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South Africa

Briefing for the Committee against Torture

Concerns under Article 2.2

Please see under Article 14.

Concerns under Article 3.1 and 3.2

AI is concerned that the South African authorities are not taking adequate steps to protect asylum-seekers, suspected illegal immigrants or individuals arrested on suspicion of involvement in terrorism-related offences from being exposed to the risk of torture or other cruel, inhuman or degrading treatment or other gross human rights violations when being deported from South Africa. The safeguards provided for under applicable legislation¹ have been ignored in some cases, as has been shown in court proceedings and rulings arising from legal challenges brought by refugee rights organizations and other applicants. While the country is under pressure from the growing number of asylum-seekers and economic migrants entering South Africa, as well as having to fulfil its international obligations to prevent and punish acts of terrorism, there is an emerging pattern of breaches of its obligations under Article 3 which should be addressed by the Government.

In 2004, for instance, joint operations by Department of Home Affairs (DHA) officials and members of intelligence and police services against individuals suspected of links with international “terrorist” organizations resulted in the incommunicado detention, ill-treatment or forcible repatriation of immigrants or asylum-seekers. In one case, Mohammed Hendi, a Jordanian national who had applied for permanent residence, was detained by police and intelligence officers when they raided his home on 2 April 2004. He was held for 22 days at police stations in the Pretoria area, shackled, denied access to a lawyer, and subjected to racial abuse during interrogation. On 14 April the police and immigration authorities attempted to deport him and arbitrarily deny his residence application. Lawyers secured his release on 23 April 2004 through a habeas corpus action in the High Court. Jamil Odys, detained at the same time, was deported to Jordan on 14 April despite having lodged an application for asylum. He was later traced to detention facilities in Jordan and his release negotiated after several months. In May 2004 the national Commissioner of Police told Parliament that the security services had in April arrested and deported a number of “terrorism” suspects, but he refused to give more details.

¹ Immigration Act (13 of 2002 and the Immigration Amendment Act (19 of 2004), with applicable Regulations; the Extradition Act (67 of 1962) and the Extradition Amendment Act (77 of 1996); the Refugees Act (130 of 1998) and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (128 of 2004)

Amnesty International wrote to the government in July 2006 that it may have breached its obligations under Article 3 by participating in the enforced disappearance and exposing to the risk of torture a Pakistani national, Khalid Mehmood Rashid (Mr Rashid) who was handed over by the South African authorities to Pakistani officials in Pretoria on 6 November 2005. The Pakistani authorities have acknowledged in writing to the South African government that Mr Rashid was flown to Islamabad in the custody of their law enforcement officials, but they have failed to inform Mr Rashid's family or to state in court where he is being held or on what charges. In response to a habeas corpus petition filed by Mr Rashid's family on 17 June 2006, Justice Akhtar Shabbir in the Lahore High Court, Rawalpindi Bench, directed the State on 29 June to report back to the Court on the whereabouts of Mr Rashid within three weeks. Two scheduled hearings were postponed, with a new date having been set for 17 October 2006.

South African government officials from the Department of Home Affairs (DHA) have maintained publicly and in the Pretoria High Court since at least January 2006 that Mr Rashid was lawfully arrested and lawfully deported on 6 November 2005 to Pakistan because he was a foreign national with no legal right to reside and work in South Africa. However on 6 June 2006 the Office of the State Attorney, in compliance with an order of the Pretoria High Court, stated that Mr Rashid was handed over by the DHA's Chief Immigration Officer (Tshwane) to four named Pakistani officials at Waterkloof Air Base (near Pretoria) on 6 November 2005 and that these officials departed with him in an aircraft on a flight which, it was admitted, did not have a number. The signature of one of these officials is on the DHA form "Body Receipt for Transfer of Detained Persons" and is dated "2005-11-06". In the Pretoria High Court on 24 June counsel for the DHA reportedly admitted to Mr Justice Brian Southwood that it was not known to whom the plane belonged.²

The government provided some explanation for their actions in a statement issued on 8 June by the Justice, Crime Prevention and Security Cluster, in which it was noted that the "*arrangements for Mr Rashid's deportation were undertaken in co-operation with Pakistani authorities*" because it had come to the attention of the (South African) government that "*Mr Rashid was alleged to have connections with international terrorist cells*". It is not clear why or by what process it was concluded that "*there were not sufficient grounds to extradite him*", while at the same time, according to the statement, "*extra care had to be taken with regard to the deportation*" of Mr Rashid as "*an illegal foreigner*".

