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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 2000

SOUTH AFRICA*

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Foreword

The Charter of the United Nations states that the purposes of the United Nations include respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Despite the fact that the whites-only Government was party to the Charter, the apartheid regime was introduced in 1948. This was contrary to the Charter and the Universal Declaration of Human Rights (1948). The apartheid regime's mission was to elevate colonial racism and racial discrimination to the central doctrine of all State policies in our country. Torture and other cruel, inhuman or degrading treatment or punishment were central to the implementation of racist policies and laws. These methods were used to suppress the quest by the oppressed black majority for a democratic South Africa.

The liberation movements were forced to go into exile as a result of the massive repression of the early 1960s. At the height of the struggle African women protested against the pass laws and were met with untold police brutality, which included torture, death and other forms of abuse. The savage response of the apartheid regime to the democratic demands culminated in the incarceration of our leaders, including former President Nelson Mandela. In 1963 the international community responded by declaring that racism and racial discrimination, especially apartheid, constituted a violation of fundamental human rights and a threat to international peace and security. To demonstrate the concern of the international community the United Nations adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

Contrary to the call of the international community to end apartheid and torture of oppressed African people, the apartheid regime's response was the passing of repressive legislation, which included the Terrorism Act of 1967, the old Internal Security Act of 1950, including the 1976 amendments, which allowed for the notorious 180 days of detention, and the Internal Security Act of 1982, which provided for indefinite detention without trial. The combination of these laws served as justification for many acts of repression and infringements of personal liberty in South Africa. The 1976 – 1980 periods are one of the epics of student struggle for democracy. This followed the Soweto massacre in 1976. Thousands of students escaped from the country to become freedom fighters, enabling the initiation and development of a new phase of armed struggle. The late 1980s' student resistance, campaigns by internal organisations such as the United Democratic Front (UDF), pressure exerted by liberation movements and campaigns by the international community forced the apartheid regime to unban the liberation movements and open a dialogue with our leaders that culminated in the adoption of the Interim Constitution, enabling South Africa's first ever non-racial democratic elections on 27 April 1994.

The Constitution of the Republic of South Africa Act, 1993 (Interim Constitution) provided for the establishment, *inter alia*, of the Truth and Reconciliation Commission with a mandate to hold hearings on atrocities committed in the past and to reconcile the nation. The Truth and Reconciliation Commission heard how those who fought for liberation were tortured and killed by the security forces of the former white minority government. Amnesty was and is still being granted to deserving applicants so as to break with our painful past and establish a new nation founded on the values of human dignity and equality enshrined in the Constitution of the Republic of South Africa Act, 1996.

The Constitution provides for the right to freedom and security of the person, which includes the right not to be tortured and not to be treated or punished in a cruel, inhuman or degrading way. This ushers in our newly founded democratic State, a new chapter to deal with torture and cruel, inhuman or degrading treatment or punishment in keeping with the principle that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is of universal application, and which South Africa ratified on 10 December 1998.

During 1996, 36 internal security laws which were inconsistent with the Constitution and which were remnants of the erstwhile TBVC States and the Republic before 1994, were repealed by our democratic Parliament by the Safety Matters Rationalisation Act, 1996 (Act 90 of 1996). The repealed Acts provided for detention without trial, and various administrative actions against persons, the media, demonstrations and organisations.

The security personnel of our new democratic government, namely, the police, prison warders and military officers are being trained on the promotion and protection of human rights, and in particular, the total elimination and prevention of torture of persons suspected of having committed crimes, including convicted persons. This remains a challenge given the level or lack of skills on the part of some personnel and the culture of torture orchestrated by the former white minority government.

The Constitution is our paramount legal framework aimed at ending torture, and other cruel, inhuman or degrading treatment or punishment used by the apartheid regime to oppress blacks; and allowing all the people of South Africa to resolve their differences through the ballot paper in the spirit of the rainbow nation.

His Excellency Mr Thabo M Mbeki
President of the Republic of South Africa

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Part I

Introduction

Historical background

The period: 1652

1. South Africa's recorded political history begins in the 17th century with the establishment of a Dutch settlement. The history of colonial occupation is a history of conquest, accompanied by gross violations of human rights. Dutch and British colonial powers governed South Africa in whole or in part, from 1652 to 1910. Torture was widely practised until it was abolished by the British in 1796.

2. The Dutch East India Company was empowered in terms of its charter (Octrooi) to administer law and order in the areas under its control. Both in the British colonies and the two Boer Republics, the white governments established regimes of white power, wealth and privilege at the expense of the black people that were consigned to poverty and powerlessness.

3. The death penalty was a competent form of punishment from 1652 until 1994. "The death penalty was carried out, *inter alia*, by hanging, strangling (in the case of women), breaking on the wheel, burning and drowning. [I]n 1796 the Governor of the Cape was instructed to abolish 'breaking upon the wheel' and other barbarous modes of execution" (John Dugard, South African Criminal Law and Procedure, Vol. IV, 1977, at 19). More information on the death penalty follows below.

Torture and other cruel, inhuman and degrading treatment or punishment in the apartheid era

The period: 1948-1990

4. The formalisation of apartheid into a State ideology resulted in an intensification of racial discrimination and racism became fully institutionalised. Black people were subjected to cruel, inhuman and degrading treatment. The key features of apartheid in South Africa included the dispossession and segregation of black people, achieved mainly through the ***Group Areas Act of 1951,*** which subjected black people to forced removals and conditions of squalor in the so-called black townships. This Act was implemented from 1954. It demarcated the entire country into zones for exclusive occupation by designated racial groups. It resulted in the uprooting of (almost exclusively) black citizens from their homes and the destruction of communities like Sophiatown, District Six and Cato Manor. Immense suffering and huge losses of property and income were endured (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 31).

5. Other relevant laws included the ***Bantu Authorities Act of 1951,*** which institutionalised the system of indirect rule and created a separate body of law and administration for the African people. The ***Bantu Education Act of 1953*** placed the education of Africans under the direct supervision of the Minister of Native Affairs with the explicit purpose of ensuring that they received an inferior education. This Act transferred the control of African schools from the provinces to a central Bantu Education Department headed by Dr H Verwoerd. Verwoerd stated

that: “The school must equip the Bantu to meet the demands which the economic life will impose on him…What is the use of teaching a Bantu child mathematics when it cannot use it in practice? Education must train and teach people in accordance with their opportunities in life …?” (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 62).

6. The long-term consequences of the Bantu education system were, *inter alia*, a critical shortage of skills in the economic sector forty years later and the huge numbers of unemployed African people (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 32).

7. The ***Separate Amenities Act of 1953*** ensured separate inferior amenities for black people. The ***Abolition of Passes Act of 1953*** consolidated previous laws to curtail freedom of movement for black people and introduced reference books. The ***Job Reservation Act of 1956*** reserved a number of occupations for white people building on the previously established white labour policy. This package of segregationist laws included the ***Mixed Marriages Act of 1949*** and the ***Immorality Act of 1957,*** which were intended to reinforce the segregationist thrust of government policy by making illegal all sexual contact across the colour line. Trapped in the poorest parts of the countryside, the towns and the cities, black people were systematically denied even the most basic services. By statute, between 1951 and the late 1960s Africans were stripped of South African citizenship. Coloureds and Indians too were relegated to the status of second or third class citizens, with no rights other than those that the white minority would concede.

8. The struggle to achieve a non-racial democratic South Africa grew as a response in intensity. The struggle received extensive support from the international community, some of it provided directly by member States and some provided through United Nations channels. The apartheid regime countered the struggle for human rights and democracy with further and intensified human rights violations, which included various forms of State brutality and suppression. An event that shocked the entire international community was the massacre of unarmed demonstrators who had gathered to protest against pass laws in Sharpeville, near Johannesburg, in March 1960. This, together with the banning of the liberation movements, refusal to engage in negotiations, imprisonment of their leadership and other forms of brutality led to the adoption of the armed struggle by the liberation movements. The apartheid government’s response aimed at maintaining white domination, included the arrest and imprisonment of activists and the leaders of the struggle. Detention without trial became law. The torture of political detainees became standard procedure for the security police. Political activists were banished to live under harsh conditions or were given one-way passports to leave the country.

9. The racist government also began its campaign of underhanded methods which were later unveiled by the Truth and Reconciliation Commission process. These included “disappearances” of people, murders of detainees and a number of attacks on neighbouring States seen to be supporting the liberation movement. Botswana, Mozambique, Lesotho, Angola, Zambia and Zimbabwe all fell victim.

10. The South African judiciary played no meaningful role to protect human rights generally or the rights of black people in particular. The courts failed to apply human rights norms when confronted with various forms of racial discrimination that grossly violated the dignity of black people.

11. The period 1960 to 1990 saw the systematic and extensive use of detention without trial in South Africa. Such detention was frequently conducive to the commission of gross abuses of human rights. The Human Rights Committee estimated the number of detentions between 1960 and 1990 at approximately 80 000, of which about 10 000 were women and 15 000 children and youths under the age of 18 (Truth and Reconciliation Commission of South Africa Report; Vol. 2; page 187). Detention without trial represented the first line of defence of the security forces. It was only when this strategy began to fail that the killing of political opponents increased.

12. Evidence before the Truth and Reconciliation Commission (TRC) shows that torture was used systematically by the Security Branch, both as a means of obtaining information and of terrorising detainees and activists (information on the establishment of this Commission is provided under article 2 below). Torture was not confined to particular police stations, particular regions or particular individual police officers – although certain individuals' names came up repeatedly. Torture was used by the security police and by other elements of the security forces, including the Reaction Unit, the Municipal Police, the CID and, to some extent, by the military intelligence unit of the Defence Force (for more information on the TRC refer to The Truth and Reconciliation Commission of South Africa Report, volumes 1-4).

13. The TRC was guided in its work by the internationally accepted definition of torture as described in article 1 of CAT (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 78). The first allegations of torture of political detainees arose during the state of emergency declared on 24 March 1960. Ninety-eight Whites, thirty-six Coloureds, ninety Indians and eleven thousand two hundred and seventy nine Blacks were detained under the Public Safety Act of 1953. From statements received by the Commission, it appears as though detainees were routinely subjected to beating and other forms of assault (Truth and Reconciliation Commission of South Africa Report; Vol. 2; page 197).

14. "With the introduction of the 90-day detention clause provided for by the General Laws Amendment Act of 1963 torture became far more prevalent. Section 17 authorised any commissioned officer to detain without a warrant any person suspected of political activities and to hold them in solitary confinement, without access to a lawyer, for 90 days. In practice, people were often released after 90 days only to be re-detained on the same day for a further 90-day period." (Truth and Reconciliation Commission of South Africa Report: Vol. 2; page 197). The Commission was told of a number of cases where the victim died while detained under security legislation.

15. Under the state of emergency, section 29 detentions focused on individuals suspected of underground military activities. These detainees suffered extensive physical and psychological abuse, mainly at the hands of the Western Cape Security Branch (Truth and Reconciliation Commission of South Africa Report; Vol. 3; page 441).

16. "Many section 29 detainees suffered serious psychological torture. They were almost without exception kept in solitary confinement for six months or longer. It was not unusual for section 29 detention to be extended into a second 180-day period. Several attempted-suicide survivors and others were admitted to hospital suffering from acute anxiety or depression. A further form of psychological torture was the threatened or actual detention of family members" (Truth and Reconciliation Commission of South Africa Report; Vol. 3; page 443).

17. The security police suggested that detainees had received instructions from the ANC to commit suicide rather than talk. Some claimed that the detainees committed suicide in order to malign the Security Branch.

18. Beating was the most commonly used form of torture. A range of other techniques was regularly used. Suffocation as a form of torture increased significantly from 1975 to the end of the Commission's mandate period, when it became the third most common form of torture. Cases of sexual torture included forcing detainees (both male and female) to undress; the deliberate targeting of genitals or breasts during torture, the threat of and, in some instances, actual rape of detainees (male and female); the insertion of objects such as batons or pistols into bodily orifices and placing detainees overnight in cells with common law prisoners known to rape newcomers (Truth and Reconciliation Commission of South Africa Report; Vol. 3; page 446-447).

