



Submission by the Centre for the Study of Violence and Reconciliation to the United Nations Human Rights Council Universal Periodic Review (UPR) pertaining the situation of human rights in South Africa
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This submission is made by the Centre for the Study of Violence and Reconciliation (CSVr) in response to the call made by the Human Rights Council. CSVr is a multi-disciplinary South African non-governmental organisation. CSVr is a registered section 21 Company, and is also registered as a non-profit organisation. Since its inception in 1989, the CSVr has been dedicated to making a meaningful contribution to peaceful and fundamental transformation in South Africa, and in the Southern African region. Throughout this period, CSVr has been an innovator in preventing violence in South Africa and dealing with its effects and in building reconciliation in a historically divided society. In doing this, CSVr has always engaged with violence in all its forms: political, criminal, domestic, gendered, etc. During the course of our work we have been concerned with the rights and treatment of people who come into contact with the criminal justice system and other government institutions. We are concerned with democratic and human rights orientated transformation of key institutions such as the police, justice and correctional services. We are also concerned with the rights of refugees and other foreign nationals within our borders.

This submission deals with four specific aspects of the human rights situation in South Africa

1. Prosecuting crimes of the past.
2. Torture, in particular:
 - a. The Criminalisation of Torture and Monitoring Places of Detention
 - b. The South African Police Services response to Torture.
3. The treatment of refugees and other foreign nationals.
4. The state response to Gender-based violence.

1. Prosecuting “Crimes of the past”

The UN Committee Against Torture (UNCAT), noted in November 2006, that the South African Government should “bring to justice persons responsible for the institutionalisation of torture as an instrument of oppression to perpetuate apartheid and grant adequate compensations to all victims.”¹

The provision of amnesty, including for torture, within the mandate of South Africa’s Truth and Reconciliation Commission (TRC), was justified on the grounds that the building of a new democratic order was a very difficult task and that this could not be achieved without a firm and generous commitment to reconciliation and national unity, which included a conditional amnesty.² Those who did not apply for amnesty, or were denied amnesty by the TRC were to be prosecuted. However, after a few limited attempts at prosecutions for apartheid era crimes, the National Prosecuting Authority in

¹ CAT/C/ZAF/CO/1

² Paragraph 2, *Azanian Peoples Organisation and Others v President of the Republic of South Africa 1996 (4) SA 671 (CC)*

February 2006³, introduced amendments to its prosecution policy that creates a special dispensation for crimes committed prior to 11 May 1994. The amended policy authorizes the National Director of Public Prosecutions (NDPP) to take a decision not to prosecute on the basis of a full disclosure by a perpetrator of an offence committed prior to 11 May 1994 with a political objective. The policy requires the NDPP to exercise his prosecutorial discretion in a way which would amount to a rerun of the truth for amnesty procedure under the former TRC. The policy purports to confer powers, formerly exercised by the TRC's Amnesty Committee, upon the NDPP. It amounts to an improper attempt to perpetuate the TRC's legal regime in order to allow those who chose not to participate in the TRC a second bite at the amnesty cherry. No law will authorize the extension of such powers. It does so rather under the guise of prosecutorial discretion. In so doing the policy interferes with the independent exercise of the NDPP's discretion as to whether or not to prosecute. The policy is both unconstitutional and a violation of South Africa's obligations under international law, including the ICCPR and the UNCAT, and is currently being challenged in the High Court in South Africa. The first case referring to these amended guidelines saw the former Minister of Law and Order, Mr Adriaan Vlok and others receiving a suspended sentence of between 5 and 10 years for attempted murder⁴. Thus, while the Constitutional Court in the matter of *S v Basson*⁵ has emphasized that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid, their continues to be attempts at forms of amnesty, pardons, rather than full investigations, prosecutions and accountability.

2. Torture

a. Criminalisation of Torture and Monitoring Places of Detention

South Africa has ratified important international conventions prohibiting torture and protecting human rights.⁶ In particular, South Africa ratified that United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) on December 10, 1998, and recognised the competence of the UN Committee against Torture (established under Article 17(1) of the CAT). However, as yet the government has not passed legislation to criminalise torture. The Committee Against Torture (CAT) identified this as particularly disconcerting in its findings and recommendations issued after the November 2006 session⁷. CSVR is concerned that the lack of a crime of torture as well as a definition of torture has removed this issue from public and official discourse. We believe that it is crucial for the South African government to re-introduce the public engagement on a revised bill on the Criminalisation of Torture. As yet there is no indication of this being put before Parliament.