² In response to the order of the Pretoria High Court on 15 May 2006 the state acknowledged that the aircraft registration number was no. A6-PHY. This Gulfstream plane belongs to Phoenix Aviation Group, an aircraft charter and leasing company, registered in the United Arab Emirates (UAE) and based at Sharjah International Airport in the UAE. The plane was sold in April 2005 to Phoenix Aviation Group, now known as AVE, and has a twice-weekly service from Dubai to Basra. (On 28 October 2005 it was photographed at Dubai-International airport in UAE).

On 14 June the High Commission for the Islamic Republic of Pakistan in South Africa, through its First Secretary Mr Javid Jalil Khattack, stated publicly that “*Mr Khalid Mahmood, a Pakistani national, was arrested by South African authorities on 31 October 2005. Mr Khalid Mahmood was wanted in Pakistan for his suspected links with terrorism and other anti state elements. The suspect was handed over to Government of Pakistan officials on 6 November 2005. Presently he is in the custody of Government of Pakistan.*” Amnesty International has also been informed that on 14 July the Ministry of Foreign Affairs of the Islamic Republic of Pakistan reconfirmed earlier information provided to the South African Government by Lt Col Muhammad Imran Yaqub, Director (Operations) of the National Crisis Management Cell, Ministry of Interior, Islamabad, that the “deportee” had arrived in Pakistan at Islamabad airport and that he was in or placed into the custody of law enforcement officials whose identity could not be divulged for “reasons of security”.

It would appear from the various, including public, acknowledgements by the Pakistan authorities to the South Africans that Mr Rashid was not simply an illegal immigrant, but had been actively sought by the Pakistan authorities in connection with alleged internal security/terrorism offences. Even though the South African authorities bear a duty to prevent and punish crimes such as acts of terrorism, including by bringing to justice those suspected of committing such acts and through cooperation with agencies of other states, South Africa also had an obligation under Article 3, as well as under its own laws, to ensure that its officials do not hand over a person to another State where that person may be in danger of being subjected to torture (or certain other human rights violations). As the Committee has stated, no exceptional circumstances, however grave or compelling, can justify the introduction of a “balancing test” when fundamental norms such as the prohibition of torture and other ill-treatment or return to torture or other ill-treatment are at stake.³ On the relatively few occasions when states have introduced a degree of balancing in domestic systems, they have come under strong criticism by the Committee.⁴

With respect to Pakistan, Amnesty International and other human rights organizations have documented in Pakistan a pattern of arbitrary arrest, secret and unlawful detention and enforced disappearances, torture and other ill-treatment; extrajudicial executions, and unlawful transfers to other countries in violation of the principle of *non-refoulement*, in particular with respect to those arrested on suspicion of terrorist activities. The Pakistan authorities have publicly admitted to handing over terrorism suspects to third countries.

There are elements in this case of *refoulement* which are similar to an earlier case, which is referred to in South Africa’s initial report to the CAT (at para.104), involving the *refoulement* of Khalfan Khamis Mohamed to the United States. In that case the South African

³ See for instance Concluding Observations on Germany, UN Doc. CAT/C/CR/32/7, 11 June 2004 commending the reaffirmation of the absolute ban on exposure to torture, including through *refoulement*, even where there is a security risk.

⁴ See for instance *Mafhoud Brada v. France*, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 14; and Concluding Observations on Canada, UN Doc. CAT/C/34/CAN, 07 July 2005, para. 4(a)).

Constitutional Court, in May 2001, ruled that “South African government agents acted inconsistently with the Constitution in handing over Mohamed [to agents of the United States] without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice” ruled.⁵

In the case of Mr Rashid there were indications that it should have been anticipated by the South African authorities that transferring him to Pakistan placed him at risk of human rights violations, including torture and other ill-treatment. As already mentioned above, the South African government’s Justice, Crime Prevention and Security Cluster publicly noted in June that the “arrangements for Mr Rashid’s deportation were undertaken in co-operation with Pakistani authorities” because it had come to the attention of the government that “Mr Rashid was alleged to have connections with international terrorist cells”. The Pakistan High Commission stated publicly (and may have communicated this to the South African authorities) that “Khalid Mahmood was wanted in Pakistan for his suspected links with terrorism and other anti state elements.” As already noted Amnesty International and other human rights organizations have documented that suspects arrested in Pakistan in connection with alleged terrorism offences are at serious risk of torture, secret detentions, enforced disappearance or death sentences imposed after unfair trials.