19. In one case reported to the TRC (Mpumelelo Rwarwa –CT00864) a group of youths was arrested, and assaulted and tortured both on arrest and at the Gugulethu police station. Torture included wet bag suffocation, electric shocks and beatings with gun butts (while being kept naked). Police also threatened to burn alive one detainee around whom they had placed a tyre and poured petrol. This security force raid resulted in the death of Rwarwa (Truth and Reconciliation Commission of South Africa Report; Vol. 3; page 441).

20. "The Commission (found) that the use of torture in the form of the infliction of severe physical and/or mental pain and suffering for the purposes of punishment, intimidation and the extracting of information and/or confessions, was practiced systematically particularly, but not exclusively, by the security branch of the South African Police throughout the Commission's mandate period." The Commission concluded that the South African government, as official practice, condoned the use of torture (Truth and Reconciliation Commission of South Africa Report; Vol. 2; page 220).

21. "The Commission (found) that torture, as practised by members of the South African Police, constituted a systematic pattern of abuse which entailed deliberate planning by senior members of the police, and was a gross human rights violation" (Truth and Reconciliation Commission of South Africa Report; Vol. 2; page 220).

22. "The Commission (found) that the following were directly accountable for the use of torture against the detainees and indirectly for all unnatural deaths of detainees in police custody: the Ministers of Police and of Law and Order, the Commissioners of Police; Officers commanding the Security Branch at national, divisional and local levels. The Cabinet (was) found to be indirectly responsible" (Truth and Reconciliation Commission of South Africa Report; Vol. 2; page 220).

New democratic government's response in dealing with torture, cruel, inhuman and degrading treatment or punishment

23. The **Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)** (the Interim Constitution), brought constitutional democracy to South Africa. It served as a basis for the entrenchment, promotion and protection of human rights, including the right to freedom and security of the person.

24. In respect of CAT some of the following provisions are of relevance:

Section 10 - Human dignity

Every person shall have the right to respect for and protection of his or her dignity.

Section 11 - Freedom and security of the person

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to cruel, inhuman and degrading treatment or punishment.

25. A very significant case, ***S v Makwanyane*** **1995 (3) SA 391 (CC)**, decided under the interim Constitution, was one dealing with the death penalty. The Constitutional Court, interpreting provisions of the Interim Constitution, abolished the death penalty. The Constitutional Court held that capital punishment violated the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The majority of the Court concluded that capital punishment constituted cruel, inhuman and degrading treatment or punishment on four primary grounds:

(a) The almost inherent arbitrariness in sentencing;

(b) The failure of the sentence to treat the guilty party as a human being worthy of respect;

(c) The irremediable nature of the punishment; and

(d) The cruelty that inevitably flows from the delays which convicted individuals face when awaiting execution and often the nature of the execution itself.

26. Also under the Interim Constitution, juvenile whippings were held to constitute cruel, inhuman or degrading treatment or punishment in ***S v Williams*** **1995 (3) SA 632 (CC)**. Section 35(1) of the Interim Constitution provided expressly that the rights entrenched in it, "including s 10 (which provides that '(e)very person shall have the right to respect for and protection of his or her dignity') and s 11(2) (which provides that no 'person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment'), shall be interpreted in accordance with the values which underlie an open and democratic society based on freedom and equality" (Headnote in *S v Williams* 1995 (3) SA at 633).

27. The Court emphasised the dehumanising nature of whippings:

"The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he

> **is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding... The whipping ... is, in itself, a severe affront to [his] dignity as [a] human being."**

28. The Court held that while there may be evidence to show that whipping had some deterrent effect on juvenile criminal behaviour, it was not sufficient to warrant the overriding of a constitutionally entrenched right. The Court also held that juvenile whipping was unjustifiable given that other creative sentencing options are available and that to continue such an outdated mode of punishment failed to comply with the Constitution's clear commitment to break with our violent past and move towards a more caring and humane society.

29. Parliament responded to the decision of the Constitutional Court in ***S v Williams*** by adopting the Abolition of Corporal Punishment Act (Act 33 of 1997). This Act repeals or amends all the remaining statutory provisions in terms of which corporal punishment may be imposed by a court of law or a court of traditional leaders. Parliament also adopted the Criminal Law Amendment Act (Act 105 of 1997), which makes provision for the setting aside of sentences of death. The Criminal Law Amendment Act makes provision for the setting aside of sentences of death in accordance with law and their substitution by lawful punishments. Refer also to the case of ***Christian Education South Africa v Minister of Education*** **2000 (4) SA 757 (CC)** (discussed below) which was decided under the Constitution.

30. The **Constitution of the Republic of South Africa (Act 108 of 1996)** was passed by the Constitutional Assembly on 8 May 1996. It was certified by the Constitutional Court on 11 October 1996 and came into operation on 4 February 1997. Section 2 of the Constitution states that **"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."**

31. The sections of the Constitution which are of relevance in regard to CAT are discussed below. Section 10 of the Constitution states that:

> **10 Human Dignity**
>
> **Everyone has inherent dignity and the right to have their dignity respected and protected.**

32. Section 12 of the Constitution provides for the right to freedom and security of the person and makes specific reference to the right not to be tortured in any way. Section 12 states as follows:

> **12 Freedom and Security of the Person**
>
> **12 (1) Everyone has the right to freedom and security of the person, which includes the right:**
>
> **(a) Not to be deprived of freedom arbitrarily or without just cause;**
>
> **(b) Not to be detained without trial;**

(c) To be free from all forms of violence from either public or private sources;

(d) Not to be tortured in any way; and

(e) Not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right:

(a) To make decisions concerning reproduction;

(b) To security in and control over their body; and

(c) Not to be subjected to medical and scientific experiments without their informed consent.

33. The Constitution further outlaws torture and other cruel and inhuman treatment even under a state of emergency. During a state of emergency certain rights may be limited. However, certain rights are regarded as non-derogable rights. In terms of section 12 rights, sections 12 (1) (d) and (e) and (2) (c) are non-derogable. Section 37 of the Constitution deals with states of emergency and the table of non-derogable rights.

34. Section 36 deals with the limitation of rights. It states:

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) The nature of the right;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In comparison to the Interim Constitution it is clear that the Constitution protects a person more when it comes to freedom and security of the person.

35. A case on corporal punishment (***S v Williams***), decided in terms of the Interim Constitution, was discussed above. The following case on the same issue was decided in terms of the Constitution. The appellant in ***Christian Education South Africa v Minister of Education*** **2000 (4) SA 757 (CC)** was granted leave to appeal from the court *a quo* to the Constitutional Court on grounds that the blanket prohibition contained in section 10 of the **South African Schools Act, 1996 (Act 84 of 1996)** infringed provisions relating to, *inter alia*, privacy, freedom of religion and education.

36. Section 10 states:

> **10 Prohibition of corporal punishment**
>
> **(1) No person may administer corporal punishment at a school to a learner.**
>
> **(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.**

37. The question in the case was whether Parliament, in prohibiting corporal punishment in schools, had violated rights of parents of children at independent schools who (in line with religious convictions) consented to the use of corporal punishment in the schools.

38. The respondent argued that "the appellant's claim to be entitled to special exemption to administer corporal punishment was inconsistent with the provisions relating to equality (s 9), human dignity (s 10), freedom and security of the person (s 12) and children (s 28) in the Constitution and that s 31(1) rights could not, in terms of the provisions of s 31(2), be exercised in a manner inconsistent with any provision of the Bill of Rights. The respondent further contended that the trend in democratic countries was to ban corporal punishment in schools and that South Africa's obligations as signatory to various conventions required the abolition of corporal punishment in schools, since it involved subjecting children to violence and degrading punishment" (From the headnote of the case). The Court held, *inter alia*, "that the respondent had established that the prohibition of corporal punishment was part and parcel of a national program to transform the education system and bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools was crucial for educational development as was a coherent and principled system of discipline. The State was further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. Furthermore, in every matter concerning a child, the child's best interests were of paramount importance. This principle was not excluded in cases where the religious rights of the parent were involved". It was further held that, "when all the factors were weighed together, the scales came down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption". The Constitutional Court dismissed the appeal.

Part II

Information of a general nature

General political structure

Historical background

39. South Africa was reborn as a constitutional democracy in 1994 after many centuries of colonialism and four decades of apartheid. The constitutional democracy founded upon the rule of law, the values of human dignity and the achievement of equality, followed the country's first non-racial democratic elections on 27 April 1994.

40. Black people, particularly African people, were excluded from political participation and enjoyment of human rights until 1994. Limited participation was allowed within the context of transitional arrangements which led to, and subsequently included, the Interim Constitution of 1993. The 1993 Interim Constitution, which framed the historic non-racial democratic elections of 1994, was also the basis for the Constituent Assembly that drafted the Constitution, which became operational on 4 February 1997.

Structure of Government

41. Constitutional democracy has replaced the racially exclusive system which allowed the previous racist regime to flagrantly violate human rights and the rule of law with impunity. The new arrangement is based on the separation of powers between the Executive, Legislature and the Judiciary. The Constitution also creates 9 provinces with significant, although limited, powers. The country is governed on the principle of co-operative governance, as provided for in the Constitution. Government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

42. The President is the Head of State and head of the national executive of Government known as the Cabinet. The President is elected by the National Assembly. The President has the powers entrusted to him in the Constitution and in legislation, including those necessary to perform the functions of Head of State and head of the national executive of Government.

43. The national executive negotiates and signs all international agreements. Treaties, negotiated and signed by the national executive, will only bind the Republic on the international level once they have been approved by resolution in both the National Assembly and the National Council of Provinces.

44. The legislative authority of the national sphere of government is vested in Parliament. The national legislative authority, as vested in Parliament, confers on the National Assembly the power to, *inter alia*, amend the Constitution and to pass legislation with regard to any matter. Parliament consists of the National Assembly and the National Council of Provinces. Parliamentary sittings are open and public.

45. According to Chapter 12 of the Constitution, the institution, status and role of traditional leadership according to customary law, are recognised, subject to the Constitution. The Constitution mandates the establishment of Houses of Traditional Leaders by means of either

provincial or national legislation. The Council of Traditional Leaders was established on 18 April 1997 according to legislation passed by Parliament. The Council advises the national government on the role of traditional leaders and on African customary law.

46. Provincial government is dealt with under Chapter 6 of the Constitution. Each of the nine provinces has its own legislature, elected in terms of proportional representation. The executive authority of a province is vested in the Premier of that province. The Premier exercises the executive authority, together with the other members of the Executive Council, by, *inter alia*, implementing provincial legislation in the province and developing and implementing provincial policy.

47. Local government is dealt with under Chapter 7 of the Constitution. The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. The objects of local government are, *inter alia*, to provide democratic and accountable government for local communities, to ensure provision of services to communities in a sustainable manner and to promote a safe and healthy environment.

48. South Africa is a multiparty democracy. The governing political party is the African National Congress (ANC), with the Democratic Party (DP) as the official opposition party. The Democratic Party merged with the New National Party (NNP) to form the Democratic Alliance (DA) under which name the merged parties contested the local government elections on 5 December 2000. Other political parties include the Inkatha Freedom Party (IFP), the United Democratic Movement (UDM), the African Christian Democratic Party (ACDP), the Pan Africanist Congress (PAC) and the Freedom Front (FF).

49. The judicial organs comprise the Constitutional Court, the Supreme Court of Appeal, High Courts, special superior courts, regional courts, magistrates' courts, labour courts, and the small claims court. The Constitutional Court is a new structure which was specifically created to protect constitutional democracy.

General legal framework within which human rights are protected

The Bill of Rights and the judicial system

50. Judicial authority for the protection of human rights in the Republic of South Africa is vested in the courts. The courts are independent, impartial and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. An order or decision pronounced by a court binds all persons to whom and organs of State to which it applies. No person or organ of State may interfere with the functioning of the courts.

51. The justiciable Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of democracy, human rights and the rule of law in South Africa. It enshrines the fundamental human rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom. The Constitution binds all legislative and executive bodies of the State at all levels of government and provides that the State must respect, protect, promote and fulfill the rights contained in the Bill of Rights.

