

Third Cycle of the Universal Periodic Review

South Africa

Submission to the UN Human Rights Council

Submission by the Dullah Omar Institute

1. Introduction

The Dullah Omar Institute for Constitutional Law, Governance and Human Rights is a research and advocacy unit of the University of the Western Cape (South Africa). It was founded in 1990 by Adv. Dullah Omar, who was later appointed by President Mandela as the first Minister of Justice in a democratic South Africa. It conducts research, advocacy and teaching in children's rights, socio-economic rights, criminal justice, women's rights and multilevel governance. We are thankful for the opportunity to make the submission outlined below.

2. Adoption of legislation criminalising torture

Recs 124.20, 124.54, 124.55, 124.57 and 124.56

Legislative framework and awareness raising

2.1 The Prevention and Combating of Torture of Persons Act (the Torture Act) was adopted in 2013¹ and we congratulate the government on this momentous step in the journey to ensure better compliance with human rights standards by state officials. The legislation contains a definition of torture that goes further than the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. However, we regret that the Torture Act does not contain any meaningful provisions that would allow victims of torture to seek redress other than through prohibitively expensive civil proceedings. Also, the legislation does not contain any reference to cruel, inhuman or degrading

treatment or punishment (CID), despite South Africa committing during its 2012 UPR review to criminalise CID as well.

2.2 The South African Police Service (SAPS) has adopted its *Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service* in 1999, which will hopefully be updated soon to be in line with the 2013 legislation. It is unclear to what extent police officials have been trained on this Policy.

2.3 The Department of Correctional Services (DCS) has trained approximately 15% of its staff on the prevention of torture and the use of force between 2014 and 2016.² However, judges, magistrates and prosecutors appear to be unaware of the new legislation. Considering the absence of effective prosecutions for the crime of torture despite the high number of complaints recorded annually (see below), there is a clear need for such capacity reinforcement.

Situation of de facto impunity in law enforcement

2.4 The two dedicated oversight mechanisms over law enforcement, namely the Independent Police Investigative Directorate (IPID) and the Judicial Inspectorate for Correctional Services (JICS),³ receive numerous complaints of acts of torture and assault annually,⁴ but their data shows that disciplinary and criminal convictions are rare.

2.5 Research shows that, out of all of IPID's recommendations to SAPS to take disciplinary action against its officials or to the National Prosecuting Authority (NPA) to bring charges against police officials, less than 20% result in disciplinary action or criminal convictions.⁵ Moreover, sanctions are shockingly light. During the 2014/15 financial year, four police officials were disciplined for acts of torture and in all four cases, the sanction imposed was a written warning. Similarly light sentences are usually imposed by the judiciary following guilty findings of assault, assault to do grievous bodily harm or murder.⁶

2.6 In the prison setting, while the Independent Correctional Centre Visitors (JICS' lay visitors) records close to 500 000 complaints annually and approximately 4000 complaints of assault by prison officials on prisoners, JICS itself only investigates around ten such complaints of assault. The SAPS is supposed to lead criminal investigations in

prison but appears unwilling or unable to do so. Therefore, most complaints of assault are not addressed or investigated. Sporadically available information indicates that no prison official has been criminally sentenced for murder, torture or assault of a prisoner since 2009.⁷

2.7 The role of the NPA must also be underlined. It has the sole authority⁸ to prosecute suspected perpetrators of crime, but exercises discretion as to whether to prosecute or not.⁹ The extremely low number of prosecutions against law enforcement officials therefore relates more to an apparent unwillingness to prosecute state officials, or perhaps the deliberate protection of law enforcement officials against prosecution.

2.8 The data outlined above points to a culture of *de facto* impunity for acts of torture and other gross human rights violations committed by South Africa's law enforcement officials and their management structures. This can be addressed by reviewing the mandate of the dedicated oversight institutions, but also requires political will to effectively engage with the recommendations of said oversight institutions in order for the system to have legitimacy.