Apart from this apparent failure by the authorities to take into account “all relevant considerations” to assess “whether there are substantial grounds for believing that he would be in danger of being subjected to torture in Pakistan”, there is no evidence that Mr Rashid was afforded any access to independent legal advice or warned of his right not to self-incriminate or of his right to remain silent or his right to demand protection against exposure to torture. This was the case throughout the period from 31 October 2005, when he was seized from his accommodation in KwaZulu Natal province by armed men using vehicles with false number plates, according to eyewitness evidence, through his detention at Cullinan Police Station and up to his being handed over to Pakistani officials at Waterkloof Air Base on 6 November 2005. He had no access to independent legal advice on 2 November, when, according to the evidence of the DHA in the Pretoria High Court, he apparently signed the “Notification of Deportation” form. His signature purportedly confirmed his agreement that he would “await [his] deportation at the first reasonable opportunity, whilst remaining in custody”. In view of the absence of independent legal advice, it cannot be assumed that he gave informed consent to his “deportation”.⁶ Furthermore it is difficult to be confident that the signature on the form is actually that of Mr Rashid, as the Pakistani authorities have not allowed any independent access to him since he was flown out of South Africa in their custody nearly a year ago.

⁵ CCT 17/01, Judgment in *Khalfan Khamis Mohamed, Abdurahman Dalvie (Applicants) and President of the Republic of South Africa and Six Others (Respondents) and The Society for the Abolition of the Death Penalty in South Africa, The Human Rights Committee Trust (Amici Curiae)*, 28 May 2001

⁶ The Pretoria High Court on 26 June 2006 in another matter is reported to have criticised the DHA form as invalid and the powers of immigration officers who administer the form as “draconian”.

Finally, it remains unclear why the procedures and safeguards under the provisions of South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act (33 of 2004), in particular Section 15 (5) – (9), were not applied at the time when Mr Rashid was being sought and taken into custody by police and DHA officials.⁷ While South Africa may not have an extradition treaty with Pakistan,⁸ the President can give consent to an extradition but after due consideration and the exercise of safeguards provided for under the Extradition Acts.⁹ However, for reasons not fully disclosed, the authorities involved in handing over Mr Rashid to the Pakistani agents circumvented these procedures and safeguards by conducting a “disguised extradition”¹⁰.

With respect to its obligations under Article 3(1) of the Convention Against Torture, South Africa has acknowledged in its initial report to the CAT that the Constitutional “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” (CAT/C/52/Add.3, para 104).

In its letter to the South African Government in July 2006 regarding the case of Mr Rashid, Amnesty International urged it to enforce and respect the prohibition on returning or transferring people to states where they face a risk of torture or other cruel, inhuman or degrading treatment or other gross human rights violation, and to ensure that any person subject to deportation or transfer to another state has the right, prior to such transfer, to challenge its legality before an independent tribunal. Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect.

⁷ These provisions would have required *inter alia* that the police inform the National Director of Public Prosecutions of the arrest and the NDPP in turn to notify Pakistan directly or through the Secretary general of the United Nations of the fact of the detention, the grounds justifying the detention and the intention either to prosecute in South Africa or to surrender him to Pakistan for prosecution there.

⁸ In July 2005 bilateral relations between South Africa and Pakistan were strengthened with the holding of the first session of a Joint Commission in Islamabad. Reportedly steps were being taken to finalise a number of agreements, including on Mutual Legal Assistance on Criminal Matters and on an Extradition Treaty.

⁹ Safeguards such as the provision that the Minister of Justice may “order that a person shall not be surrendered” on various grounds including that “the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion” (Section 11 (b) of 1962 Act and Section 9 of 1996 Act).

¹⁰ This is the conclusion drawn in the Submissions of the Amicus Curiae In the matter between Ismail Ebrahim Jeebhai Applicant and The Minister of Home Affairs, Michael Sirela Respondents and University of Witwatersrand Law Clinic Amicus Curiae, Case No. 35377/05 in the High Court of South Africa, 25 August 2006. There has been no ruling as of 21 October in this case in which the Applicant is seeking an order declaring the “arrest and deportation” of Mr Rashid unlawful.

Concerns under Article 4

Amnesty International shares the concern of civil society organizations in South Africa that the current draft *Combating of Torture Bill [B-05]* should be strengthened in line with the language and requirements of the Convention Against Torture. Political will is needed to ensure that an improved Bill is promoted, discussed and passed by the South African Parliament as soon as possible.

Section 3 of the Bill ('Acts constituting torture') omits reference to "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The inclusion of this reference is critical to ensure that official involvement in torture (and other ill-treatment), at all levels, is specifically criminalised, as it is in the Convention Against Torture, and that no impunity for officials is allowed.