52. Legislation of the national, provincial and local governments, as well as any form of delegated legislation must comply with the Constitution, including the Bill of Rights. If legislation is incompatible with the Constitution, a High Court, Supreme Court of Appeal or the Constitutional Court may do one of two things. It may directly apply the Bill of Rights to the legislation and strike down the legislation to the extent that it is incompatible, leaving the legislature, if necessary, to rewrite the legislation in a manner compatible with the Bill of Rights. Alternatively, if the legislation is reasonably capable of being re-interpreted in such a way as to remove the incompatibility with the Bill of Rights, that interpretation will be given to the legislation. In the case of incompatibility between a provision of the common law and the Bill of Rights the court will develop the common law so that it is in conformity with the Bill of Rights. The Constitutional Court is the highest court on all constitutional matters.

53. The judiciary in the higher courts is appointed openly by the President on the advice of an inclusive and independent Judicial Services Commission (JSC). The Commission is a creature of the Constitution and its composition is broadly representative of the South African society. The judiciary in the lower courts is appointed by the Minister for Justice and Constitutional Development on the advice of a Magistrates Commission, created by statute. The judiciary has fixed tenure and functions independently with regard to judicial matters. Measures are being implemented with a view to integrating the judiciary of the lower and higher courts.

54. Respect for the rule of law, by government, has been demonstrated on numerous occasions. One of these was when Mr Nelson Mandela, the first democratically elected South African President, was the first president in this country to be called by a court of law to account for his administrative action. The then President lawfully appeared before the court, and was subjected to cross examination about an administrative decision he had made regarding the administration of professional rugby.

State institutions supporting constitutional democracy

55. Our Constitution makes provision for the establishment of a number of institutions (Chapter 9 institutions) to support our constitutional democracy. These are the independent institutions that have the particular responsibility of cementing the fundamental values upon which our constitution and democratic State is founded. Among the institutions provided for are:

(a) South African Human Rights Commission;

(b) Commission for Gender Equality;

(c) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;

(d) The Public Protector.

South African Human Rights Commission (SAHRC)

56. The South African Human Rights Commission is an important instrument for promoting the recognition of the human dignity, the achievement of equality and the advancement of human rights and freedom. It came into operation in October 1995. One of the functions of the SAHRC

is to promote respect for human rights and a culture of human rights. The SAHRC also has the power to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated.

Commission for Gender Equality

57. The mandate of the Commission is to promote respect for gender equality and the protection, development and attainment of gender equality. The Commission has the power to monitor, investigate, research, educate, advise and report on issues concerning gender equality.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

58. Our Constitution seeks to elevate and advance the status of indigenous languages and culture, which has historically been diminished. The primary objectives of the Commission are to promote respect for the rights of cultural, religious and linguistic communities and to promote peace, friendship and tolerance among our nation's diverse communities.

Public Protector

59. The Public Protector plays an important role in safeguarding citizens against improper or prejudicial conduct by the State or public administration across the three spheres of government. It also has the power to take appropriate remedial action. These institutions would play an important monitoring and evaluation role in ensuring that our citizens are not subjected to general abuse of human rights, including, in particular, the right to be free from cruel and inhuman treatment.

60. Other independent constitutional and statutory institutions which have a positive bearing on the realisation of human rights include, *inter alia*:

(a) Commission on Employment Equity;

(b) South African Youth Commission.

Legal framework

61. The South African legal system derives from statutes read with secondary legislation, common law as found in the writings of jurists and court decisions and indigenous laws of the African communities (although this has either been neglected or distorted, particularly in the ***Black Administration Act, 1927 (Act 38 of 1927***).

62. Access to justice, and consequently enforcement of human rights, is difficult for many black people, because of the complexity of the legal system. Measures are under way to bridge the gap between people's life experiences and the legal system. Many intended interventions in this regard are articulated in **Justice Vision 2000**, a strategy released in 1997 by government, with the aim of setting out the vision and parameters for the transformation of the justice system. This followed and was aligned with, the **National Crime Prevention Strategy,** which looked at the transformation of the Criminal Justice System from a cross-sectoral perspective.

Status of international instruments, including the Convention

63. On ratification or ratification and subsequent enactment into law, a convention becomes binding on South Africa as part of international law. The current rules on the status of binding treaties are contained in section 231(4) of the Constitution:

> **"Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."**

64. Provisions of a Convention cannot be invoked before, or directly enforced by, the courts, other tribunals or administrative authorities. They have to be translated into South African laws or administrative regulations to be enforced by the authorities concerned ***(AZAPO and Others v President of the Republic of South Africa and Others*** **1996 (8) BCLR 1015 (CC)**.

65. However, section 39 of the Constitution strengthens the role of international law in the interpretive process, as it obliges courts to apply international law where it is applicable. By requiring a court to consider international law when interpreting the Bill of Rights, section 39(b) paves the way for South African courts to consult all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, including international conventions, whether general or in particular, establishing rules expressly recognised by States. Section 233 of the Constitution requires judges to strive to reconcile national law with international law standards without prejudice to the principle of the supremacy of the Constitution.

Remedies and rehabilitation programmes

66. Besides government, there are a number of non-governmental organisations (NGOs) that deal with the rehabilitation of victims of torture. The **Centre for the Study of Violence and Reconciliation** assists both South Africans and refugees who are victims of torture through sessions of counseling. Some of the people assisted are victims of violence of the apartheid era and victims of police violence. A similar NGO, the **Cape Trauma Centre**, also assists victims of torture, both South Africans and refugees, through counseling sessions. The **KZN Programme for Survivors of Violence** in KwaZulu-Natal not only focuses on counseling victims of political violence, but also assists other victims of torture and violence. Professional staff is employed to counsel victims. See information under article 14 for rehabilitation programmes of government departments.

Part III

Information relating to articles 2 to 16 of the Convention

Article 2 - Measures to prevent torture

Legislative

67. As stated in Part I above, torture is not as yet regarded as an offence under South African criminal law. South Africa has to still incorporate the crime of torture into its domestic law.

However, section 12 of the Constitution provides for the right to freedom and security of a person, including the right not to be tortured and to be free from all forms of violence. Acts of torture, cruel, inhuman and degrading punishment will not be tolerated. Furthermore, section 232 of the Constitution, 1996, provides that "**Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament**".

68. Any person, including a state official, who commits an act of torture may be charged with the common law offence of assault, assault with the intent to do grievous bodily harm, indecent assault or attempted murder. The jurisdiction of a Magistrate's Court is a sentence of three years imprisonment or a fine, the maximum of which is determined by the Minister and announced in the Government Gazette, or both. The Regional Court has a sentencing jurisdiction of 15 years imprisonment or a fine or both, and in the High Court the presiding Judge has an unlimited jurisdiction - (section 51 of the Criminal Law Amendment Act (Act 105 of 1997)). Insofar as legislative and judicial measures are taken to prevent torture from occurring, reference is also made to the information provided above.

69. In respect of superior orders, section 199 (6) of the Constitution provides:

> **"No member of any security force may obey a manifestly illegal order."**

70. The ***Promotion of National Unity and Reconciliation Act, (Act 34 of 1995)*** provides for the establishment of a Truth and Reconciliation Commission. It provides for:

> **"the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees;"**

71. As stated above, the Promotion of National Unity and Reconciliation Act provided for various mechanisms in dealing with gross violations of human rights emanating from conflicts of the past. 'Gross violations' are defined to include the killing, abduction, torture or severe ill treatment of any person. The Act, *inter alia*, establishes bodies and procedures for investigating gross violations of human rights; granting amnesty for those who committed gross violations of human rights; and making recommendations on reparations for the victims of gross violations of

human rights. A grant of amnesty in respect of a person who has committed an act of torture denies the victim the protection afforded by article 14(1). This will be further discussed under article 14.

72. The Promotion of National Unity and Reconciliation Act also creates three committees for the purpose of achieving the objectives of the Truth Commission. One of the committees is the Committee on Amnesty. This committee is empowered to grant amnesty in respect of any act, omission or offence associated with a political objective that was committed before 10 May 1994, provided that the applicant concerned had made a full disclosure of all the relevant facts.

Exceptional circumstances: justification of amnesty *vis-à-vis* torture

73. International law obliges States to prosecute those responsible for gross human rights violations. In ***Azanian Peoples Organisation and Others v President of the Republic of South Africa*** **1996 (4) SA 671 (CC*)*** it was contended that agents of the State, acting within the scope and in the course of their employment, unlawfully murdered and maimed activists during the anti-apartheid struggle. It was further contended that the applicants had a clear right to insist that such wrongdoers should properly be prosecuted and punished and that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims. It was also contended that the State should make good to such victims or dependants the serious losses for which they had suffered in consequence of the criminal and delictual acts of the employees of the State.

74. The court considered an argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) of the Promotion of National Unity and Reconciliation Act, which authorised amnesty for such offenders, constituted a breach of the requirements of the four Geneva Conventions of 1949 on the law of war, which required State Parties to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the provisions of the Conventions. The court held that international laws and the contents of international treaties to which South Africa might or might not be a party were relevant only in the interpretation of the Constitution itself. International Conventions and treaties do not become part of the municipal law of South Africa until or unless they are incorporated into the municipal law by legislative enactment. The Constitution provides that an Act of Parliament could override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. However, perpetrators of torture who choose not to appear before the TRC to give information on their involvement or those who do so but are not granted amnesty, are still to appear before the ordinary courts of the land for trial.

75. The court held that central to the justification of amnesty in respect of criminal prosecution of offences committed during the prescribed period, was the appreciation that the truth would not effectively be revealed by the wrongdoers if they had to be prosecuted for such acts. This Constitutional Court decision has met with either approval or disapproval among South African and other international law experts. The former group point to the national imperative for peace and reconciliation, while the latter group point to the need for judicial redress to the victims of torture and other gross violations of human rights.

Administrative and judicial measures

South African Police Service

76. The South African Police Service (the Police) developed a Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service (the Policy). It sets out a system of checks and balances to protect persons in the custody of the Police from acts of torture, cruel, inhuman or degrading treatment by members of the Police. To ensure the effective implementation of this Policy, a number of Standing Orders of the Police were redrafted to fit in with this Policy. These Standing Orders came into effect on 1 July 1999. Any contravention of, or failure to comply with, any Standing Order of the Police, constitutes misconduct. Such contravention or failure is regarded as serious misconduct and disciplinary proceedings have to be implemented in respect thereof. In addition to the fact that such contravention or failure will constitute misconduct, a member may also be guilty of a criminal offence, provided that his or her conduct also complies with the requirements of a criminal offence.

77. In view of the implementation of the Policy, all stations were issued with the necessary registers, including a Custody Register (SAPS14) and Notice of Rights in terms of the Constitution (SAPS 14(a)) to ensure the proper treatment of persons and to monitor police activities. In terms of the Policy as embodied in the Standing Orders, no member of the Police may torture any person, permit anyone else to do so or tolerate the torture of another by anyone. The same applies to an attempt to commit torture and to an act by any person that constitutes complicity or participation in torture. In the Standing Orders it is clearly evident that no exception, such as a state of war, or threat of war, state of emergency, internal political instability or any other public emergency will serve as justification of torture.

78. The commander is obliged to conduct a proper investigation and inform the complainant of his or her right to have the matter referred to the Independent Complaints Directorate (ICD) for investigation once an allegation of torture is brought to his or her attention. The ICD is an independent body established in terms of the South African Police Service Act, 1995 (Act 68 of 1995). It is responsible for investigating the alleged commission of offences or misconduct by members of the Service. The ICD is more fully discussed under article 12.

79. The Policy also deals with reports and complaints regarding acts of torture, steps to be taken in informing persons in custody of their rights, questioning of persons in custody and measures to prevent torture.

80. The Police Service started implementing human rights training in 1994 after the elections. The training manual was developed over a four-year period and launched in November 1999 by Mr S Tshwete, the then Minister for Safety and Security. The South African academic institutions, NGOs, the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross in Geneva, the human rights unit of the Commonwealth Secretariat in London, the Raoul Wallenberg Institute in Sweden and the Danish Centre for Human Rights assisted in developing the manual. After the training material was developed for a national human rights programme a group of approximately 600 police trainers

were trained to present three-day workshops to all functional police officials on station level. The aim was to have 90 000 police officials trained by the end of the year 2003. To expedite the training process, the Training Manual was translated into 7 official languages.