2.9 JICS is currently not financially and administratively independent from DCS. It receives its funding from the government department it is mandated to oversee, hampering its operational efficiency.¹⁰ Its CEO is appointed by and accountable to the National Commissioner and JICS staff is on the DCS staff establishment.¹¹ Research shows that JICS as an institution has probably been captured by DCS.¹² In addition, JICS staff has no investigative powers in law, despite conducting investigations. Finally, DCS has no obligation to act on JICS recommendations, and in practice their recommendations are by and large ignored.¹³

2.10 While IPID's mandate and powers are adequate in law to fulfil its mandate, its recommendations do not result in adequate sanctions (see above). This puts the legitimacy of the institution and the quality of its investigations in doubt. Importantly, the law providing that its Head is appointed by the President was recently declared unconstitutional as it compromises the independence IPID. Parliament must now amend the relevant legislation.¹⁴

2.11 Despite South Africa having signed the Optional Protocol to the Convention against Torture in 2006 and despite then Deputy Minister of Justice and Constitutional Development Andries Nel publicly committing in 2012 to ratifying it, ratification has yet to take place. Except for JICS, which has a regular visiting mechanism of prisons in place, no other independent institution at national level regularly visits places of detention.¹⁵ This includes police cells.¹⁶ However, the scarce information publicly available indicates that conditions of detention in police cells vary greatly, and whereas some cells are well maintained, sporadic visits of police cells by Members of Parliament indicate that some are in appalling condition.¹⁷

3. Practice of solitary confinement

The UN Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”) prohibit prolonged or indefinite solitary confinement.¹⁸ Although the South African legal framework no longer permits solitary confinement,¹⁹ segregation’ has actually become a disguised form of solitary confinement. Not only is the law unclear as to the purpose of segregation,²⁰ it can also be extended beyond 30 days.²¹ Furthermore, the oversight mechanism over segregation has been weakened, from a mandatory review to a voluntary review mechanism, whereby prisoners have the possibility to appeal the measure to the Inspecting Judge.²² In practice, less than 2% of cases are referred for review.²³ We assume this is either because they cannot contact the Inspecting Judge or because they are unaware of the possibility.

4 Leadership on women’s rights

Ministry on women; resourcing and implementation of the normative framework

Recs 124.26, 124.49 and 124.59

4.1 The Ministry on Women, Children and Persons with Disabilities (DWCPD) was disbanded in 2014 and replaced by a Ministry of Women in the Presidency. The establishment of the Ministry responsible solely for political leadership on women’s rights was well received. It is therefore regrettable that it is mostly inactive, largely ineffective and has promoted negative and regressive positions on women’s roles.²⁴ A strong Ministry on

women has the potential to advance women's and gender rights and increase the commitment of state resources to these.

4.2 The Ministry on Women must be capacitated to provide decisive leadership to address the deeply entrenched patriarchy and consequent obdurate inequalities experienced by women in South Africa.

Women's Empowerment and Gender Equality Bill; normative framework for women's and gender rights

Rec 124.48

4.3 In 2014 the Women's Empowerment and Gender Equality Bill was withdrawn after CSOs called for its scrapping due to inadequate consultation and weak content.²⁵ Organisations argued that while claiming to address patriarchy; women's poverty; inequality of rural women; violations of the rights of women with disabilities; and broad gender discrimination, the Bill's provisions failed entirely to do so. Organisations argued that the more meaningful legislative investments would be a) on amended legislation to mandate resourcing and improve implementation of the raft of legislation and policy aimed at addressing gender discrimination, inequality and violence against women and b) addressing gaps in the framework regarding the recognition of Muslim marriages, addressing hate crimes, and the decriminalisation of adult sex work.

4.4 South Africa should pursue legislative measures to address gaps in the normative framework for women's rights and gender equality, including specific amendments to progressively tackle the barriers to the current laws having the intended effect on women's lives.

5 Gender-Based Violence

Recs 124.60 – 124.74

We endorse the submissions of the Shukumisa Campaign on Gender-Based Violence and add the following points:

5.1 The South African Government has not adequately invested in evidence-based prevention programmes to address the high rates of gender-based violence and should do so as a priority. These typically require a focus on early life interventions at individual, family and community levels.

5.2 Police statistics indicate that 51895 sexual offences were recorded in the previous financial year.²⁶ However, it is estimated that as few as ten per cent of women report sexual offences to the police. Further, not all cases reported are recorded, possibly due to national pressure to reduce this number, exacerbated by discriminatory beliefs among police officials. Case attrition through the criminal justice system results in an approximate conviction rate of seven per cent of the cases that are reported.²⁷

5.3 Disinvestment in specialised services for gender-based violence (GBV) has had a serious negative impact. Recent steps taken to legislate for Sexual Offences Courts and increase coverage of Thuthuzela Care Centres are bedevilled by the failure to commit state resources to their implementation. Similarly the police Family Violence, Child Protection and Sexual Offences Units suffered a serious blow when they were disbanded and subsequently re-instated. At this time the majority of these exist in name only.