It was notable during the hearings of the Truth and Reconciliation Commission's Amnesty Committee that former security force members who acknowledged having committed torture or the equivalent crime under the common law, were reluctant to fully disclose the names of high level officers who knew or even supervised torture sessions.¹¹ Currently the main means of holding high level officials accountable is through their liability as respondents in civil damages suits. Establishing criminal liability in cases of consent/acquiescence would increase the pressures on political officials and senior officers responsible at the police station/area/provincial and national levels not to appear to consent or turn a blind eye to the unlawful actions of their subordinates to unambiguously denounce torture and to take all necessary steps to ensure that complaints are vigorously investigated and witnesses and complainants protected from reprisals.

The Bill under subsection 5 (d) includes as an "aggravating circumstance" for the purposes of sentencing that "complainant was raped or indecently assaulted". Although the preamble to subsection 5 provides that "if it is proven the one or more of the under mentioned circumstances [including 5(d)] occurred during or formed part of torture", there is a risk that the bill could be read as implying that rape/sexual assault are not always torture or ill-treatment. The UN Special Rapporteur on torture has stated that "[s]ince it is clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture."¹² Amnesty International continues to receive reports of the rape of women in police custody, including a case, in the Free State Province, in which the detainee, who had been kept for two years in custody pending investigations, was repeatedly raped and eventually fell pregnant as a result. The relevant Area Commissioner of the SAPS failed to act. Nor were steps taken by the office of the provincial minister

¹¹ See comments under Article 14 below.

¹² Oral introduction to the report of the Special Rapporteur to the 1992 session of the Commission on Human Rights, quoted in E/CN.4/1995/34, para.16 (cited in Amnesty International Combating Torture A manual for action (AI Index: ACT 40/001/2003), p.75

responsible for the police, the Secretariat for Safety, Security and Liaison. An effective investigation only began when the ICD were informed of the case and three police officers arrested. However they were released on bail and allowed to continue on duty pending the outcome of the trial. The case highlights the lack of awareness of the gravity of the actions of the accused police officers and the need for the draft legislation to make clear that rape and serious sexual assaults in custody constitutes torture, and that all forms of sexual assaults constitute torture or ill-treatment, and are absolutely prohibited and are punishable crimes.

The title of Section 7 of the Bill ('Extradition') does not include all forms of return as it should under Article 3.

The language of Section 8 is weak and does not include reference to the state having the duty to promote awareness, not just on "the gravity of torture" but that there is an absolute prohibition of torture, which must be stated in all rules and instructions governing the operations of security officials. Such language in the legislation would provide critical legal backup for the injunctions in existing policy documents, as for instance the *Policy on the prevention of torture and the treatment of persons in custody of the SAPS*. The training of "public officials" noted in Section 8 (2) (1) (d) does not include a reference to all law enforcement officials, the military and medical personnel. Amnesty International continues to receive reports that medical personnel involved in post-mortem examinations primarily outside the main urban areas have failed to fully report signs of torture on the bodies.

The Bill does not include provisions on the following obligations; to conduct independent and impartial investigations of a standard consistent with requirements under Articles 12 and 13, of all allegations of torture; to prohibit the admissibility of evidence in legal proceedings obtained under torture; and to ensure that victims of torture have an enforceable right to fair and adequate reparations, including the means for as full rehabilitation as possible.

Concerns under Articles 12 and 13

As indicated in the comments below under Article 14, South Africa has a history of systematic failure to investigate and bring to justice perpetrators of torture. In an effort to overcome this legacy the South African government, under President Mandela, established the Independent Complaints Directorate (ICD) as a statutory body with the authority to investigate allegations against the police of human rights violations, including torture and suspicious deaths in custody, as well as other serious abuses such as corruption. Unfortunately the statutory basis for the ICD is the 1995 South African Police Services Act, with the ICD falling under the executive control of the national Minister of Safety and Security (police). Amnesty International and civil society organizations in South Africa have expressed concern over the past decade that this legislative basis for the ICD and line of political accountability has created the public perception and at times the reality of diminished independence and

impartiality in the ICD's work, notwithstanding that the ICD is also accountable to the national parliament in its annual reporting obligations.¹³

A recent analysis¹⁴ of the "legislative vulnerability" of the ICD highlighted that:

"[c]ore functions central to the functioning of the ICD require Ministerial approval. The Executive Director of the ICD is required to consult with the Minister prior to the issue of instructions regarding the lodging, receiving and processing of complaints, recording and safeguarding of information, disclosure of information and making of findings. The Executive Director is also required to consult with the Minister regarding the appointment, terms and conditions of employment of members of the Directorate. Furthermore, the Executive Director must request the Minister to authorise members of the Directorate to exercise those powers and perform those duties conferred by the Act or any other law. The powers of the ICD personnel are also assigned through the Minister, at the request of, and in consultation with, the Executive Director. These are therefore not derived directly from legislation but subject to Ministerial approval."¹⁵

As the pressure increased from the late 1990s on the government to address the serious violent crime problem in the country, the political and public support for the continued operations of the ICD declined. At the same time the organization's responsibilities in areas other than criminal investigations were increasing, without a commensurate increase in operational staffing. Subtle political pressures also began to have an effect on internal decision-making on priorities. In May this year when the national commissioner of the South African Police Service made comments in the parliament attacking the value of maintaining the ICD ten years after the political transition, the Minister of Safety and Security remained publicly silent. No other government minister rose to the defence of the ICD's work or noted that the country is obliged under the Convention Against Torture to conduct independent and impartial investigations into allegations of torture and other ill-treatment.

Despite the equivocal political support and some internal problems in the ICD, the persistence and dedication of some of its staff at the provincial operational level over the past ten years has ensured that some cases of torture have been properly investigated and subsequently prosecuted successfully by the Office of the Director of Public Prosecutions. Amnesty International believes that the continued and strengthened political and financial support for the ICD's core criminal investigation role and the speedy establishment of an independent legislative basis for its existence and accountability, separate from the police minister, would

¹³ See for instance the concerns expressed in Amnesty International, *Policing to protect human rights A survey of police practice in countries of the Southern African Development Community, 1997-2002* (AI Index: AFR 03/004/2002), pp. 48-65.

¹⁴ Duxita Mistry & Melanie Lue-Dugmore, Institute for Security Studies, *An Overview of the Independent Complaints Directorate in the light of Proposals to Restructure the Directorate* (prepared for the Open Society Foundation of South Africa), 25 April 2006

¹⁵ *Ibid*, (The Author is referring to Section 53(7), (3)(a), (3)(b) of the 1995 Act)

make its work more effective. It would also be important to oblige the police authorities to report all suspected cases of torture and other ill-treatment to the ICD for investigation. Currently the police are only obliged to report all deaths in custody to the ICD for investigation.

Concerns under Article 14 (with reference to concerns also under Articles 4, 5 and Article 2.2)

South Africa's initial report to the CAT refers briefly to the conclusion of the Constitutional Court 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". Perpetrators of torture who chose not to appear before the TRC, or those that did but failed to receive amnesty remained liable to criminal investigation and prosecution. The report also refers to the establishment of the President's Fund that compensates victims of torture within the context of the TRC process. (ACT/C/52/Add.3, paras. 73-75, 175 and 176)

Indemnity against criminal and civil liability in cases of torture prior to May 1994

Countering the past culture of deniability

Under the apartheid state, victims of human rights violations, including torture and other ill-treatment, and victims' relatives had faced years of denial from officials that the violations had taken place. The evidence of widespread and routine torture and ill-treatment accumulated by health and legal practitioners and human rights monitoring organizations was simply denied. The statements of victims brought to trial after months of often incommunicado detention about their treatment at the hands of the security police were mostly ignored by the courts. At best, victims might receive an out-of-court settlement in a civil case, but with police denying any liability. However the Truth and Reconciliation Commission (TRC) and the public hearings held in particular by one of its three sub-committees, the Human Rights Violations Committee (HRV Committee), gave survivors and their relatives an opportunity to tell their stories publicly.¹⁶ The HRV Committee held a

¹⁶ The TRC was established in terms of the Promotion of National Unity and Reconciliation Act (34 of 1995) and conducted the core part of its functions from 1996 until 1998, while one of its sub-committees, the Amnesty Committee, continued to operate until December 2001. The TRC's final two volumes were published in 2003.

number of public hearings in major urban centres, small towns and rural areas, with the hearings broadcast nationally on television and radio and widely reported in the print media.¹⁷

Over the 18-month period of these public hearings, hundreds of witnesses gave detailed accounts of torture and other ill-treatment by police and other agents of the apartheid state. There were also some accounts of torture and other ill-treatment inflicted by opposition organizations, including the ANC in camps they controlled outside South Africa. The TRC regarded these hearings as vital to achieve one of its statutory objectives – “restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims”. In the TRC’s view, “they revealed the extent of gross violations of human rights and made it impossible for South Africans ever again to deny that such violations had indeed taken place”.¹⁸

This was a very important outcome from the work of the TRC. However, the decisions taken by its semi-autonomous sub-committee, the Amnesty Committee, did lead to breaches of South Africa’s obligations under Article 14 (and Article 2.2) of the Convention Against Torture.