81. Although government has been proactive in putting an end to torture, incidents of abuse have been reported. In an incident that occurred in 1999, members of the Johannesburg Flying Squad Unit allegedly assaulted suspected car hijackers. Following this incident two police officers were charged and subsequently convicted of assault and assault with intent to commit grievous bodily harm. Another incident involved members of the Flying Squad Unit setting dogs loose on handcuffed suspects. Only one police officer was identified and is being charged with assault. The criminal trial was postponed until 27 November 2000. Thereafter, this matter had been before court on numerous occasions, including 14 December 2000, 1 January 2001, 15 October 2001 and 22 October 2001. On 28 November 2001, the court decided to dismiss the case against the accused on the basis that the State had failed to proceed with this case on all the preceding court appearances. The State could not proceed due to lack of cooperation from the witnesses. On 22 January 2002, the Director of Public Prosecutions (DPP) ratified the court's decision in writing by declining to prosecute the accused.

South African National Defence Force

82. The ***Defence Act, 1957 (Act 44 of 1957)***, the ***Military Discipline Supplementary Measures Act, 1999 (16 of 1999)*** and the Rules of Procedure to the Military Discipline Supplementary Measures Act 16 of 1999 deal with the jurisdiction and prosecution of military offences. Torture *per se* is not defined in these Acts, but ill treatment, assault and degrading treatment or punishment are covered by legislation. The legislation outlined here provides a legal process for the reporting, charging, trial process and punishment of offenders who commit torture. Any person, whether a civilian, or a member of the South African National Defence Force (SANDF) has numerous avenues available to him or her in the event that such person was subjected to torture or cruel punishment. A complainant may lodge formal charges before a criminal court, a military court, or alternatively lodge a private prosecution, and/or claim for damages in a civil action.

83. Where the complainant is a civilian, and is subjected to torture by a member of the SANDF, he or she may lay charges ranging from unlawful arrest, *crimen injuria*, kidnapping, assault or attempted murder, as well as take the matter further by means of instituting a civil action. The civilian courts would most likely have jurisdiction in this matter. As a general rule this type of incident, were it ever to happen, would most likely be investigated by the South African Police Service and processed by the public prosecutor. The SANDF is unlikely to have much involvement where serious offences are committed within the borders of the Republic.

84. Where an incident of torture or cruel treatment or punishment occurs outside the borders of the Republic, for example, if the accused is a member of the SANDF on operations (such as peacekeeping in terms of Chapter 6 of the UN Charter), then the jurisdiction of the matter would most likely fall within the realm of the military courts. This would depend ultimately on the Status of Forces Agreement and whether the SANDF has exclusive jurisdiction or not. However, in the event of a member of the SANDF being found accused of torture, there would be a number of charges that may be brought against the member in a military court. Section 56 of the Military Disciplinary Code (MDC) allows military prosecutors to bring criminal charges that are

not catered for in the Code (such as assault). This code and the relevant legislation are currently undergoing review and a new Military Disciplinary Act is envisaged for the near future. The new Act will fall in line with provisions of the Constitution.

85. Further to the provisions of the MDC, all SANDF members are required to swear to a code of conduct that clearly highlights the issues as outlined in the articles. All SANDF personnel are subjected to intensive training in Humanitarian Law and the Law of War. These courses address the illegalities, protection of civilians, respect for human rights and illegal orders. A manifestly illegal order is not a legal defence in the Republic.

86. All operational orders reinforce the requirements of upholding the respect of the rule of law. The SANDF is part of the Security Services. Section 199(5) of the Constitution provides:

> **"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."**

Prisons and prisoners

87. There are various measures adopted to prevent torture from occurring. With respect to prisoners/awaiting-trial prisoners, the Department of Correctional Services has adopted the principle of unit management in the design of all new prisons constructed after 1994 as one of the measures in preventing torture from occurring. The unit management approach refers to the design as well as the manner in which a prison functions. Unit management is designed to help attain:

(a) The establishment of a safe, controllable, humane environment, which minimises the detrimental effects of confinement; and

(b) The delivering of a wide variety of social, educational and vocational programmes designed to improve the interaction between staff and prisoners and to aid offenders to make a successful return to the community.

Overcrowding in prisons

88. According to available departmental (Correctional Services) statistics, by the end of January 2002, the level of overcrowding had reached approximately 67%, with a total prison population of 177,701 prisoners for a system with a carrying capacity of approximately 106 090. Awaiting-trial prisoners constitute approximately 32% of the total prison population.

89. In many of the large prison centres the overcrowding is very serious. Opposition politicians and human rights groups criticise the Department of Correctional Services for failing to provide prisoners with conditions of detention that are consistent with human dignity as contemplated in section 35(2) of the South African Bill of Rights. As a result of overcrowding, many awaiting-trial under aged children, referred to the Department by the Courts in terms of section 29 of the Correctional Services Act, 1959, are detained in overcrowded and unsanitary conditions with inadequate provision for their personal hygiene and security. Overcrowding

therefore remains the greatest challenge facing the South African Correctional System. It continues to threaten and undermine our efforts to comply with international norms and standards regarding safe custody and offender rehabilitation programmes.

Alleviating overcrowding

90. The problem of overcrowding in South African prisons cannot be effectively addressed by only obtaining more and more accommodation. Current growth in the prison population exceeds the increase in prison population at a rate of 1,37% prisoners per year against an increase in accommodation of 3,47% during 2002. Although increasing the available accommodation slows down the rate at which overcrowding grows, it cannot really have a positive impact. Construction of four new prisons will begin during 2003 and it is envisaged that they will be operational by the 2005/2006 financial year. The prisons are:

Province	Prison	Capacity
Gauteng	Leeuwkop Nigel	3 000 3 000
North west	Klerksdorp	3 000
Northern cape	Kimberley	3 000

91. To address this growing problem, the Justice Crime Prevention and Security Cluster departments are dealing with overcrowding in an integrated manner. An Overcrowding Task Team, consisting of the Departments of Correctional Services, Justice and Constitutional Development, Social Development, National Prosecuting Authority (NPA) and Treasury has been established to deal with both day-to-day operational issues relating to overcrowding, as well as long-term strategies in an effort to alleviate overcrowding. Some interdepartmental initiatives currently under consideration are:

(a) To bring the current placement policy of the Department of Correctional Services in line with the stipulations of the Correctional Services Act;

(b) To align information between the various departments in order to enable visibility of information on operational level to inform decisions on all levels of management;

(c) A system of practical steps supported by relevant statistical information to relieve overcrowding is to be set up. The system should be informative from management area level through provincial level up to national level and should be cross-cutting between all the relevant departments;

(d) The Department of Correctional Services, the NPA and the Department of Justice and Constitutional Development are to engage on working team level to exploit possibilities to enhance conversions of sentences into Community Corrections;

(e) Increased utilisation of section 15 of the Judicial Matters Amendment Act 62 of 2000 in order to release unsentenced persons on bail;

(f) The development of clear policy processes to facilitate the development of awaiting-trial detainee policy in relation to the rights of awaiting trial detainees, and the role of other Departments in this regard;

(g) Increased utilisation of section 62(f). Reconsideration of bail on an individual basis and possible referrals back to court to consider alternatives;

(h) The implementation of an Inmate Tracking System to improve awaiting-trial detainee court appearances;

(i) Greater use of alternatives to detention by courts with a specific focus on placement under Community Corrections;

(j) Wider utilisation of prosecutors and Clerks of Courts for admissions of guilt and payments of fines without court appearance;

(k) Improved co-ordination of processes to reduce the duration of detention of unsentenced persons.

Relationships between members and prisoners

92. The Department of Correctional Services developed a code of conduct, where members are expected to:

(a) Treat prisoners with the necessary dignity and respect;

(b) Acknowledge and adhere to the limitations placed on social and intimate relationships with prisoners in his/her care;

(c) Aim at developing prisoners to live law-abiding and productive lives on release from prison; and

(d) Follow acceptable directives and practices when dealing with prisoners.

93. Even though torture is not recognised as a crime under South African criminal law, the courts have considered torture as an aggravating circumstance. In ***State v Madikane and Others*** **1990 (1) SACR 377 (N)** the accused (all police officials) were convicted of culpable homicide and assault with the intent to do grievous bodily harm following the interrogation of suspects which led to the death of one of them. The accused used a telephone dynamo to apply electric shocks to the bodies of the two suspects. The deceased had been shocked for a far longer period due to the fact that he would not admit to the suspicions of his interrogators. This eventually led to his death. The Honourable Broome J, made the following remark (page 380):

> **"The application of electric shocks by accused Nos. 2 and 3 to the deceased at the Seaview shooting range amounted to a prolonged and deliberate torture and constituted a very serious assault on the deceased."**

94. With regard to sentencing the Honourable Judge stated (page 387-388):

> **"This brings me to the interests of the community at large…and here I cannot overemphasise that bullying or torture of a suspect in the circumstances as existed in this case is conduct which all civilised people find not only distasteful but absolutely repulsive…I have come to the conclusion that this is indeed a case which calls for a severe sentence."**

The accused were sentenced to direct imprisonment without the option of a fine, of which a portion was suspended.

Article 3 - *Refouler*

95. South Africa acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments. In so doing, South Africa has assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

96. The provisions relating to refugees are contained in, *inter alia*, the ***Refugees Act of 1998 (Act 130 of 1998)***. One of the purposes of this Act is to give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees. Section 3 relating to refugee status states:

> **"Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person:**
>
> **(a) Owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or**
>
> **(b) Owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or**
>
> **(c) Is a dependant of a person contemplated in paragraph (a) or (b)."**

97. The provisions relating to exclusion from refugee status, that is, section 4 of the Act, states:

> **"4(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she:**

(a) Has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) Has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) Has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) Enjoys the protection of any other country in which he or she has taken residence.

(2) For the purposes of subsection (1) (c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity."

98. The **Immigration Act, 2002** ***(Act 13 of 2002)*** provides for the regulation of the admission into and sojourn of foreigners in the Republic as well as for their departure. Section 34 of the Act deals with the arrest, detention and deportation of illegal foreigners from the Republic. This section ensures that this takes place under the most humane conditions possible.

99. The ***Extradition Act, 1962 (Act 67 of 1962)***, as amended by Act 77 of 1996, serves as enabling legislation governing extradition in South Africa. The Act provides for three forms of extradition:

(a) Extradition in terms of an extradition treaty between South Africa and the foreign State;

(b) Extradition based on the consent of the President in respect of cases where there is no extradition treaty between South Africa and a requesting State;

(c) Extradition based on designation of a requesting State.

100. Persons can only be extradited if they have been convicted of an extraditable offence. An extraditable offence is an offence, which, under the law of the Republic and the foreign State, is punishable with a sentence of imprisonment or other form of deprivation of liberty of at least six months. The Act contains no prohibition on the extradition of South African nationals to a foreign State or on the extradition of the nationals of a third State from South Africa to another State. Any such limitation must therefore be sought in a treaty and may vary from an absolute prohibition to a discretion accorded to the State either to extradite the individual sought, or to punish him or her itself. In the event of a discretionary clause, South Africa has discretion to refuse to extradite its nationals, although it has never refused to do so.

101. The Minister for Justice and Constitutional Development has a discretion in terms of section 11 of the Extradition Act to refuse extradition where it is not required in good faith and it

is not in the interests of justice, or where, for any other reason, and having regard to all the circumstances of the case, extradition would be unjust or unreasonable or too severe a punishment. The possibility that a person might be tortured if extradited covers this type of case.

102. The Extradition Act provides a further category in terms of section 11 based on the potential violation of the extraditee's basic rights. The Minister has a discretion to refuse extradition where the Minister is satisfied that the extraditee will be prosecuted, punished or prejudiced at his or her trial in the foreign State because of gender, race, religion, nationality or political opinion. This provision of the Extradition Act would cover article 3(1).

103. The Extradition Act makes no mention of the death penalty as a ground for refusal of extradition. However, an exclusionary clause occurs in certain of the Republic's bilateral treaties. For example, in terms of article 5(1) of the Extradition Treaty between the Government of the Republic of South Africa and the Government of the United States of America, it is stated that "when the offence for which extradition is sought is punishable by death under the laws of the Requesting State, and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides assurances that the death penalty will not be imposed, or if imposed will not be carried out". South Africa should decline surrender of a person to a foreign jurisdiction where the death penalty is a competent form of punishment given the Constitutional Court's decision in ***S v Makwanyane*** (see article 1, above.)