5.4 South Africa should commit to a legislative framework, including the allocation of public funds, for specialised services for investigation, prosecution, health services, and psycho-social support in GBV matters. Quality training programmes for criminal justice personnel must be linked to a dedicated programme to improve the quality of management of these matters, training front-line staff alone will not have the necessary impacts.

6 Ratification of the Optional Protocol to the ICESCR

Recs 124.1 - 124.9

We commend the South African government for ratifying the ICESCR in January of 2015. However, government has not yet ratified the Optional Protocol. The OP-ICESCR was

concluded in December 2008 and entered into force on 5 May 2013 to facilitate individual communications before the Committee on CESCRC with a view to strengthening accountability mechanism towards the realisation of socioeconomic rights. It also provides for an inquiry and inter-state complaints procedures. So far the OP-ICESCR has been ratified by approximately 15 countries, including three African countries, namely Niger, Cape Verde and Gabon. It has been signed by another 45 countries. Given its importance to the realisation of socioeconomic rights and poverty reduction, South Africa should ratify the OP-ICESCR as soon as possible. This will demonstrate the government's commitment to advancing socioeconomic rights of disadvantaged groups nationally and internationally.

7 Infant and maternal mortality

Recs 124.124, 124.126, 124.127, 124. 132, 124.137 and 124.141

7.1 At the last review, the government of South Africa was called upon to address the high rates of infant and maternal mortality. South Africa has committed under international and regional law as well as its Constitution to guarantee the rights to the highest attainable standard of health for everyone, including women and children.²⁸ This requires the government to take appropriate measures to prevent infant and maternal mortality. Since the last review, South Africa has made considerable efforts in reducing infant and maternal mortality rates in the country. Despite these efforts, infant and maternal mortality rates remain alarmingly high and South Africa is one of the countries that failed to meet MDGs 4 and 5 -to reduce under-five deaths by two-thirds and reduce maternal mortality by 75% from the 1990 rates respectively. These targets have been incorporated into the Sustainable Development Goals (SDGs). While infant mortality rates reduced from 77.2 deaths per 1 000 live births in 2002 to 45.1 deaths per 1 000 live births deaths in 2015 and deaths of infants under one year of age declined from 51.2 deaths per 1 000 live births in 2002 to 34. 4 deaths per 1 000 live births in 2015, these reductions fell short of the targets to reduce under five deaths to 20 per 1000 live births and 18 per 1000 live births under the MDGs.²⁹

7.2 South Africa's maternal mortality ratio has increased from 108 deaths per 100, 00 live births in 1990 to 138 deaths per 100, 000 live births in 2015.³⁰ Indeed, the country is classified as having made no progress to reduce maternal mortality as envisaged by the MDGs. Aside from the scientific causes of maternal deaths, lack of political will to properly implement laws, policies and programmes on maternal health, lack of skilled health care personnel and negative attitudes of health care providers tend to aggravate maternal deaths in the country.³¹ Failure by a state to prevent maternal deaths constitutes a gross violation of women's rights to health, dignity, non-discrimination and life.³² Therefore, South Africa must redouble its efforts in addressing maternal deaths in the country if it is to meet the target of 70 deaths per 1000, 000 live births by 2030 under SDGs 3.

8 Birth Registration

Recs 124.150 - 151

8.1 During its last UPR, the Government of South Africa was recommended to “[c]arry out the necessary measures to eliminate the barriers that impede the birth registration of all persons born in South African territory, including migrants and refugees” as well as to “[e]nsure that all children are issued with a birth certificate in order to access various social services, with particular focus on children of migrants”.

8.2 Since then, there have been efforts by the Government to address the gaps in birth registration in the country. These efforts include legislative as well as administrative reforms. In 2010, the Births and Deaths Registration Act 51 of 1992 was amended. Regulations on the Registration of Births and Deaths (2014) was also adopted.³³ Both the Amendment Act and final Regulations came into force in March 2014. The Department of Home Affairs (DHA) remains the Government body with responsibility to provide birth certificates.

8.3 Among others, through the amendment and the regulations, stringent measures as well as penalties for late registration were introduced. By definition, late registration of birth

is “a notice of birth given after the expiry of the period of 30 days contemplated in section 9(3A) of the Act”³⁴ and attracts three categories of fines namely 31 days up to 1 year; 1 year up to seven years; and 7 years and above.