The amnesty provision in the new constitution

The Interim Constitution of 1993 which resulted from the transition negotiations contained a “post-amble” or epilogue, which stated that there would be amnesty for politically motivated offences and that future legislation would provide the criteria and procedures to regulate the process. Section 20 of the 1995 Promotion of National Unity and Reconciliation Act contained some protections for victims and relatives, in that they had to be notified of the place and date of a hearing on an amnesty application relating to “gross human rights violations”, which was defined to include torture, and they would have the right to “testify, adduce evidence and submit any article to be taken into consideration”. An applicant had to make “full disclosure of all relevant facts” and demonstrate that the act for which amnesty was sought “was an act associated with a political objective committed in the course of the conflicts of the past”. There was no requirement that the perpetrator should make individual reparation to the survivor or their family.¹⁹

¹⁷ Amnesty International, “South Africa: Exposing torture under apartheid” in *Combating Torture – A Manual For Action*, (AI Index: ACT 40/001/2003), pp. 51- 52. Some 2,000 victims and witnesses were involved in giving testimony at about 80 separate public hearings in different parts of the country (Priscilla Hayner, 2001, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York and London, Routledge, p.227).

¹⁸ *Combating Torture*, p. 52 and citing TRC Report, 1998, Vol 5, pp. 7-8

¹⁹ Amnesty International criticised some of the provisions in the draft promotion of National Unity and Reconciliation Bill which would have an impact on the rights of victims of human rights violation to a legal remedy and fair and adequate reparations (Memorandum to the Select Committee on Justice: Comments and Recommendations by Amnesty International on Promotion of National Unity and

Relatives of some prominent anti-apartheid activists who were victims of police brutality, including torture mounted a legal challenge in the Constitutional Court to the provisions allowing the TRC to grant amnesty. The Court, while acknowledging that the provisions had an impact on the fundamental rights protected under the new Constitution, ruled that the post-ambale effectively limited those rights and victims would have to look to a broader state program of post-apartheid reparations to obtain a remedy. In *Azanian Peoples Organization and Others v President of the Republic of South Africa and others*, (CCT 17/96, judgement of 25 July 1996) the Court upheld the validity of section 20(7) of the 1995 Act which provided for a process to grant amnesty under certain conditions for those who committed gross human rights violations “emanating from conflicts of the past”. The Court also stated that

“Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or propriety interests.” (para.36)

The Court attempted to mitigate the impact of the amnesty by noting that it would operate narrowly as it was

“specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee [of the TRC] and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.” (para.32)

Decisions of the TRC’s Amnesty Committee in torture cases

One seventh of the 1,000 amnesty applications received by the TRC were decided after public hearings by the Amnesty Committee. Some 50 of these publicly-heard and decided cases involved applicants who disclosed that they or other police officers had used torture or other ill-treatment against detainees, or against individuals whom they had abducted and later murdered.

The record of these hearings indicate that in a number of the survivors of torture, their relatives or their legal representatives were present to challenge the versions presented by the

Reconciliation Bill, 13 January 1995, unpublished; South Africa: Amnesty International supports call for public role in Truth Commission appointment (AI Index: AFR 53/10/95), July 1995)

applicants. The interventions of these interested parties and their legal representatives often exposed the failure of the applicants to make “full disclosure”. This failure would then lead (or ought to have led) to the Amnesty Committee denying the application, as happened for instance in the case of Gerhardus Johannes Nieuwoudt, a former member of the then police Security Branch in Port Elizabeth, who was denied amnesty for the torture of political activists in 1985.²⁰ In contrast though, the Amnesty Committee granted the application of Jeffrey Benzien, a former member of the police Security Branch from Cape Town, despite important gaps in his testimony. While the persistent questioning of his former victims exposed his failure to admit to the use of forms of torture and ill-treatment other than the acknowledged “wet bag” method, or to name other police officers who participated in the torture sessions, the Amnesty Committee granted him amnesty for “assault with intent to inflict grievous bodily harm” on seven named detainees. In their ruling they did not note this lack of full disclosure, only that the offences “arose out of the conflicts of the past between the State and the Liberation Movement”.²¹

In the majority of the 50 cases, however, the Amnesty Committee granted amnesty on the grounds that the applicant had complied with the requirements of section 20 of the Act, in that the applicant had made “full disclosure” of all relevant facts, that the act disclosed was “associated with a political objective committed in the course of the conflicts of the past” and had been committed, ordered or planned by an employee of the state acting within the course and scope of his duties, or by a member or supporter of a publicly known political organization or liberation movement in furtherance of that organization’s objectives.