104. The above was further confirmed *in* ***Mohamed and Another v President of the Republic of South Africa and Others*** **2001 (3) SA 893 (CC)**. The Constitutional Court dealt with extradition to States having in force the death penalty. Mr Mohamed, a Tanzanian, was on trial in New York on charges arising out of the bombing of the US embassy in Dar es Salaam. He was found living in Cape Town under an assumed identity and in possession of a false passport. The South African immigration authorities arrested him as an illegal immigrant. Mr Mohamed was handed over to the FBI for removal to the US, where he was informed that he was facing the death penalty. In handing over Mohamed the South African officials were said to have breached the law relating to deportation under the Aliens Control Act, 1991 (Act 96 of 1991), in particular Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment. The Constitutional Court found that South Africa could not expose a person to the risk of execution, whether by deportation or extradition and regardless of consent. Our Constitution does not preclude the government from deporting an undesirable alien, or require it to secure an assurance from the United States government that the death sentence would not be imposed on Mohamed if he were to be convicted. If, however, what happened was an extradition, it would have been unlawful because the correct procedures had not been followed. Moreover, if the removal had been effected by way of extradition, it might have been necessary to secure an assurance from the United States government as a condition of the extradition that the death sentence would not be imposed. The Constitutional Court mentioned that the European Courts drew no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. It further mentioned the Convention against Torture, of which South Africa is a signatory and which it ratified on 10 December 1998. Article 3(1) of CAT, in particular was mentioned. The Court stated that Article 3(1) made no distinction between expulsion, return or extradition of a person to another State to face an unacceptable form of punishment. All are prohibited, and the right of a State to

deport an illegal alien is subject to that prohibition. The Court concluded that the handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful.

105. In terms of section 10 of the Extradition Act, if a magistrate finds on the consideration of the evidence adduced, that a person is liable to be surrendered to the foreign State concerned, the magistrate shall commit such person to prison to await the Minister's decision with regard to his or her surrender. At the same time such person is informed that he or she may, within 15 days, appeal against such order to the High Court. Furthermore, in terms of section 13(3), any person who has lodged an appeal may, at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail.

106. South Africa has an Interdepartmental Committee on Extradition and Mutual Legal Assistance in Criminal Matters. This Committee is a mechanism whereby its members, which include the Police Service, National Prosecuting Authority, Interpol and Justice, discuss issues relating to negotiation of Extradition Treaties and Mutual Legal Assistance in Criminal Matters Treaties, including the handling of requests emanating from these Treaties. Therefore, members are able to obtain the necessary training in handling requests pertaining to extradition in the process. Some members of the Committee have obtained training on extradition from regional and international organisations such as the International Criminal Law Institute in Siracusa, Italy. This includes the determination that there is a likelihood that a person might be subjected to torture if he were expelled. South Africa has not received any formal extradition requests from States where persons were being sought to be extradited for offences of torture.

Article 4 - Torture as a criminal offence

107. Torture, as a criminal offence, is not specifically mentioned either under the common or statute law. The common law crime of assault is, however, defined as unlawfully and intentionally (a) applying force, directly or indirectly, to the person of another; or (b) inspiring a belief in another that force is immediately to be applied to him. The qualified forms of assault are assault with intent to do grievous bodily harm, assault with intent to commit another offence and indecent assault. "Ordinary" assault that does not fall into one of these categories is also known as common assault.

108. As already indicated above, legislation outlawing torture as a specific act distinct from other acts such as murder, culpable homicide, assault, *et cetera*, is yet to be passed by Parliament (it is noted that a Criminalisation of Torture Bill, 2003 has been prepared and will be finalised as soon as possible).

109. However, section 12 of the Constitution (discussed above) provides for the right of every person to freedom and security. This includes the right not to be tortured in any way, not to be treated or punished in a cruel, inhuman and degrading way and, *inter alia*, the right of a person not to be subjected to medical or scientific experiments without his/her informed consent.

110. Section 35 of the Constitution deals with the protection of arrested persons. In particular, section 35 (2)(e) states:

"Everyone who is detained, including every sentenced prisoner, has the right:

(a) …

(b) …

(c) …

(d) …

(e) To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; …

(f) …"

Article 5 - Jurisdiction

111. In terms of section 327 (1) of the ***Merchant Shipping Act, 1951 (Act 57 of 1951)***: if any person:

(a) Being a South African citizen, is charged with having committed an offence on board a South African ship on the high seas, or on board a South African ship in any port outside the Republic, or on board any ship (other than a South African ship) irrespective of whether he belongs to that ship or not; or

(b) Not being a South African citizen is charged with having committed an offence on board a South African ship on the high seas, and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within the said area, that court shall have jurisdiction to try the offence.

(2) If any South African citizen:

(a) Is charged with having committed an offence on board a South African ship during a voyage to a port in any treaty country (other than the Republic), or on board a South African ship in a port in any treaty country (other than the Republic); or

(b) Who is a seaman belonging to a South African ship which is in a port in any treaty country (other than the Republic), is charged with having committed an offence in that treaty country, and he is found within the area of jurisdiction of any court in that treaty country which, according to the laws in force in that treaty country, would have had jurisdiction to try the offence if the act or omission which under the laws in force in the Republic constitutes the offence were also punishable under the criminal law in force in that treaty country, and if the act had been committed or the omission had occurred on board a ship registered in that treaty

country, or within the said area, that court shall have jurisdiction to try the offence, provided the Minister has generally or in the particular case requested that the courts of that treaty country shall exercise such jurisdiction.

(3) The Minister may by notice in the Gazette declare that the provisions of sub-section (2) shall apply in respect of the courts of any foreign country mentioned in that notice as if that foreign country were a treaty country; and thereupon the said provisions shall apply in respect of the courts of that foreign country as if it were a treaty country.

(4) In this section the expression 'offence' means any act or omission which is punishable under the criminal law in force in the Republic.

112. In terms of the ***Aviation Act, (Act 74 of 1962)***, any offence committed on a South African aircraft is deemed to have been committed in any place where the accused happens to be, provided that if any such offence is committed within the Republic, the offence may be tried by any court having jurisdiction where the offence was committed.

113. Section 2 of the Defence Act and sections 3 and 5 of the Military Discipline Supplementary Measures Act give clear establishment of jurisdiction over members of the SANDF. Section 2 relates to proper administration of military justice and the maintenance of discipline to ensure fair military trials and to give the accused access to the High Court of South Africa. Section 3 relates to all SANDF members subject to the Code, that is, persons who can be charged and sentenced if found guilty by a military or civil court. Section 5 relates to all extraterritorial acts outside the Republic regarding any finding, sentence, penalty, fine or order pronounced or imposed to be valid as if pronounced or imposed in the Republic.

114. South Africa has signed the Rome Statute for the International Criminal Court (ICC) which, *inter alia*, outlaws torture and creates a universal jurisdiction to try it. South Africa has ratified the Rome Statute and will promote implementation legislation in the near future.

Article 6 - Criminal proceedings

115. All the legislation referred to above serve as a sound basis to deal with torture in the meantime. There are procedures in place to ensure that persons suspected of any offences (referred to under article 4) are held for the time necessary to initiate criminal or extradition proceedings. Investigations are conducted by members of the police service in criminal matters. After finalisation of the investigation the docket is forwarded to the Director of Public Prosecutions (DPP). The DPP has the authority to institute criminal proceedings in his/her area of jurisdiction against any person in respect of any offence in regard to which the particular court has jurisdiction.

116. Section 38 of the ***Criminal Procedure Act, 1977 (Act 51 of 1977)***, deals with methods of securing the attendance of the accused in court. This is by way of arrest, summons, written notice and indictments. The South African law of criminal procedure recognises the principle that the accused must be present at his trial (section 158 of the Criminal Procedure Act).

117. As arrest is a drastic method of securing an accused person's attendance in court, it is suggested that it ought to be confined to serious cases. The rights of arrested, detained and accused persons are protected in terms of section 35 of the Constitution. A summons is used to secure the attendance of an accused in cases where the State intends prosecuting him/her for a crime, but he/she is not in custody and the State does not require his/her arrest. Indictments are limited to superior courts. As these courts deal with serious crimes, accused persons who have to appear before them will usually be in custody or on bail. Indictments are therefore seldom used to secure the attendance of the accused in courts. A written notice to appear is a document used in cases of minor offences to secure the attendance of the accused person.

118. Section 35 of the Constitution details the rights of arrested, detained and accused persons. Such persons are protected through these various rights. Section 35 states:

Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right:

(a) To remain silent;

(b) To be informed promptly:

(i) Of the right to remain silent; and

(ii) Of the consequences of not remaining silent;

(c) Not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) To be brought before a court as soon as reasonably possible, but not later than:

(i) 48 hours after the arrest; or

(ii) The end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) At the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) To be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right:

(a) To be informed promptly of the reason for being detained;

(b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) To have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) To challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) To communicate with, and be visited by, that person's:

(i) Spouse or partner;

(ii) Next of kin;

(iii) Chosen religious counsellor; and

(iv) Chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right:

(a) To be informed of the charge with sufficient detail to answer it;

(b) To have adequate time and facilities to prepare a defence;

(c) To a public trial before an ordinary court;

(d) To have their trial begin and conclude without unreasonable delay;

(e) To be present when being tried;

(f) To choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) To have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) To be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) To adduce and challenge evidence;

(j) Not to be compelled to give self-incriminating evidence;

(k) To be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) Not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) Not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) To the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) Of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

119. In respect of extradition matters section 5 of the Extradition Act (see article 3, above) provides for the issuing of a warrant for the arrest of persons alleged to have committed an ‘offence’ in the Republic. Section 9 deals with persons detained under a warrant who shall be brought before a magistrate for the holding of an enquiry. Section 10 deals with the enquiry where an offence was committed in a foreign State. This section further provides that for the purpose of the magistrate satisfying himself that there is sufficient evidence to warrant a prosecution in a foreign State, the magistrate shall accept as conclusive proof a certificate which appears to him to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

120. South Africa does not have legislation dealing with assisting persons to communicate with a representative of the State in which he is a national, neither with notifying the State of the fact that such person is in custody, nor the circumstances which warrant his detention. However, these matters are regulated by article 36 of the 1963 Vienna Convention on Consular Relations, which South Africa has acceded to. Furthermore, South Africa has open channels of communication through the Ministry of Foreign Affairs, with foreign States regarding extradition matters. Therefore, assistance can be extended to persons who need to link with representatives of their States.

Article 7 - Criminal proceedings in respect of persons who commit torture-related offences and are not extradited

121. Information given under article 4 above is also relevant. However, as stated previously torture is not regarded as an offence under South African criminal law. This offence is dealt with under assault with intent to do grievous bodily harm, common assault, *et cetera*. If a person who commits torture-related offences is not extradited, then such person will most likely be prosecuted under the above offences. However, section 35(3)(l) of the Constitution anticipates

the trial and conviction of an offender in violation of national and international law. The matter has not come before the courts for authoritative interpretation. Furthermore, section 233 of the Constitution states:

> **Application of International Law**
>
> **"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."**

122. In addition (as stated under article 9 below), the ***International Co-operation in Criminal Matters Act, (Act 75 of 1996)***, provides for international co-operation in criminal matters with foreign States in respect of the provision of evidence, the execution of sentences and compensatory orders and the enforcement of confiscation and restraint orders.

123. With all the above provisions in place it is possible that persons who have committed torture-related offences can be tried and convicted for such offences.

Article 8 - Extradition

124. The Extradition Act provides for surrender, to a requesting State, of an accused person suspected of having committed an extraditable offence. The extraditable offence is defined as an offence, which **under the laws of the Republic and foreign State**, is punishable by a sentence of imprisonment or other form of deprivation of liberty of at least six months. Extradition is in terms of an existing treaty or multilateral treaty to which South Africa is a party. In the absence of a treaty it shall be in terms of the Extradition Act, where a requesting country has been designated or the President consents to the surrender of the accused.

125. There have been no cases relating to requests for surrender of persons accused of having committed torture. If there were such requests, these can be processed as South Africa is party to an international instrument outlawing torture (CAT).