8.4 In this respect, a number of concerns have been raised. For instance,

... the amendments introduced stricter requirements of proof and stricter verification procedures for birth registrations after 30 days; stricter rules around birth registration by grandparents and other family members caring for children; paternity tests for unmarried fathers at their own cost even if they had the consent of the mother confirming them as the father; and a new requirement that non-South African citizens wishing to obtain a birth certificate for their child must first provide a copy of their passport and proof of their lawful residence in South Africa.³⁵

8.5 These rules have a potential negative impact on those very group of children who are in particular facing challenges related to birth registration such as children whose caregivers do not have identity documents; children in rural areas; children born in South Africa to foreign nationals; orphaned and abandoned children; as well as children living in the care of grandparents and other extended family members.

8.6 Recommendations could include

- amend the law to remove the penalties and proof of payment for late registration,
- amend the law to remove one of the joint requirements that foreign national parents produce both proof of lawful residence in South Africa and a copy of their passports;
- remove the administrative burden associated with late registration of births so that disadvantaged members of society are not unfairly punished;
- regularly monitor and ensure that measures adopted by legislation, and regulations effectively facilitate birth registration of all children, including non-nationals, and do not have any discriminatory impact;

- ensure that DHA officials are well trained on the law; and
- provide awareness raising on the procedures and supporting documents required for accessing birth certificates.

¹ Act 13 of 2013

² It has trained 5689 staff over this period, mostly senior management. See E Coetzee, “Training is part solution to preventing torture in centres”, *Corrections @ Work*, Winter 2016, p. 12; DCS Annual Report 2014/15, p. 78.

³ IPID investigates serious crimes allegedly committed by police officials, and JICS is mandated to inspect and report on the treatment of prisoners with a view to resolve complaints. JICS conducts some investigations of crimes in prison, including torture by officials, without having any investigative powers in law. SAPS remains the institution in charge of investigating crime taking place within the prison setting beyond internal disciplinary investigations conducted by DCS of its own officials.

⁴ We include data on both assaults and torture as the institution has alleged that the staff of both institutions does not always correctly categorise an incident as either torture or assault; furthermore, some victims have pointed to their inability to report an incident as torture (it was categorised as assault instead).

⁵ L. Muntingh, and G. Dereymaeker (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre, p. 45; IPID Annual Report 2014/15 pp. 8, 66, 78 and 80.

⁶ IPID Annual Report 2014/15, pp. 78-95.

Furthermore, officials found guilty in a court of law of assault or assault to do grievous bodily harm during the 2014/15 financial year were usually fined (between R 300 (20 USD) and R 5000 (320 USD) or to a suspended prison sentence, with only one sentenced to an effective prison sentence, of 12 months (IPID Annual Report 2014/15 pp. 92-97).

Sample of outcome of criminal proceedings following a guilty verdict for murder as a result of police action: 7 years imprisonment; Fined R500 (approx. US\$ 30) or 6 months imprisonment; 12 years imprisonment suspended for 6 years; Fined R 5000 (approx. US\$ 350) or 1 year imprisonment and community service suspended for 2 years; 8 years imprisonment wholly suspended for 5 years; 5 years imprisonment.

⁷ The 2011/12 JICS Annual Report indicates that in all the homicide cases it finalized during that financial year, SAPS closed the files in the majority of those cases, and where matters were referred to the NPA for prosecution (by SAPS), the NPA returned a *nolle prosequi* i.e. they declined to prosecute. See JICS Annual report 2011/12 p. 53.

⁸ There is one exception in the sense that private prosecutions are possible, as enabled by section 7 of the Criminal procedure Act. This option is, as far as could be established, rarely used and has been met with little success. Moreover, a private prosecution can only be instituted once the prosecutor has issued a certificate of *nolle prosequi*.

⁹ There is, however, a duty to prosecute when there is a *prima facie* case and there is no compelling reason not to prosecute (See *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP); *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) *S v Lubaxa* 2001 (2) SACR 703 (SCA).). The low number of prosecutions calls into question how prosecutors are employing their discretionary powers. However, torture being punishable with life imprisonment, it automatically makes it a ‘priority crime’ in terms of the SAPS Act and schedules when the offences/s appear to be organised in nature. This leaves even less discretion to the NPA (see section 16 South African Police Services Act 68 of 1995).

¹⁰ In terms of section 88 of the Correctional Services Act 111 of 1998 the Department is responsible for the expenses of the Judicial Inspectorate; Judicial Inspectorate for Correctional Services Annual Reports: 2012/2013, 2013/2014, 2014/2015.

¹¹ Section 88A (2) and (4), Correctional Services Act 111 of 1998.

