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South Africa's reporting on the UN Convention against Torture

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Introduction

This issue of the CSPRI Newsletter focuses on the obligation of South Africa, as a state party to the United Nations Convention Against Torture, Ill-treatment and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT), to report every four years to the Committee against Torture (CAT) on measures taken to give effect to its undertakings under this Convention.^[2] South Africa submitted its initial report, which was due in January 2000, in June 2005^[3] and it was assessed by CAT in its 37th session in November 2006. In its conclusions and recommendations CAT requested urgent feedback on a number of issues by November 2007 and the submission of the second periodic report by 31 December 2009.^[4] However, neither the feedback, nor the report has been submitted to CAT at the time of writing. This Newsletter comes out as the state report is being drafted and a number of related civil society initiatives are underway.

Objectives of state reporting

State reporting serves to achieve a variety of objectives and should be seen rather as an 'opportunity' than a 'formality'. It is an opportunity to reaffirm a government's commitment to respect the human rights of its own citizens, to take stock of its achievements and failures, to adopt measures to remedy any shortcomings that have been identified, and to assert to the international community that the government is serious about its international commitments.^[5] It is furthermore an opportunity for constructive dialogue between the state concerned and the treaty monitoring body; in this case CAT. There are a number of other objectives of reporting, which can be found in the documents related to and created by treaty bodies.^[6]

List of Issues

While a number of documents provide guidance on the general drafting of state reports to CAT^[7], a new optional reporting procedure was adopted by CAT in May 2007. This procedure consists of the preparation and adoption of a List of Issues (LOI) to be sent to States parties prior to the submission of a periodic report. The intention is that the State party would report specifically on the LOI instead of reporting article-by-article on measures taken. The Committee adopted this procedure to bring more focus to periodic reports and make reporting more efficient and effective. The LOI for South Africa was released by CAT in 2008^[8] and a review of this LOI was published in CSPRI Newsletter No. 31 of June 2009.^[9] In order to fulfil reporting obligations, it will be of great importance for South Africa to respond with due diligence to the LOI, especially as the previous report was not in line with CAT's expectations and the requested urgent feedback was never provided. In its conclusions and recommendations, CAT stated that "[...] the report does not fully conform to the Committee's guidelines for preparation of initial reports and limits itself mainly to statutory provisions rather than analysing the implementation of the Convention's provisions."^[10] The next report is therefore expected to provide more information on the practical measures taken to meet the Convention's provisions, which would be attained by an honest response to the LOI.

South Africa's upcoming state report

The Department of Justice and Constitutional Development (DoJ&CD) is responsible for the drafting of this report and the Centre for Human Rights (CHR) of the University of Pretoria was commissioned to provide its expertise in this process.^[11] The so-called *common core document*^[12] is also in the process of being updated. In order to collect the relevant information, CHR developed questionnaires targeted at specific departments or other officials, which were then distributed to the relevant actors by DoJ&CD. This process has proven to be a difficult one, as not all responses were sent back in time for CHR to incorporate the information in the report. Furthermore, information for the report was mainly to be sourced from official government documentation and not from media and reports from non-governmental organisations (NGOs). Interestingly, a draft shared with NGOs in August 2010, was not formulated as a direct response to the LOI. Also, the information provided was again mainly based on policies and legislation, with little space for factual information and critical analysis measures taken or stumbling blocks encountered. Following an information gathering session with these NGOs, however, further changes to the report are expected, in particular with regard to content, while the format may indeed also be revised in line with the LOI. At this point, it is not known when the report will be submitted to CAT. Given SA's reporting record to treaty monitoring bodies, it can only be hoped that some urgency will be displayed.^[13]

One of the issues that will most certainly be included, although, unfortunately, not as an example of success, is the criminalisation of torture. In its previous report to CAT, South Africa explained that "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." A comment was added between brackets, stating that "it is noted that a Criminalisation of Torture Bill, 2003 has been prepared and will be finalised as soon as possible."^[14] A final Bill, however, has still not been tabled in Parliament and, at this stage, it is unlikely that it will be tabled in 2010. The failure to criminalise torture (required by Article 4 UNCAT) has been criticised by CAT in the consideration of the initial report^[15] and the LOI also deals with this in the first two questions.^[16]

In a related development, the need for a definition of torture was once more confirmed during the public hearings on the Independent Police Investigative Directorate (IPID) Bill. This Bill gives IPID (to replace the current Independent Complaints Directorate) the mandate to investigate incidences of torture. The Bill, however, does not include a definition of torture neither does it refer to any other document (e.g. UNCAT) in this regard. The drafters did not, however, wish to address this issue by either including their own definition or referring to the UNCAT definition.^[17]