Consequences of these decisions

However necessary the amnesty provisions may have seemed for the negotiated transition, the decisions by the Amnesty Committee to grant amnesty for acts of torture and other ill-treatment meant that survivors of those acts or the relatives of those who had died as a result of them were thus denied the right to pursue criminal and civil redress through the courts. In addition the justifications given by the torturers who applied for amnesty and the acceptance of these by the Amnesty Committee under the terms of the 1995 Act may have left a dangerous legacy for the country’s continuing fight to end torture and other ill-treatment and uphold its obligations under the Convention Against Torture – including not only Article 14 and 2(2) but also Articles 4 and 5. The extent to which the Amnesty Committee may have “normalised” torture is evident in its ruling in the case of Stanza Bopape, a political activist who had “disappeared” after being detained by the security police in 1988. The Amnesty Committee accepted the claims of 10 former Security Branch officers that they had unlawfully killed him (as a result of inflicting electric shocks), disposed of the body and concocted an elaborate cover-up to conceal the crime. Reflecting on the issue of “proportionality”, the Committee commented that

²⁰ Amnesty Committee hearing, G, J. Nieuwoudt, September 1997; decision AC/97/0068

²¹ Amnesty Committee hearings, Jeffrey Theodore Benzien, July 1997 and October 1997; decision AC/99/0027

“The methods used in the interrogation of the Deceased were both odious and unlawful. We are, however, after careful consideration, of the view that their use of the electric shock device in the interrogation was not disproportionate to the objective they were pursuing. According to them the use of electric shock devices in interrogation was common practice... They perceived it as being an effective and convenient method of forcing the victim to co-operate and they did not anticipate or suspect that its use would have fatal consequences.”²²

Reparations

The Constitutional Court, when ruling that the post-amble of the Interim Constitution effectively limited the rights of victims, stated that they would have to look to a broader state program of post-apartheid reparations to obtain compensation. The 1995 Act establishing the TRC recognized that adequate reparation and rehabilitation measures were essential as a counterbalance to the consequences of granting amnesties to perpetrators. In its October 1998 five-volume report the TRC recommended that final reparations should involve an amount of money for each victim, whose testimony and claims had been corroborated through the TRC process, or equally divided amongst relatives and/or dependants in the case of victims who had died. They also recommended other symbolic measures.²³ It was not until February 2001 that the government announced that it would pay a reparation amount to identified victims (substantially less than a third to what the TRC had proposed), but announced no accompanying plan for distribution. The continuing delays in the implementation of the TRC’s recommendations were also accompanied by negative public comments made by government officials against campaigners for reparations. One support group of survivors and relatives were prompted by this situation to apply to the High Court in June 2002 for an order compelling the government to make available to the applicants its reparation policy and to pay out urgent interim reparation in the meantime, on the grounds that the Respondents had failed “to fulfil their obligations towards the victims of gross human rights abuses who had participated in the TRC process”.²⁴

Following the High Court settlement in January 2003 of a separate legal suit which had delayed the publication of the TRC’s final two volumes and their subsequent publication, the government announced that a once-off payment of R30, 000 (=US\$3,978) would be paid to

²² Amnesty Committee decision, Adriaan Pieter van Niekerk and others, AC/2000/059

²³ The TRC policy was announced in October 1997 and formally presented to the State President with the hand over of the five-volume report in October 1998 (TRC Report, volume 5, chapter 5).

²⁴ Affidavit of first Applicant, *In the matter between the Khulumani Support Group Western Cape Region and Others, and Desmond Mpilo Tutu NO, the TRC, the Minister of Justice, the President of the Republic of South Africa Respondents*. (See for further details on the context for this case Amnesty International/Human Rights Watch, *TRUTH AND JUSTICE: Unfinished Business in South Africa*, (AI Index: AFR 53/001/2003, February 2003), pp.8-10)

each of the victims identified by the TRC.²⁵ There were 21, 769 “identified victims” according to the Department of Justice, which took over legal responsibility for remaining TRC matters²⁶. Of this number, 16, 837 beneficiaries applied for the reparations amount, with 15, 520 having received payment as of 30 September 2006, according to the Department of Justice. Some of the beneficiaries identified by the TRC had died before payments could be made.²⁷

Concerns under Article 16

Since 2004 South Africa has experienced numerous public protests against poor socio-economic conditions. Members of the South African Police Service (SAPS), with the support of the Municipal (Metro) Police Services (MPS), have, for the most part, responded to these public gatherings without resorting to the use of excessive force. Apart from some cases where the police have misused lethal force or misused the weapon of “last resort” (rubber bullets), which fall outside the purvey of the UN CAT, AI is concerned that the police have used a chemical control substance, pepper spray, in some instances in a manner which may amount to a breach of the state’s obligations under Article 16.

