¹⁵ The cases stem from incidents in the Democratic Republic of Congo (DRC) and Burundi.

¹⁶ CAT/C/ZAF/CO/1, available at <http://www.ohchr.org/english/bodies/cat/cats37.htm>

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