South Africa signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OPCAT) on September 20, 2006. CSVR is also concerned that the government, as with the UNCAT, may not ratify or implement the protocol for a lengthy period of time. While South Africa has created institutions to monitor certain places of detention (in particular the Independent Complaints Directorate for police cells; and the Judicial Inspectorate of Prisons for prisons) there needs to be some consolidation between these institutions, in particular on the issues of definition, as well as standard setting and monitoring and reporting procedures. The monitoring of other places of detention remains a concern – in particular, refugee detention centres, and military and intelligence detention facilities. CSVR has undertaken research to make recommendations on a

³ Only 3 cases were taken forward between 2002 and 2003, before prosecutions were put on hold in 2004 pending amendments to the prosecution guidelines. At the time it was estimated that at least 21 cases were worthy of prosecution considering evidence, etc. Only one has been taken forward (see the Vlok finding in the text).

⁴ *The State vs Johannes Velde Van Der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smit, Gert Jacobus Louis Hosea Otto and Hermanus Johannes van Staden (PHC)*

⁵ 2005 (1) SA 171 (CC)

⁶ The International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR, the Second Optional Protocol to the ICCPR, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Optional Protocol to the CEDAW, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Rome Statute of the International Criminal Court, the Convention Relating the Status of Refugees, the Protocol relating to the Status of Refugees, the Convention on the Elimination of All Forms of Racial Discrimination (CERD). South Africa has also signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Optional Protocol to the CRC on children in armed conflict.

⁷ CAT/C/ZAF/CO/1

possible National Preventive Mechanism for South Africa in order to advance the prevention of torture.⁸

b. The South African Police Services and Criminal Justice Response to Torture

Allegations of torture and other assaults have continued to be reported by the Independent Complaints Directorate (see Table 1), suggesting that there continues to be a systemic problem of torture being used for the purposes of interrogation, and that steps taken in implementing the prevention of torture policy fall short of the type of measures necessary to ensure that torture is prohibited.

Table 1: ICD national figures non-fatal police violence 1997-2004⁹

	'97-'98	'98- 99	'99-'00	'00- '01	'01-'02	'02-'03	'03-'04
Category							
Torture	68	61	28	27	37	22	26
Assault GBH & attempted murder	157	311	500	344	298	390	592
Assault	67	69	143	102	81	64	127
Total	292	441	671	473	416	476	745

The SAPS Policy on the Prevention of Torture provides for prompt steps to be taken to ensure that complaints of torture are properly investigated. The Independent Complaints Directorate (ICD) has a legal mandate to investigate offences allegedly committed by any member of the SAPS or municipal police agency. However, obstacles to the effectiveness of these mechanisms in relation to their impact in ensuring that instances of torture are properly investigated and in preventing torture, include:

- SAPS does not record data on reports of torture or on investigative or other steps which have been taken in relation to allegations of torture.
- While the ICD is obliged by law to investigate deaths in police custody and as a result of police action, cases of torture are not given particular priority and the ICD has not given any specific priority to ensuring its effectiveness in investigating such cases. ICD investigations are also not of a consistently high quality, even in high priority cases where the organisation does reach the point of taking specific investigative steps. Instances of lack of cooperation by the SAPS with ICD investigations have been reported.
- Prosecutors allocated to prosecuting cases of torture are also not necessarily of senior rank or properly experienced.
- The cumulative effect of the weaknesses on the part of the SAPS, ICD and the prosecution service is that torture cases have little chance of succeeding except in exceptional circumstances.

3. The Treatment of Refugees and other Foreign Nationals

While the Refugees Act of 1998 (Act 30 of 1998) was a significant achievement, in that it separated out refugees and asylum seekers from other categories of migrants, and provided for non-refoulement, there are a few issues which should be brought to the attention of the Committee in relation to the implementation of the Act:

- While the Act provides for the completion of an application for asylum of 180-days, in practice the Department of Home Affairs, which is tasked with this responsibility currently has a backlog of just over 110,000 applications that are in its system. The latest backlog initiative was undertaken between June and October 2007. People wait on average 3-4 years to have their refugee status determined. While waiting for their applications to be decided, such asylum seekers are also harassed by police, who do not understand South Africa's refugee

⁸ A copy of this report can be made available upon request.