¹² Steven Wood ‘An Exploratory Study of Staff Capture at the South African Inspectorate of Prisons’ (2012) 36 *Int J Comp Appl Crim Justice* 45 at 45-59.

¹³ Judicial Inspectorate for Correctional Services Annual Reports: 2010/2011, 2011/2012, 2012/2013, 2013/2014, 2014/2015.

¹⁴ *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30 (6 September 2016)

¹⁵ At provincial level, the Western Cape Community Safety Act, 3 of 2013, provides for a regular visiting mechanism of police cells in the Western Cape: Western Cape Community Safety Act, 3 of 2013, s. 4.

¹⁶ Ballard, C. (2014) *Expert Report on the Independent Oversight of Police Stations*, Khayelitsha Commission of Inquiry.

¹⁷ Reports include that of filthy cells and blankets, dysfunctional ablution facilities, detainees being refused their HIV medication, to make phone calls, and not receiving food, or a lack of hourly monitoring visits by a police officer, posing serious risks for detainees. Portfolio Committee on Police, Report of the Portfolio Committee on Police on its oversight visit from 02-05 August 2011 and 10-12 August 2011 dated 28 October, 2011, <http://pmg-assets.s3-website-eu-west->

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- 1.amazonaws.com/doc/2012/comreports/111031pcpolicerreport.htm ; Portfolio Committee on Police, Report of the Portfolio Committee on Police, dated 16 August 2011, on its oversight visit from 25 -28 January 2011, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2011/comreports/110816pcpolicerreport.htm> ; 'Good, bad and ugly of SA's police stations' Mail and Guardian, 26 Nov 2007. <http://mg.co.za/article/2007-11-26-good-bad-and-ugly-of-sas-police-stations> Accessed 3 February 2016.; 'Conditions at police station a disgrace' IOL, 8 February 2000. <http://www.iol.co.za/news/south-africa/conditions-at-police-station-a-disgrace-1.27544> Accessed 3 February 2016.
- 18 UN Standard Minimum Rules for the Treatment of Prisoners, Rule 43.
- 19 Correctional Services Amendment Act (25 of 2008).
- 20 Correctional Services Act, s 30(1) Segregation is permissible under the following conditions: if a prisoner requests to be placed in segregation; to give effect to the penalty of the restriction of amenities; if prescribed by a medical practitioner; when a prisoner is a threat to himself or others; if recaptured after escape and there is reason to believe that he will attempt to escape again; and at the request of the police in the interests of justice. Therefore, segregation should not be used for punishment.
- 21 In the event of serious and repeated transgressions : s 24(5)(d) read with 24(5)(b and c) and s30(9) of the Correctional Services Act.
- 22 s 30(7).
- 23 Office of the Inspecting Judge (2010) p. 27. Office of the Inspecting Judge (2015) p. 93.
- 24 <http://www.dailymaverick.co.za/article/2014-11-13-analysis-whats-going-on-at-the-ministry-of-women/#.V-JH0hSVaol> and <http://mg.co.za/article/2016-06-30-00-what-department-of-women>
- 25 The numerous submissions made to parliament in this regard can be accessed at <https://pmg.org.za/committee-meeting/16819/>
- 26 South African Police Service. 2016. Crime Situation in South Africa April 2015 to March 2016. <http://www.statssa.gov.za/publications/P0341/P03412013.pdf>
- 27 Smythe D. 2015. *Rape Unresolved: Policing Sexual Offences in South Africa*. UCT Press.
- 28 Act 108 of 1996. These include section 27 on access to health care services; 28 on the right to health of children and 35 on the right to health of prisoners and those in detention.
- 29 Institute for Race Relations (IRR) *South Africa Survey* (Johannesburg: IRR, 2016)
- 30 WHO *et al Trends in maternal mortality: 1990 to 2015* (Geneva: WHO, 2016) 5
- 31 See for instance Human Rights Watch *Stop Making Excuses: Accountability for Maternal Health Care in South Africa*. (New York: Human Rights Watch; 2011; see also. Amnesty International *Struggles for Maternal Health: Barriers to Antenatal Care in South Africa* (London: Amnesty 2015),
- 32 United Nations Human Rights Council Preventable maternal mortality and morbidity and human rights A/HRC/11/L.16/Rev 1, 16 June 2009
- 33 Regulations on the Registration of Births and Deaths Government Gazette 37373 Notice R128, 26 February 2014
- 34 Reg 1 of the Regulations on the Registration of Births and Deaths.
- 35 P Proudlock (ed) South Africa's progress in realising children's rights: A law review (2014), 11.