126. According to the Extradition Act, as amended, the procedure for extradition from the Republic depends on whether one is dealing with a foreign State, an associated State, or a designated State. In the case of foreign and associated States, extradition is based on the relevant treaty. In the case of a designated State, there need not be a formal treaty. A foreign State is defined to include any foreign territory. An associated State is a foreign State in Africa with which South Africa has an extradition agreement providing for the endorsement for execution of warrants of arrest on a reciprocal basis. A designated State is a State designated by the President. The request for extradition is addressed to the Minister for Justice and Constitutional Development by the foreign State through diplomatic channels. The Minister notifies a magistrate of the request and the magistrate issues a warrant for the arrest of the person sought.

127. The Extradition Act also allows for the issue of a warrant without a request from the Minister where the magistrate receives information of a person accused or convicted of an extraditable offence which would, in the magistrate's opinion, justify the person's arrest had the offence been committed in the Republic. The Minister may intervene at any time to order the cancellation of a warrant of arrest or the release of the person detained where he or she is

satisfied that the offence charged is of a political nature. The person detained must, as soon as possible, be brought before a magistrate in whose area of jurisdiction he or she was arrested. The purpose of the enquiry is to establish whether the person before the court is a person liable to be extradited and the hearing takes place in the form of a preparatory examination.

128. The request for extradition from an associated State need not go through diplomatic channels. The warrant for the arrest of a person alleged to be a person liable to be extradited, which was issued in the associated State, is produced to a magistrate. Where an extradition treaty exists, the request will be governed by the terms of the treaty. In the case of a designated State, the request will be governed by the extradition legislation of the respective States. Also see information under article 3. Reference is also made to Mohamed's case discussed in article 3 above ***(Mohamed and Another v President of the Republic of South Africa and Others*** **2001 (3) SA 893 (CC**).

Article 9 - Mutual judicial assistance

129. The ***International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)***, provides for international co-operation in criminal matters with foreign States in respect of the provision of evidence, the execution of sentences and compensatory orders and the enforcement of confiscation and restraint orders.

130. South Africa has Mutual Legal Assistance in Criminal Matters Treaties (MLA) with the following countries:

(a) Canada (ratified by Parliament on 3 April 2001; entered into force on 5 May 2001);

(b) USA (ratified by Parliament on 9 November 2000; entered into force on 25 June 2001);

(c) Lesotho (ratified by Parliament on 7 November 2001; will enter into force once documents of ratification are exchanged).

The following MLA treaties were recently signed:

(a) France;

(b) Algeria (MLA and Extradition);

(c) Egypt (MLA and Extradition);

(d) Nigeria (MLA and Extradition).

The following MLA treaties have been negotiated but not yet signed:

(a) Brazil;

(b) Zambia;

(c) Hong Kong;

(d) Namibia.

131. The two SADC Protocols (on Extradition and Mutual Legal Assistance in Criminal Matters) were developed and discussed by the SADC Legal Experts at their meeting in South Africa during March 2001. The protocols have been approved by the Ministers for Justice and Attorneys-General and recommended to the SADC Council of Ministers. If approved by the Council it will be adopted by the SADC Summit during September 2002.

132. Since mutual judicial assistance does not require that a requested State should have a similar law outlawing the offence on which assistance to provide evidence is sought, South Africa will be able to assist foreign States in obtaining evidence. There are no cases of torture on which evidence was sought by a foreign State from South Africa.

Article 10 - Education and information regarding the prohibition against torture

133. Correctional systems find their purpose in contributing to the maintenance of a just and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of needs-based programmes in prisons and the community. This means that interaction with the offender is directed at correcting his or her offending behaviour. The role that Correctional Services staff play in the rehabilitation of those under correction is always crucial to bringing about more permanent changes in behaviour, conduct and demeanour, thus contributing to social crime prevention. Therefore, it is imperative to train members of DCS in Human Rights programmes in order to prohibit acts of torture, inhuman treatment and other acts of degrading treatment.

134. In terms of the Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service (the Policy), all members of the Police Service are trained on the Policy and on the Standing Orders giving effect thereto. The instructions are brought to the attention of every member and they are trained to implement them. The Policy is also communicated to members through circulars and in the salary advice of every police official. Furthermore, the Policy was also explained in a full-length article that was published in the Police Service magazine, *Servamus*. The training programme on Human Rights and Policing also includes training to prevent torture when making an arrest. These principles are also included in the new basic training curriculum of the Police, as well as all in-service training programmes.

135. The SANDF has, since 1994, engaged in an active training programme to inculcate the principles of the Hague Convention, Geneva Conventions, Additional Protocols and a respect for the law in general by incorporating training programmes, as well as ensuring that all personnel commit themselves to a pledge (which members must sign) in a code of conduct. The training has been considered extremely successful in the SANDF, for example, the good behaviour and restraint exhibited by troops in Operation Bolius (the SADC military intervention in Lesotho in 1998-1999) was commended by the International Committee of the Red Cross (ICRC).

Article 11 - Custody and treatment of arrested, detained or imprisoned persons

136. As discussed above, section 35 of the Constitution sets out in detail the rights of arrested, detained and accused persons. Refer to article 6 above.

137. In respect of imprisoned persons the provisions of the ***Correctional Services Act, 1998 (Act 111 of 1998)*** apply. Chapter Vlll of this Act describes the structure and functions of the National Council for Correctional Services. The primary function of the National Council is to advise, at the request of the Minister for Correctional Services or on its own accord, in developing policy with regard to the correctional system and the sentencing process.

138. Chapter IX of the Correctional Services Act sets up an Independent Judicial Inspectorate under the control of an Inspecting Judge. The President appoints the Inspecting Judge. The Inspecting Judge, *inter alia*, inspects or arranges for the inspection of prisons in order to report on the treatment of prisoners in prisons and on conditions in prisons.

139. Chapter X of the Correctional Services Act provides for the Inspecting Judge to appoint an Independent Prison Visitor for any prison or prisons. The Prison Visitor will deal with complaints of prisoners in various ways (as described under this chapter). As at 31 March 2002, 183 Independent Prison Visitors had been appointed and were deployed as follows:

(a) Gauteng: 47;

(b) Free State: 29;

(c) KwaZulu-Natal: 29;

(d) Mpumalanga: 17;

(e) North West: 19;

(f) Western Cape: 31;

(g) Limpopo: 6;

(h) Northern Cape: 11.

140. The Judicial Inspectorate has publicly called for nominations for the appointment of Independent Visitors in the Eastern Cape. As at 31 March 2002, 3 124 nominations were received and are currently being considered. The appointment of Independent Prison Visitors in the Eastern Cape is scheduled to be completed by June 2002 and will complete the process of appointing Independent Prison Visitors nationally. In addition, the SAHRC may also visit detainees, and in terms of a standing agreement with the relevant authorities, the International Red Cross also visits prisons.

141. Chapter XIIl of the Correctional Services Act provides that a judge of the Constitutional Court, Supreme Court of Appeal or High Court and a magistrate within his or her area of jurisdiction, may visit a prison at any time and must be allowed access to any part of a prison and any documentary record.

142. The Policy, as discussed under articles 2 and 10 above, sets out a system of checks and balances to protect persons in the custody of the Police Service. The Policy also includes guidelines that must be followed when a person in custody is being interviewed. As discussed under article 2, in view of the implementation of the Policy, all stations were issued with the necessary registers, including a Custody Register (SAP14) and Notice of Rights in terms of the Constitution (SAP14(a)) to ensure the proper treatment of persons and to monitor police activities. The Policy also makes provision for complaints by persons in custody to be received by the Independent Complaints Directorate (ICD). Although the Policy does not make specific provision, the complaints can also be lodged with the Public Protector and the South African Human Rights Commission.

143. The Police Service is in the process of developing a system providing for the video and audio recording of interviews with suspects or arrested persons. A pilot project was launched in this regard at the offices of three Detective Units responsible for investigating serious violent crimes. Once this project has been completed it is envisaged that the Police will develop the necessary infrastructure to support the introduction of such systems throughout the Detective Services within the Police. Instructions were issued during 1999 that a specific form (SAPS 3M (m) – Statement Regarding Interview with Suspect), into which a range of control measures are built, must be utilised to keep record of every interview with a suspect. These include the suspect being required to sign that he or she is aware that he or she is entitled to legal representation during the interview and that, if he or she so prefers, the State will at State cost provide a legal representative to him or her to assist him or her during the interview. The form also requires a suspect to mention any injuries which he or she might have sustained before the interview and to provide an explanation of how those injuries came about. This enables the commander of the interviewer to become aware of injuries which may have been the result of acts of torture and, in such a case, to take action to have the matter properly investigated.

144. With regard to the SANDF and its personnel, the Military Police Agency would have the responsibility of investigation and interrogation. Section 30 of the Military Discipline Supplementary Measures Act 16 of 1999, relates to a preliminary investigation to be held in respect of allegations made against a person subject to the Code. The preliminary investigation must contain all evidence to be used by the prosecution in a court of law. This is all done in the presence of an accused after his or her rights are explained to him/her. During the entire process one is not permitted to torture, pressurise or harass the accused to obtain any information, as the accused has the right to remain silent until he or she consults with a legal representative.

145. Custody and detention of civilians are not permissible and in the event of a civilian being apprehended, the person would have to be handed over to the South African Police Service as soon as possible, as the latter has facilities to process any offenders. The SANDF only has jurisdiction to deal with its own personnel.

Article 12 - Complaints

146. In relation to impartial investigations, in addition to the information given hereunder, reference is also made to information in article 6 above.

147. The Policy (on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service) provides for mechanisms to ensure the prompt and thorough investigation into any complaint of torture. Complaints of torture are conveyed to the station commissioner immediately. Where the station commissioner is unavailable, the area commissioner must take immediate steps to ensure that such allegations or complaints are investigated. Immediate steps are also taken to protect persons who report acts of torture against victimisation.

148. The Independent Complaints Directorate (ICD), as discussed under article 2 above, also investigates complaints of torture. For the first time complaints against the Police in South Africa are investigated by a body outside police command structures, which can demand co-operation from the police in its investigations. The main objective of the ICD is to ensure that complaints in respect of criminal offences and misconduct allegedly committed by members of the Police Service are investigated in an impartial, effective and efficient manner.

149. In order for it to achieve its object the ICD:

(a) May *mero motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member, and may, where appropriate, refer such investigation to the commissioner concerned;

(b) Shall *mero motu* or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and

(c) May investigate any matter referred to the Directorate by the Minister or the Member of the Executive Council.

150. After completing its investigation, the ICD may submit the results to the Director of Public Prosecutions (DPP) for his or her decision to prosecute, and may make recommendations to the Police or to the Minister or to the relevant Member of the Executive Council in a province. The Executive Director of the ICD must submit an annual report to the Minister, which must be tabled in Parliament within 14 days of its submission, and must in addition, report at any time when requested to do so by the Minister or the Parliamentary Committees.

151. The ICD is now able to deal with complaints in a very effective and efficient manner. Previous problems, which hampered the ICD, included a lack of manpower and a lack of funds. These problems were resolved by increasing the budget of the ICD and thus enabling the ICD to increase its investigative capacity. The ICD has therefore started to investigate more cases with a view to independently investigate all cases falling within its mandate by 2005.

152. Some of the cases being dealt with by the ICD at present are set out below. In Mpumalanga the following case was alleged: The allegation here was that during September 1999, three women were, on different occasions and places, arrested by members of the Police Service at Hazyview in Mpumalanga. After the arrests, the three women were handed

over to the Murder and Robbery Unit at Nelspruit for questioning. During the course of the questioning, they were allegedly tortured and assaulted. Allegations are that the police suffocated them, initially using their hands, but as the interrogation progressed they were then covered with plastic bags. It was also alleged that the police used the notorious ‘helicopter’ method and the victims were allegedly left ‘hanging’ for a considerable period of time. They were then incarcerated at Nelspruit police station for a week before being transferred to a local prison. Upon arriving at the prison, they requested and received medical treatment. The investigation has yet to be finalised, since it has been difficult to trace the complainants after their release from police custody. Further attempts are being made to locate their whereabouts (ICD reference: 99ML000153; SAPS reference: 36/10/99).