⁹ Note that no figures for non-fatal assaults were provided in the ICD annual report of 2004-2005. In addition, no statistics on torture which leads to death is presented.

legislation, and are often inappropriately detained. Within this context, an asylum seeker who has been tortured is not regarded in a special category. Zimbabwe refugees have borne the brunt of ill-informed officials, and government policy which did not identify Zimbabwe asylum seekers until 2004.

- Training on the rights of refugees and asylum seekers within various government is lacking, and refugees and asylum seekers continue to be victims of xenophobic attitudes.¹⁰
- The CAT, in November 2006, noted its concern regarding the extradition of individuals, contrary to the non-refoulement obligations. The government has still not provided information on the known cases of extradition.
- In addition, the Lindela Holding facility, where foreigners are held pending their deportation, is also over-crowded, with between 200-250 people being admitted daily. Two recent reports indicate that the state of this facility may not be up to standard – the UN Working Group on Arbitrary Detention’s report on South Africa in 2005, as well as an October 2005 Ministerial Committee of Inquiry Into Recent Deaths at the Lindela Holding Facility. In the latter it was noted that the problem of over-crowding at the facility needed to be addressed as well as the need to improve the provision of medical care to detainees

4. The State response to Gender-based violence

a. Implementation (or lack thereof) of the Domestic Violence Act 116 of 1998 and the role of the South African Police Service

The government of South Africa has taken cognisance of the high levels of gender-based violence and violence against children in the country. Indeed, as recently as November 2006, the Deputy Minister of Social Development Dr Benjamin, stated that: *“South Africa has one of the highest per capita rates of reported rapes in the world. This is despite the fact that most of rape cases are not reported...What is more disturbing is that more than 51% of all cases fell into the category of sexual abuse. More than 69% of the victims were female. The results of the large-scale community based prevalence study that was conducted in three provinces also showed that at least 25% of women have experienced abuse in their lifetime.”*¹¹

South Africa is signatory to a number of international instruments relevant to the gender-based violence field. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1985 is one of them. Furthermore, the Bill of Rights in the Constitution of South Africa (1996) provides in section 12 that: *“Everyone has the right to freedom and security of the person, which includes the right... to be free from all forms of violence from either public or private sources.”* The main piece of legislation passed by the South African government to address the domestic violence issue is the Domestic Violence Act 116 of 1998 (hereinafter, the Act). The purpose of the Act is to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.¹²

The Domestic Violence Act (DVA) imposes positive duties on the South African Police Service, and specific guidelines to facilitate the effective implementation of the actions to be performed by police were required. To this end, the National Instruction on Domestic Violence 7/1999 was issued a year after the Act had been passed. In terms of the Instruction 7/1999, domestic violence incidents which are reported to a police station must be recorded in the Domestic Violence Register (SAPS 508(b)) and it is the responsibility of the station commissioner to ensure that an accurate record is kept. However, this instruction has not been implemented. The SAPS argues that there is no such crime as domestic violence and that incidents of such nature are included among figures relating to assault, rape, attempted murder, pointing of firearm, etc.¹³ According to the Independent Complaints

¹⁰ See, CSVR research, Higson-Smith, C.; Mulder, B. and Masitha, S. 2006. Human dignity has no nationality: A situational analysis of the health needs of exiled torture survivors living in Johannesburg, South Africa. Centre for the Study of Violence and Reconciliation: Johannesburg.

¹¹ Speech by the Deputy Minister of Social Development, Dr Jean Benjamin, during a ceremony to commemorate 16 Days of Activism in December, 2006, available at: http://www.polity.org.za/article.php?a_id=99246, accessed on 4 October 2007.

