



Convention Against Torture (CAT) & Optional Protocol to the Convention (OPCAT)

Presentation to the Portfolio Committee on Justice and Constitutional Development, 25 June 2008

South African Human Rights Commission

The Convention Against Torture

- Adopted in 1984, the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the use of torture thus establishing it as a rule of international law.
- CAT provides for the establishment of the UN Committee Against Torture to monitor the compliance of State parties to the Convention.

Definition of Torture

■ *any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, or for any reason based on discrimination of any kind, 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... Article 1 of CAT*

- **EXCEPTION:** It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions
- South Africa does not have a crime of torture defined in the statute books, hence common law crimes have been used to prosecute offenders.

The OPCAT

- Optional Protocol to the CAT further contributes to the prevention of torture, cruel, inhuman and degrading treatment and punishment.
- *'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'* **Art. 1 of OPCAT**

Visiting mechanisms

- OPCAT provides for international and national visiting mechanisms to places of detention.
- International visiting mechanism known as 'Sub-Committee on the Prevention of Torture (SPT)'
- National visiting mechanism known as 'National Preventative Mechanism (NPM)'
- OPCAT grants the SPT and NPM access to all places of detention, people detained there and documentation at such places.
- State parties to the OPCAT are obliged to cooperate with SPT and NPM and ensure functional independence and resources for the fulfillment of the NPM mandate.

The Treaty Bodies and their monitoring mechanisms

- | | |
|------------------------|---|
| ■ CAT | ■ OPCAT |
| ■ Committee on Torture | ■ Sub Committee on Torture |
| | ■ National Preventative Mechanism (NPM) i.e. system of regular visits |
| | ■ There are currently 35 state parties and 33 signatories to OPCAT |

OPCAT - Powers of NPM (Art 19)

- To regularly examine the treatment of persons deprived of their liberty, with a view, if necessary to protect them from cruel, inhuman and degrading treatment or punishment.
- To make recommendations to the relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty.
- To submit proposals and observations concerning existing or draft legislation.

OPCAT - Government shall grant the NPM (Art 20):

- Access to all information concerning persons deprived of their liberty.
- Access to all information referring to the treatment and conditions of persons deprived of their liberty.
- Access to all places of detention, their installations and facilities.
- The opportunity to have private and confidential interviews with persons deprived of their liberty
- The liberty to choose the places it wants to visit and the persons to be interviewed.
- The right to have contact with SPT, meet with it and send information

Why SA should ratify OPCAT

- Ratification would demonstrate an important step in South Africa's commitment to the eradication of torture.
- Can be used to strengthen existing oversight mechanisms such as the JI and ICD
- Government must create the opportunity for dialogue with the NPM, SPT and civil society to address issues emanating from visits to places of detention.

NPM for South Africa

- South Africa could utilise existing structures to fulfill the NPM mandate; can establish new structures and/or amend the mandates of existing structures to perform functions of an NPM
- Can be tailored to State's preference but 4 requirements set by OPCAT:
 - i) must be functionally independent
 - ii) consists of individuals with the necessary capabilities and expertise
 - iii) have access to the necessary resources
 - iv) be in-line with the Paris Principles

South Africa's obligation

- In 1998, South Africa ratified CAT and in 2006, signed the OPCAT
- Signature of a treaty expresses the State's intention to become party to the OPCAT and ratification would place a legal obligation on the State to apply the OPCAT.
- South African Constitution (Act 108 of 1996) places obligation on the State to protect and promote the dignity of all people and protect them from torture and cruel, inhuman or degrading treatment or punishment [Sec 12(1)(d)& (e)].
- The international prohibition of the use of torture has the enhanced the status of a peremptory norm and hence no State may excuse itself from the application of this law.

Concerns raised by the UN Committee Against Torture

In November 2006, South African government appeared before the UN Committee Against Torture. Some concerns and recommendations raised by the Committee:

| Concerns: | Recommendations: |
|---|---|
| The absence of a specific offence of torture and a definition of torture | Criminal law legislation should be enacted with a specific offence of torture and definition in-line with Art.1 of CAT |
| Absence of clear legal provisions ensuring absolute prohibition of torture is not derogated in any circumstances | Adoption of appropriate legislation implementing the principle of absolute prohibition of torture, orders/statements from superior may not be invoked as justification of torture |
| The return of persons by the State to States where the individual may be in danger of being subjected to torture or sentenced to death. | Restation that under no circumstances may the State expel, return or extradite a person where there is a threat of torture. Should use Art.3 'non-refoulement' principle. State to provide detailed information on all cases of extradition, return or removal to the CAT Committee in cases where assurances are given. |

| | |
|---|--|
| Concern over the difficulties and allegations of ill-treatment of documented and undocumented non-citizens in repatriation centres and by law enforcement officials. | Steps should be taken to prevent and combat ill-treatment of non-citizens detained at repatriation centres. Prompt, thorough and independent investigation of all allegations of ill-treatment of non-citizens. |
| Concern over the high number of deaths in detention and the lack of investigation of alleged ill-treatment of detainees and the impunity of law enforcement personnel. | State should promptly, thoroughly and impartially investigate all deaths in detention and allegations of torture/ill-treatment and bring perpetrators to justice so as to fulfil the obligations under Art. 12 of the CAT. |
| Overcrowding in prisons and places of detention. Deep concern that there is no effective oversight mechanisms to monitor the conditions for persons placed in police custody and pre-trial detention. | State to adopt effective measures to improve the conditions in prison. Establish an effective monitoring mechanism for persons in police custody. |

Universal Periodic Review (UPR)

- UPR is a new mechanism, through which the Human Rights Council (HRC) will monitor the human rights situation in all member states of the United Nations (UN). It will regularly review the fulfilment of the human rights obligations of the states, starting with the members of the HRC itself. The main aims of UPR are to improve the human rights situation on the ground, assess developments and challenges in relation to a State's human rights obligations and to support cooperation in the protection and promotion of human rights. The involvement of the country under review and the participation of all relevant stakeholders (for example, NGOs and NHRIs) are vital. The process aims to ensure universal coverage and the equal treatment of all countries.

SAHRC Activities

- Section 5 Committee on Torture
- Participation OHCHR Workshop
- Raised issues through UPR
- Human Rights Development Report
- Bristol Africa Regional Seminar

**Key issues to be addressed to
CAT & OPCAT**

- CAT provides for the criminalization, prosecution and punishment of perpetrators of torture, as defined by the Convention. Legislation is needed.
- The Follow-up Report to the CAT committee is overdue.
- OPCAT needs to be ratified. Champions needs to be identified in order for SAHRC Section 5 Committee to begin engaging with government around the establishment of a NPM

The SAHRC is the national institution established to entrench constitutional democracy. It's committed to promoting respect for, observance of, and protection of human rights for everyone without fear or favour.