153. In another case in the North West Province it is alleged that the complainant was arrested by 10 members of the Murder and Robbery Unit at Garankuwa police station, who accused him of having murdered his wife. The complainant was reportedly assaulted by these members. He was allegedly slapped, booted and hit with fists. Furthermore, the complainant alleges that he was handcuffed, stripped naked and his head covered with a canvas bag, which was tied tightly around his neck, whereafter his head was immersed in a pool of water. The complainant laid a charge of assault with intent to do grievous bodily harm. The suspects have been charged with assault with intent to do grievous bodily harm. The case was finalised on 14 September 2001. All accused were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, (Act 51 of 1977) (ICD reference: CCN: 99070088).

154. In another case in the Eastern Cape it was alleged that on 3 April 1999, members of the Public Order Police (POP) were in the Majola Area in the Eastern Cape monitoring the violence. They had received information concerning the whereabouts of suspects sought by the Police Service in connection with the commission of an unspecified offence. In their attempts to locate the whereabouts of the suspects, the police allegedly tortured some members of the public believed to be in possession of information on the whereabouts of the suspects. After the assault, the complainants were taken to a camp used by POP. They were allegedly transported in a box used to house police dogs. On arrival at their camp, it was discovered that one of these people had died. The ICD investigated the matter and it is currently pending before the courts. The DPP decided that five police officers must stand trial in the Regional Court on charges of culpable homicide and assault with intent to do grievous bodily harm. The court found all five police officers guilty on a charge of culpable homicide and sentenced them to an effective five years imprisonment. The said officers have, however, appealed against both conviction and sentence. The appeal is still pending (ICD reference: CCN: 99EC00073; SAPS reference: Port St Johns-CR23/04/99).

155. In another case it is alleged that on 12 April 2000, members of the Police Service arrested six juveniles suspected of housebreaking and theft. The police initially arrested two boys and allegedly assaulted them with a view to extracting information as to the whereabouts of the other perpetrators. Three more juveniles were arrested as a result of the information provided by those who were first arrested. It is alleged that the juveniles who were arrested later were instructed to remove their clothing and to submerge themselves in a dam of water. When one of the boys tried to raise his head out of the water, it is alleged that a firearm was pointed at him. Further allegations are that two of the boys were tied with ropes and required to run on either side of a moving police vehicle. At some stage both boys fell and a vehicle drove over the deceased boy’s head, killing him instantly. The three members involved were suspended without salary. The

DPP decided that three police officers will be charged with culpable homicide, assault, theft and attempting to defeat the ends of justice. A provisional date for trial was set for 4 July 2002. Subsequent court appearances have taken place and the matter is still pending before court (ICD reference: CCN2000 04 0154; SAPS reference: Barkley East-CR36/04/2000).

156. In another case in Gauteng it is alleged that two members stationed at the Vaal Murder and Robbery Unit arrested the complainant on 25 April 1998. The complainant alleges that he was taken to the offices of this unit, where he was tied to a chair, blindfolded and tortured by means of electric shock. He was also allegedly suffocated. The allegation is that the police sought to induce him to confess that he had been involved in the attempted murder of his wife. The complainant further alleged that he was denied access to his attorney. He also alleges that he was taken to a magistrate to make a confession. He told the magistrate about the torture, but asked the magistrate not to mention this in the statement, as he was afraid that he would be tortured again. The ICD was notified of the torture on 28 April 1998. The case was investigated and referred to the DPP's office. The DPP decided to prosecute both members on a charge of assault with intent to do grievous bodily harm. This matter was finalised in court after the accused were tried, found not guilty and acquitted.

157. Although cases of torture are still an occurrence in the police force, statistics from the ICD show a decline of such cases. The human rights training is having a positive effect on members of the police force. Indications are that police officers are no longer condoning acts of torture by their colleagues; they are reporting such incidents to the authorities. The table below indicates a drop in the number of torture cases from the period April 1997 to March 2002.

Period	Total
1 April 1997 – 31 March 1998	68
1 April 1998 – 31 March 1999	56
1 April 1999 – 31 March 2000	24
1 April 2000 – 31 March 2001	46
1 April 2001 – 31 March 2002	42

158. In respect of the SANDF there is established procedure that is in accordance with the Constitution and prescribes in terms of the Military Discipline Supplementary Measures Act, 1999, the relevant authorities, responsibilities and procedure. To date there are no records of any incident in the SANDF where allegations of torture have been made. There have been media reports pertaining to the ill-treatment of illegal aliens (which may have been intercepted by the SANDF in conducting borderline operations). The responsibility for these civilians falls under the jurisdiction of the Police Service and the Department of Home Affairs. To date there has been no formal inquiry or charges made, or action for damages instituted with regard to torture or cruel treatment.

159. Complaints of prisoners of a criminal nature brought to the attention of the Department of Correctional Services are reported to the South African Police Service for justice to take its course. Personnel shortages, structural limitations and overpopulation restrict the Department's ability to fully meet the responsibility of ensuring the safety of staff and prisoners. Despite management's active involvement, the following incidents of assault were reported during 1994 to 2001: (Note that member refers to an employee of the Department of Correctional Services.)

	1994	1995	1996	1997	1998	1999	2000	2001
Prisoner on prisoner	2 857	3 130	2 252	3 050	2 361	3 104	2 354	2 380
Member on prisoner	1 805	945	394	1 193	612	545	609	633
Prisoner on member	47	20	68	40	39	11	17	16

160. Assaults on prisoners are not tolerated and existing policies prohibit such actions. Some of the strategies that have been introduced to address the problem include:

(a) Strict disciplinary and criminal actions against any prisoner involved in violence against other prisoners or officials;

(b) Strict disciplinary and criminal actions against officials rendering themselves guilty of excessive use of force or assaults on prisoners;

(c) Intervention of the Inspecting Judge through Independent Prison Visitors;

(d) The implementation of Unit Management, introduced on the principle of a structured day programme to fight idleness amongst prisoners and the negative effects thereof.

161. The South African Human Rights Commission (SAHRC) also receives complaints of torture. An investigation was held by the SAHRC into an alleged incident that occurred on 13 February 1997 at Helderstroom Maximum Prison. Prisoners alleged that between 50 and 70 inmates were assaulted by warders during an operation by authorities to move a group of 70 prisoners to the single cell section. The move arose as a result of warders refusing to go into the prison, because the said group of prisoners was identified as troublemakers - they were the gang leaders. When asked by the SAHRC to explain the injuries of the prisoners, warders claimed that they had used minimum force because the prisoners had resisted. Some injuries required stitches and at least one prisoner's hand was fractured. The SAHRC found that (8 days after the incident) none of the complaints were recorded in the complaints register. The SAHRC found that poor conditions at the prison played a part in prisoners becoming increasingly aggressive and abusive towards warders. The warders in turn felt threatened and frustrated and pressurised management to take measures.

162. The recommendations made by the SAHRC included that the Police Service appoint a special team to investigate the criminal charges; all complaints by prisoners must, in future, be recorded in the complaints register as soon as reasonably possible.

Article 13 - Investigation by impartial authorities

163. In addition to the information given under this paragraph, reference is also made to information in article 12. Section 179 of the Constitution deals with the prosecuting authority. Subsection (4) in particular states:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

164. Any individual who alleges that he or she has been subjected to torture may complain to the South African Police Service, the ICD, the Public Protector or the South African Human Rights Commission.

165. In respect of criminal offences, the State has the exclusive power to institute criminal proceedings in superior and lower courts, except for private prosecutions instituted in terms of section 7 of the Criminal Procedure Act. There is no system of compulsory prosecution. It is the duty of the prosecutor to ascertain whether there is reasonable and probable cause for prosecution, and not whether there is a defence. Courts accept the prerogative of the Director of Public Prosecutions (DPP) to institute criminal proceedings on charges he deems proper, and are reluctant to interfere, as it is the DPP who has all the relevant facts and material before him (investigations are conducted by the police and the docket is forwarded to the office of the DPP). Without proof of *mala fides* or gross unreasonableness a court of law will not interfere with the discretion of the DPP. Where the DPP exercises his discretion improperly, the court can intervene.

166. A private prosecution serves as a “legal safety valve” in that it allows an interested party the opportunity to institute criminal proceedings against another where the DPP declines to prosecute. The private prosecutor must establish that he has some substantial interest in the issue of a trial which arises from the commission of any offence against him.

167. The Department of Correctional Services has an accessible system by means of which prisoners, probationers and parolees can air their complaints, requests and grievances to the head of the prison or Head: Community Corrections or the Area Manager on a daily basis. For example, all prisoners who have complaints about psychological or social work services can lodge complaints in two ways:

(a) Through the Complaints and Requests Register, which is available at every prison; and

(b) With the Health Professions Council of South Africa, who will deal with the complaints immediately and impartially.

168. After a complaint or request has been attended to, the prisoner, probationer or parolee is given the necessary feedback.

169. Prisoners, probationers or parolees may also register their complaints during visits by judges, magistrates and representatives of the International Committee of the Red Cross and Commissioners of the South African Human Rights Commission. The prisoner, probationer or parolee also has access to the Public Protector and legal representatives and has a right to institute litigation. As explained under article 11 above, the Correctional Services Act makes provision for an Independent Judicial Inspectorate under the control of an Inspecting Judge. Its function is to prevent abuse in the treatment of prisoners and persons subject to community corrections. Provision is also made for the creation of a network of Independent Visitors to each prison to deal with complaints of prisoners, probationers and parolees and to serve as an independent local link with the Inspecting Judge. When specialised services are required, referrals to professional persons for intervention are made, for example, to hospitals, police services and psychological services.

170. With regard to amnesty and the Truth and Reconciliation Commission, refer to the discussion of the Promotion of National Unity and Reconciliation Act under article 2 above.

171. South African courts have often stated that persons in custody should not be subjected to ill-treatment or improper pressure. In ***S v Hoho*** **1999(2) SACR 159 (CPD)** it was noted that the "confessional" mode of policing, that is, extracting a confession from the suspect, adopted by the police *in casu* and which had commonly been relied upon in South Africa during the apartheid period, lay at the root of the State's problem. The court remarked that there was a need for a major campaign towards ensuring that the police moved away from confessional policing towards investigative techniques, which were congruent with the civilised and efficient standards of policing required by the Constitution.

172. The right to complain and to have allegations promptly examined is enshrined in the Constitution (section 34 dealing with access to courts) and is thus universally applicable to all complainants, whether civilian or military. Complaints and the procedure thereof in relation to the SANDF are dealt with by section 29 and 30 of the Military Discipline Supplementary Measures Act. Section 29 of Act 16 of 1999 relates to the arraignment of personnel subject to the code with regard to the pre-trial procedures after being charged with an offence. Pre-trial procedures are necessary to stop prescription as well as to ensure a speedy trial for any accused.

Article 14 - Compensation and rehabilitation

173. In addition to the information given hereunder, reference is also made to information given under 'Remedies and Rehabilitation Programmes' (discussed above). In respect of compensation the victim of an act of torture may obtain redress and fair and adequate compensation in terms of the common law through delictual claims, by bringing a civil action against the perpetrator. A court will award compensation for damages suffered by the victim. However, the Constitutional Court did not think it appropriate to use scarce resources to pay punitive constitutional damages to plaintiffs who were already fully compensated for injuries sustained.

174. In ***Fose v Minister of Safety and Security*** **1997 (3) SA 786 (CC)** the applicant claimed damages arising out of an alleged assault by members of the Police Service for pain and suffering, loss of amenities of life, insult and for past and future medical expenses. In addition, a sum of R200 000, 00 was claimed under the head of "constitutional damages … which amount includes an element of punitive damages". The court held that the remedy sought was a constitutional, and not a delictual remedy, which had, *inter alia*, as its objective the compensation for harm caused to the applicant in consequence of the infringement on the plaintiff's fundamental rights. The court further held that the facts alleged in this case did not make out a case for punitive constitutional damages. In addition, the court held that in a country where there were great demands on the public purse and urgent need for economic and social reform, it was inappropriate to use scarce resources to pay punitive constitutional damages to plaintiffs who were already fully compensated for injuries sustained. Funds of this nature could be better employed in structural and systemic ways to eliminate the causes of infringement.