¹² Domestic Violence Act 116 of 1998, preamble, available at: http://www.acts.co.za/dom_viol/index.htm

¹³ South African Police Service, *Domestic Violence: A New Approach*, available at: http://www.saps.gov.za/docs_pubs/legislation/dom_violence/dom_violence.htm, accessed on 5 October 2007

Directorate (ICD) report on Domestic Violence to Parliament for the period January – June 2006: “ICD does DVA Station Audit in order to evaluate the compliance by the station in terms of keeping the regulated records...It is disappointing to find the same situation still prevails at a station even a few months have passed”.¹⁴

Furthermore, in terms of the South African Police Service Act 68 of 1995, the Independent Complaints Directorate (ICD) is empowered to investigate all cases of misconduct against the SAPS including the following offences and misconducts: where a member kills or causes the death of any person involved with him/her in a domestic relationship, such as a spouse; where a member commits an offence such as assault, rape, etc. against a person in a domestic relationship with a member, such as a spouse; where a member refuses to assist a victim of domestic abuse. According to the above mentioned ICD report for the period January – June 2006, a total of 46 cases of non-compliance by members of the SAPS were received. The report concludes that: *“It is clear that Senior Management in the SAPS does not take Non-Compliance seriously enough, this is clearly demonstrated by the lack of commitment to discipline their members accordingly or to institute corrective measures....The number of applications for exemption received remains minimal. SAPS are currently failing to apply for exemption at a rate of 0%. The extent of SAPS’s non compliance with the Domestic Violence Act is still atrocious”*.¹⁵ During the period 2006-2007 the situation worsened. Indeed, according to 2007 ICD report, the incidence of police officers shooting their life partners or killing other people while off duty increased by 84%, and 11% more people had died as a result of police action in 2006-2007.¹⁶

It is clear that the interest and dedication that police members have in domestic violence incidents is very low. Unless the offences committed amount to serious and violent crime, the South African Police Service has not proved its commitment and effectiveness in performing the positive duties imposed by the Domestic Violence Act and the National Instruction 7/1999. In a recent judgment, the East London High Court ruled that the police were negligent in failing to arrest a man who is currently serving a 21-year sentence for rape, violation of a protection order and attempting to throttle his wife. Relating her ordeal, the woman told how she had pleaded with the police to arrest her former husband, but the police had refused. After the police left, her former husband – who is HIV-positive – raped her. The Judge in the case described the evidence of the police in the case as “deliberately deceitful” and ridden with “improbabilities and lies”.¹⁷ The attitudes of the lower echelons of the SAPS most probably mirror the mind-set of their National Police Commissioner Jackie Selebi who, in 2001, was quoted as saying that the Domestic Violence Act was “made for a country like Sweden, not South Africa” and was not practical or implementable”.¹⁸

b. Sexual Offences Bill

South Africa has one of the highest rape statistics in the world. 54,926 rape cases were reported to the South African Police Service in 2005/2006. However, a report by the South African Law Reform Commission (SALRC) found that in the year 2000, only 5% of adult rape cases and 9% of child rape cases reported to SAPS resulted in convictions. Respectively, 68% and 58% of cases reported to the police did not even make it to court. 15% and 18% of cases were withdrawn. Withdrawals included cases where the rape survivor was intimidated by the perpetrator, where the rape survivor was afraid of the possible reaction of unsupportive partners or parents; or because the police persuade the complainant to withdraw the charges where the evidence is weak. Progressive legislation does not guarantee the end to gender-based violence, but it is a step ahead. In this regard, an important piece of legislation is still languishing in the corridors of the National Assembly. The Criminal Law (Sexual Offences and Related Matters) Amendment Bill was passed by the National Assembly on 22 May 2007, but the hopes of the Bill finally becoming an Act in the year 2007 are fading, as it is now being revised at a very slow pace by the National Council of Provinces (NCOP). The Bill has been in the drafting for almost 10 years, denying victims of sexual violence access to justice and full exercise of their human rights.

¹⁴ Independent Complaints Directorate report year 2006, page 50. Available at: http://www.icd.gov.za/reports/2007/annual_rpt.pdf, visited on 18th November 2007.

¹⁵ Ibid.

¹⁶ “Killing by off duty police officers rocket”, Business Day, 3 October 2007.

¹⁷ “Cops left me to be raped. Police refused to enforce protection ruling”, The Star, 10 September 2007, available at: <http://www.security.co.za/fullStory.asp?NewsId=4509>, accessed on 10 October 2007.

¹⁸ “Well-meaning laws can’t be policed – Selebi”, The Star, 14 August 2001.