Other relevant stakeholders in the reporting process

Recommendations by CAT

Besides involving relevant departments and governmental institutions, states should involve other relevant stakeholders in implementing the Convention and in the reporting process. Numerous treaty bodies, including CAT, have encouraged the involvement of civil society and national human rights institutions (NHRIs) in the preparation of state reports.^[18] This generally means that states should consult civil society and NHRIs while drafting the report and it should include relevant information collected and produced by civil society organisations. CAT has specifically requested states to include information on the process of preparing the report, including any consultations, as it considers that the drafting of reports would benefit from broad-based consultations.^[19]

Besides civil society and NHRIs, Parliament also has a role to play in the reporting process. This role could be in the form of ensuring that government complies with its reporting obligation, commenting on the draft report, and/or being part of the delegation during the consideration of the state report.^[20]

In addition to the role NGOs and NHRIs play in the drafting of the state report, CAT has outlined other ways of participation in the reporting process.^[21] CAT receives information from NGOs and NHRIs at different stages of the reporting process and also meets with them. The ways in which NGOs and NHRIs may engage with the Committee include: written information for issues to be included in the LOIs; written information for the examination of the State party's report; NGOs in-session briefings and NHRIs meetings with the country rapporteurs and relevant

members prior to the examination of the State party's report, and written information in respect of the follow-up to the Committee's recommendations.

South Africa's upcoming state report

In consultation with CHR (which consulted with DoJ&CD), CSPRI set up a meeting with NGOs working on issues related to the UNCAT, in order to facilitate the collection of information for South Africa's report. This meeting took place on 18 August 2010 and involved representatives of more than 10 NGOs, as well as the South African Human Rights Commission and the Judicial Inspectorate for Correctional Services.

Shadow reporting

In 2006, six NGOs submitted alternative reports to CAT in advance of the consideration of South Africa's state report.^[22] These reports dealt with various issues, including the criminalisation of torture, the situation in prisons, treatment of refugees, corporal punishment and the wider problem of violence in South Africa.^[23] Given the fact that the majority of issues raised by these NGOs were subsequently included in the Committee's concluding observations, one could conclude that these submissions certainly had an impact on the Committee's assessment of South Africa's initial report.^[24]

The CAT has encouraged NGOs to coordinate their inputs and to submit consolidated reports with factual, reliable, precise, and clear information. ^[25] CAT furthermore requested that the information presented by NGOs and NHRIs be organised under the respective articles of the UNCAT or thematic issues, and to include relevant concerns and recommendations.

Conclusion

The drafting of South Africa's state report and alternative reports on the implementation of UNCAT is a process of great importance with regard to addressing the problem of torture and ill-treatment. In addition to providing an overview of the current situation with regard to the report of South Africa to CAT, this issue of the CSPRI Newsletter aims to encourage all relevant stakeholders to take a proactive approach to this issue and play a role in ensuring that the state makes use of this reporting cycle as an opportunity to look critically at developments or the lack thereof with regard to their obligations under UNCAT. Furthermore, by providing information and critical analyses in alternative reports and, where applicable, by making use of the individual complaints procedure under UNCAT Article 22, civil society can directly inform CAT of their concerns with regard to South Africa's implementation of UNCAT. Those interested in taking part in efforts to prepare joint and/or coordinated submissions are invited to contact CSPRI at their earliest convenience.

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[2] Article 19 UNCAT.

[3] *Initial report of South Africa*, UN doc. CAT/C/52/Add.3, 25 August 2005.

[4] UN Committee against Torture, *Conclusions and recommendations – South Africa*, UN doc. CAT/C/ZAF/CO/1, 7 December 2006, paras. 29 & 31.

[5] See United Nations Office of the High Commissioner for Human Rights, United Nations Institute for Training and Research & United Nations Staff College Project, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997, United Nations) 21-23.

[6] See also L. Chenwi (2010) 'South Africa: the state of state reporting under international human rights law', Research paper, Community Law Centre, p. 20, available at: <http://www.communitylawcentre.org.za/news/south-africa-state-of-state-reporting-research-paper> (accessed: 30 September 2010)

[7] See *Guidelines on the form and content of initial reports under article 19 to be submitted by states parties to the Convention against Torture*, UN doc. CAT/C/4/Rev.3, 18 July 2005; *General guidelines regarding the form and contents of periodic reports to be submitted by states parties under article 19, paragraph 1, of the Convention*, UN doc. CAT/C/14/Rev.1, 2 June 1998; and *Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties*, UN doc. HRI/GEN/2/Rev.6, 3 June 2009.