175. The Promotion of National Unity and Reconciliation Act provides for a Committee on Reparation and Rehabilitation which endeavours to restore the human and civil dignity of victims of gross violations of human rights. In ***Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*** **1996 (4) SA 671 (CC)** it was held that Parliament was entitled to decide that, having regard to the resources of the State, reparations for those victimised by the unjust laws and practices of the past justified formulae

which did not compel any irrational differentiation between the claims of those who were able to pursue enforceable delictual claims against the State and the claims of those who were not in that position but, nevertheless, deserved reparations. The court further held that the epilogue to the Constitution authorised and contemplated an "amnesty" in its most comprehensive and generous meaning, so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. For a further discussion of the **AZAPO** case refer to information given in article 2 above.

176. Government has established a President's Fund that compensates victims of torture within the context of the TRC process.

177. In treating the victims of violations and crime, the Department of Correctional Services has followed the Restorative Justice approach, which is based on the understanding of crime as an act against the victim and the community. The aim of the Restorative Justice System is to remedy the fundamental shortcomings in the Criminal Justice process. Restorative Justice emphasises the importance of the role of the victim, families and community members by actively involving them in the justice process.

178. Restorative Justice is aimed at holding offenders directly accountable to the people they have violated and at restoring the losses and harm suffered by the victims. It provides an opportunity for mediation, dialogue negotiation and problem-solving, which could lead to healing, a greater sense of safety and enhanced reintegration into the community.

179. The Department of Correctional Services, in partnership with other State departments, is pursuing a victim empowerment programme that is aimed at bringing the victim of crime to the centre of the Criminal Justice System. The primary purpose is to take seriously the concerns of the victim.

180. With the new release Parole Policy, victims of crime are invited to attend Parole Board hearings and make representations when the offenders are due for parole. An International Restorative Justice Week was celebrated at most of the provinces during the month of November 2001. Restorative Justice was launched in the Department of Correctional Services during the same month and was followed by awareness raising worth-sessions with offenders, Correctional Officials, NGOs and CBOs.

181. Some correctional officials were trained as master trainers by a team of experts from Correctional Services of Canada and Queens University. These master trainers will in turn train all Correctional Officials on mediation protocol, which facilitates dialogue between the offender and the victim. Religious care also forms an integral part of the rehabilitation programme for offenders. Provision is made for the religious needs of each prisoner according to religious conviction and with a view to international and national principles of religious freedom.

182. As a result of the de-militarisation of the Department of Correctional Services, there is ongoing re-training of the personnel in new theories and approaches towards the treatment and handling of prisoners and probationers. With regard to programmes of rehabilitation for victims of torture, the Department is involved in the inter-departmental partnership in the establishment

of the Victim Empowerment Programme, which aims at addressing the needs of victims and thereby addressing the re-offending behaviour. Reference is made to Part 1 of this Report regarding NGOs and the rehabilitation of victims.

183. The **Victims' Charter** is part of Government's commitment to provide a better deal for victims of crime. It applies to all victims of crime who have suffered directly or indirectly as a result of crime. The Charter sets out various rights which include, *inter alia*, the right to protection, the right to compensation and the right to restitution. When a crime is committed, a person's basic human rights, as set out in the Constitution, are violated. Service providers such as the officers and employees of the Department of Justice and Constitutional Development and of other government departments and agencies in South Africa engaged in the detection, investigation or prosecution of crime and those engaged in the provision of health care, educational and counselling services, would to the best of their abilities, see to it that victims of crime are accorded the rights set out in this Charter. With regard to the right to compensation a victim has the right to apply for compensation for loss or damage to property suffered as a result of a crime being committed against him/her. "Compensation" refers to an amount that a criminal court awards the victim who has suffered loss or damage to property (including money) as a result of a criminal act or omission by the person convicted for committing the crime. In addition, a victim has the right to restitution with respect to property of which he/she has been unlawfully dispossessed. "Restitution" refers to where the court, after a conviction, orders the offender to give back to the victim the goods that he/she is found guilty of having unlawfully taken from the victim in order to restore the victim to the position that he/she was in prior to the offence.

Article 15 - Statements obtained under torture

184. The pre-Constitution South African common law approach to the exclusion of evidence was that relevant evidence was admissible no matter how it was obtained. The Constitution has changed this; Section 35(5) of the Constitution provides that a court must exclude evidence obtained in a manner which violates a fundamental right if the admission will render the trial unfair or be detrimental to the administration of justice. Rules of evidence in civil courts are also applied to all Military Courts.

185. See ***S v Hoho*** under article 13, where it was stated that there was a need for ensuring that the police move away from 'confessional' policing and use investigative techniques instead.

186. The court held that the accused's confessions made under threats and assaults of the police were not admissible. These confessions were not made freely and the appeal was allowed. The convictions and sentences were set aside; ***S v Potwana*** **1994(1) SACR 159 (A)**.

187. The admissibility of the accused's statements and pointings-out was challenged on the basis that the accused had been assaulted and otherwise subjected to improper pressure by the police to generate self-incriminating evidence. In ***S v Malefo and Others*** **1998 (1) SACR 126 (WLD)** it was held that the trial court had a discretion not only to exclude evidence which had been obtained in contravention of, *inter alia*, a fundamental right, but also to admit such evidence. The court held that the Canadian approach that sought to strike a balance between the

common law inclusionary rule and the exclusionary rule, and which, in striking that balance, attempted to foster public respect for the law, was well-founded. The evidence was found to be admissible.

188. However, in ***S v Hoho*** **1999** (see above) the judge remarked that in any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even though suspected of conduct which would put them beyond the pale. This tension (between crime control and due process) means that at times "fairness", as contemplated in an accused's right to a fair trial enshrined in section 35(3) of the Constitution, might require that evidence unconstitutionally obtained should not be admitted against the accused; but there will also be times when "fairness" requires that evidence, albeit obtained unconstitutionally, should nevertheless be admitted. In the exercise of this discretion, therefore, the court must make a determination as to whether the public interest is best served by the admission or exclusion of evidence of facts ascertained as a result of, and by means of illegal action.

189. In the ***Hoho*** case the accused disputed pointings-out on the grounds that he had not effected the pointings-out and that he had been induced to do so as a result of an assault. The court held that the evidence of the pointings-out of the scenes were inadmissible.

Article 16 - Other acts of cruel, inhuman and degrading treatment or punishment

190. The system of apartheid was "evil, inhumane and degrading for the many millions who became its second and third class citizens. Amongst its many crimes, perhaps, the greatest was its power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims" (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 62).

191. In addition to the information provided hereunder, reference is also made to the case of ***S v Williams*** discussed under the introduction. The Williams case dealt with the unconstitutionality of juvenile whipping.

192. In determining whether the punishment is cruel, inhuman or degrading within the meaning of the Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution. In ***S v Williams and Others*** **1995 (3) SA 632 (CC)** the court held that punishment must respect human dignity and be consistent with the provisions of the Constitution. The institutionalised use of violence by the State on juvenile offenders, as authorised by section 294 of the Criminal Procedure Act, was decreed cruel, inhuman and degrading punishment. It was said that such punishment cannot be justified in terms of section 33(1) of the (interim) Constitution, (section 12 of the Constitution). Accordingly, section 294 and the words "or a whipping" in section 290(2) of the Criminal Procedure Act were declared invalid and of no force and effect.

193. To require an accused to participate in an identification parade was not a violation of his fundamental constitutional rights. In ***S v Mphala and Another*** **1998 (1) SACR 654 (WLD)** the

court held that the evidence obtained in an identification parade was admissible as the parade was held in accordance with the provisions of section 37(1)(b) of the Criminal Procedure Act, (Act 51 of 1977).

194. The Police Service, in its Policy, included the definition of torture as provided for in CAT and extended it to include “that a person may not be treated or punished in a cruel, inhuman or degrading way”. Guidelines in the Policy were developed to ensure the proper treatment of persons in custody and to assist members to understand the concept of cruel, inhuman or degrading treatment. The Policy further states that an order by a superior or any other authority that a person be tortured is unlawful and shall not be obeyed. This includes acts of cruel, inhuman or degrading treatment or punishment.

195. In terms of section 40(5) of the Correctional Services Act a prisoner may not be instructed or compelled to work as a form of punishment or disciplinary measure. Work performed by a prisoner must be related to a development programme or be designed to foster habits of industry. A prisoner should, however, be encouraged to work unless the medical officer or psychologist certifies in writing that he or she is physically or mentally unfit to perform such labour.

196. Furthermore, children who are older than 15 years but younger than 18 years and have not completed compulsory schooling, may not be subjected to labour. With regard to children and young offenders the focus is on development. Therefore, they may not be subjected to work for the purpose of generating income or do any work that is derogatory to their human dignity. Training is aimed at obtaining skills for their development.

Domestic violence

197. It is appropriate that information on domestic violence is given in terms of this article. It was recognised that domestic violence in South Africa was a serious social evil with a high incidence rate. It was also realised that the victims of domestic violence were among the most vulnerable members of society and that the remedies, which were available to them, proved to be ineffective. The now repealed legislation on domestic violence, the ***Prevention of Family Violence Act, 1993 (Act 133 of 1993)*** was severely criticised on the basis that it did not adequately protect victims of domestic violence, and that it was very narrow and limited in its application.

198. Having regard to the Constitution of South Africa, with specific reference to the right to equality, freedom and security of the person, international commitments resulting from the ratification of the Convention Against the Elimination of Discrimination Against Women (CEDAW) created a great need for the Domestic Violence Act.

199. The ***Domestic Violence Act, 1998 (Act 116 of 1998)***, replaced the inadequate ***Prevention of Family Violence Act***. It came into operation on 15 December 1999. The purpose of the Domestic Violence Act is to afford the victims of domestic violence the maximum protection from abuse that the law can provide. It is the intent of the Act to communicate the official response that violent behaviour will not be excused or tolerated. Having regard to the fact that

domestic violence is a pervasive and frequently lethal societal problem, the Act seeks to ensure that when victims of domestic violence or abuse do turn to the law for protection, such law is effective and efficient in its response.

200. The objective of the Act therefore is to ensure that the substance and procedures of domestic or family violence legislation are customised to the needs of those suffering abuse in a domestic context. The Act is progressive and constitutes a substantial broadening of the limited scope of the Prevention of Family Violence Act of 1993. It recognises that domestic violence is a serious crime against society, and that women and children constitute the majority of victims of domestic violence. Rape can also be a means of torturing a person.

201. The Act introduces critical policy interventions, which includes a more inclusive definition of domestic violence relationships that are covered in terms of the Act, provision for the granting of emergency financial relief and easier access to protection orders. Discussion under articles 10, 11, 12 and 13 also apply.

Conclusion

202. The struggle for liberation, which included the untold suffering in the hands of the apartheid regime's security forces, has ushered in the constitutional democracy now present in South Africa. The Constitution Act, 1996, which provides for the right to freedom and security of the person with specific reference to the right not to be tortured in any way, is the basis for legislative and administrative measures required to implement the Convention Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment. In the leading case of **Makwanyane** the Constitutional Court held that the death penalty constituted cruel, inhuman or degrading treatment or punishment. In the **Williams** case the Constitutional Court held that juvenile whippings constitute cruel, inhuman or degrading treatment or punishment.

203. Although South Africa has no legislation criminalising torture *stricto sensu*, torture can be dealt with as a form of assault under common law. South Africa has some pieces of legislation to deal with other forms of torture, which include the Criminal Law Amendment Act, providing for the setting aside of sentences of death, and the Abolition of Corporal Punishment Act. The SANDF, South African Police Service and Correctional Services, which form the South African Security Services, have policies and programmes to deal with any form of torture; and they have training programmes and/or manuals aimed at educating them about humane treatment of suspects, offenders and the public in general.

204. Despite good policies and training against torture within the context of the South African Security Services, there are still incidents of torture. This problem, given the legacy of the past, will be upon us for some time. Government is committed to dealing with this scourge, and its main challenge is to transform the old security forces and integrate them with those who respect and promote democratic values, which include humane treatment of suspects, offenders and the public in general. However, Government needs the support of business, labour and civil society in its fight to transform our security forces. This is to be combined with efforts aimed at moral regeneration. The goal is that South Africa will be a secure and safe place to live in.