In South Africa the use of pepper spray is permitted under police regulations for those situations where police need to get a violent person under control when they are attempting to conduct an arrest. It is used as an alternative to a firearm and in addition to help in reducing the numbers of injuries or fatalities suffered by police dealing with violent crime. According to information provided to AI by the SAPS in 2005, its members are given a one-day training on the use of pepper spray, as part of the basic training provided SAPS members. Additional training is provided to SAPS members, such as from the Area Crime Combating Units, who are more likely to need to use it. Under SAPS written policy, police are required to account in writing for any use of pepper spray. Police officials confirmed to AI that it would be contrary to policy and “out of order” to use pepper spray on an individual who was already under control, for instance in a police van.

This policy notwithstanding, AI is aware of instances in which the police used pepper spray to ill-treat and punish people already under arrest and detained in a police van. For instance, school children and community activists were pepper sprayed by police in the aftermath of

²⁵ The legal suit had been brought by the Inkatha Freedom Party against the TRC contesting the latter’s findings against them (see Amnesty International/Human Rights Watch, *TRUTH AND JUSTICE*, pp. 7-8.) 21, 290 people submitted “victim statements” to the TRC, who investigated and confirmed that 19, 050 of them were “found to be victims of gross violations of human rights”, under the terms of the 1995 Act. “In addition, more than 2, 975 victims emerged from the amnesty process”. (TRC Report, volume 7, Forward)

²⁶ Email confirmation to Amnesty International from the Department of Justice 20 October 2006

²⁷ As indicated by the then Deputy President Jacob Zuma in the South African Parliament in March 2004 (Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Intersentia, Antwerp-Oxford, 2004, p.101)

their violent dispersal of a demonstration in Harrismith, Free State, on 30 August 2004. In a bid to disperse the demonstrators, who were unarmed but had moved onto a major highway, the police had opened fire using live ammunition.²⁸ They proceeded then to arrest scores of people, many of whom were fleeing the scene, and pushed them into police vehicles.

In one of the vans, the police had put a seriously injured 17-year-old, Teboho Mhkonza who later died from his injuries, and two young women, both with gunshot injuries to their legs. One of them, Busisiwe Z, a Grade 11 student, told AI that she was part of the crowd who were singing and waiting for the Mayor (of Maluti-a-Phofung municipal authority) at the entrance to the N3 highway. There was no warning, she just heard gunshots and started to run. She had been hit by a rubber bullet on her right thigh, was “caught” by the police, one of whom pushed her, with his hands at her throat, into the same vehicle with Teboho. Another high school student, Laurence M, alleged that he had been beaten, kicked and sprayed with pepper spray by the police before they put him into the van with Teboho. An amateur cameraman, who had captured on film the police shooting the demonstrators, had been shoved into the same van. He managed to keep filming for some further minutes. Teboho was bleeding and moaning with pain. In the van also was one of the leading members of the Greater Harrismith Concerned Residents Association who used his cell phone to try and get help for Teboho. He and others in the van tried banging on its walls to get the attention of the police. Instead of assisting, however, a police officer, whom those arrested could identify, allegedly opened a side flap of the van and sprayed the occupants twice with pepper spray, then closed the flap. The effects of the spray increased the distress of the injured people in the van. One of the uninjured occupants, Sibusiso N, told AI that he felt “like he was dying...it made breathing difficult”.²⁹

When an independent investigation into the shootings and related incidents was launched, the investigators were confronted by a lack of co-operation from the police who were on duty at that time in confirming the identity of the police officer who had pepper sprayed the occupants of the van. The Director of Public Prosecutions then declined to prosecute on the recommended charge of assault common any member of the police van crew without such police witness evidence.³⁰

²⁸ Bird shot, the use of which is prohibited under SAPS Standing Order G262

²⁹ Amnesty International interviews conducted telephonically and in Intabazwe, Harrismith, December 2004 and April 2005

³⁰ In July 2006 three police officers were acquitted of all charges in relation to the death of Teboho Mkhonza and the injuries to scores of demonstrators.