[8] UN Committee against Torture, List of issues prior to the submission of the second periodic report of South Africa, UN doc. CAT/C/ZAF/Q/2, 28 February 2008, paras. 1 & 2.

[9] CSPRI Newsletter No. 31 June 2009, author L. Muntingh 'UN Committee against Torture releases List of Issues for South Africa'. Available at: <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/CSPRI%20Newsletter%2031.pdf> (accessed: 30 September 2010)

[10] UN Committee against Torture, *Conclusions and recommendations – South Africa*, UN doc. CAT/C/ZAF/CO/1, 7 December 2006, para. 3.

[11] Besides the report to CAT, CHR is involved in writing state reports on the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the African Charter on Human and Peoples' Rights, including its Protocol on the Rights of Women in Africa.

[12] The 'common core document' should contain general background information about the reporting state and information on the general framework for the protection and promotion of human rights. This part should also include information on non-discrimination and equality, and effective remedies. The common core document is normally submitted to the UN, including all treaty bodies, and can be subsequently updated and submitted to specific treaty bodies when required.

[13] In the past, for instance, a report to the African Commission on ACHPR was finalised in 2001 and only submitted in 2005. Currently, a report to the Committee on the Rights of the Child has been submitted to Cabinet 'a while back', but is still awaiting approval.

[14] *Initial report of South Africa*, UN doc. CAT/C/52/Add.3, 25 August 2005, para. 108.

[15] UN Committee against Torture, *Conclusions and recommendations – South Africa*, UN doc. CAT/C/ZAF/CO/1, 7 December 2006, para. 13.

[16] UN Committee against Torture, *List of issues prior to the submission of the second periodic report of South Africa*, UN doc. CAT/C/ZAF/Q/2, 28 February 2008.

[17] Public hearings on this Bill were in August 2010 by the Portfolio Committee on Police. Several submissions expressed concern in relation to the lack of a definition of torture in the IPID Bill. See Parliamentary Monitoring Group (PMG) website for reports on these hearings and full texts of submissions. PMG report (4 August): <http://www.pmg.org.za/report/20100804-public-hearings-independent-complaints-directorate-icd-bill-and-civil> PMG report (6 August): <http://www.pmg.org.za/report/20100806-public-hearings-independent-police-investigative-directorate-ipid-bil> PMG report 10 August: <http://www.pmg.org.za/report/20100810-public-hearings-independent-police-investigative-directorate-ipid-bil> (all accessed: 30 September 2010)

[18] "The reporting process should encourage and facilitate, at the national level, public scrutiny of government policies and constructive engagement with relevant actors of civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant convention." See the harmonised guidelines (fn 7 above) para. 10. See also *Participation of non-governmental organizations (NGOs) and National Human Rights Institutions (NHRIs) to the reporting process to the Committee against Torture*. Available at: http://www2.ohchr.org/english/bodies/cat/follow_up_ngo.htm.

[19] See CAT guidelines on initial reports (fn 7 above), para. 4

[20] For further reading on the role of parliament in the reporting process, see L. Chenwi (2010) 'The role of the South African Parliament in promoting rights through ensuring compliance with international human rights obligations' Research Paper, Community Law Centre (forthcoming, see <http://www.peopletoparliament.org.za/>).

[21] *Participation of non-governmental organizations (NGOs) and National Human Rights Institutions (NHRIs) to the reporting process to the Committee against Torture* (fn 18 above)

[22] These were Global Initiative to End All Corporal Punishment against Children, Amnesty International, Civil Society Prison Reform Initiative, Children's Rights Project of the Community Law Centre, Centre for the Study of Violence and Reconciliation and World Organization against Torture (OMCT).

[23] These reports can be found at the OHCHR website: <http://www2.ohchr.org/english/bodies/cat/cats37.htm>. For an overview and analysis of these reports, please see L. Muntingh (2008) 'The betrayal of Steve Biko – South Africa's Initial Report to the UN Committee against Torture and responses from civil society' Law, Democracy & Development, Vol. 12 May 2008 (1), pp. 29-48.

[24] See Muntingh (2008) (fn 23 above), pp. 31 & 46

[25] *Ibid.*

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