Submission to the Portfolio Committee on Justice and Constitutional Development

on the

PREVENTION AND COMBATING OF TORTURE OF PERSONS BILL (B21 – 2012)

31st July 2012

Introduction

1. The Southern African Catholic Bishops' Conference welcomes the opportunity to address the Committee on this significant piece of legislation. It is to be regretted that, in the 21st century, it is still necessary to enact this kind of legislation. Unfortunately, however, we know only too well that torture is still practised in many countries, whether by the state authorities or by non-state groups. Accordingly, we support the Bill and its purposes of establishing and defining a distinct offence of torture, providing effective penalties therefor, and promoting awareness of what constitutes torture and how it is to be combated.

2. We wish to highlight a few comments and reservations.

2.1. Definitions

The definition of 'torture' set out in Clause 3 of the Bill mirrors very closely the definition given in the Convention. However, it does not include the Convention's wording regarding the

perpetrator of torture: "…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."[1] Instead, the Bill accommodates the important question of people acting with the consent or acquiescence of public officials (who themselves merely allow the torture to take place) by referring to them in the definitions in Clause 1, and by deeming such people to be themselves 'public officials'.

The Convention's definition is clearer and more concise, and there is no apparent reason to deviate from it. More importantly, the Bill's definition of 'public official' stretches the concept too far, and could lead to uncertainty. For example, if a prison warder merely turned a blind eye ('acquiesced') to the torture of an inmate by fellow prisoners, such prisoners would become 'public officials'. The 'third forces', *witdoeke*, *askaris*, and other apartheid-era extra-judicial operators, who acted with the consent of the police, would also, under this definition, have been seen as 'public officials'.

In the absence of any compelling reason to separate the definitions of what torture is from who its perpetrators may be, we suggest that the Convention's definition be adopted verbatim in the Bill.

2.2. The proviso in Clause 3

According to the proviso at the end of Clause 3, torture "does not include pain or suffering arising from, inherent in or incidental to lawful sanctions." Clearly, ordinary imprisonment or other lawful punishments will always cause a certain degree of mental, psychological and even physical anguish, and this should not be counted as torture. However, the proviso as it stands covers 'severe pain and suffering' as long as it is 'incidental to lawful sanctions'. We suggest that this is too loose a formulation. It would be too easy for acts that in reality constitute torture to be excused on the basis that they were 'incidental' to the main sanction in terms of which they took place, such as imprisonment.

The key consideration must be that the 'pain and suffering' should be an unavoidable consequence of the 'lawful sanctions'; and that only such unavoidable pain and suffering should be excluded from the definition of torture. This can be achieved by inserting the word 'unavoidable' between 'include' and 'pain and suffering' in the proviso.

[1] Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.3. Offences and penalties

Clause 4(3)(a) is strongly supported. Too many presidents and other heads of state, senior officials and politicians get away with acquiescence in, or instigation of, torture due to the real or imagined immunity that attaches to their official positions.

We are less convinced about the correctness of clause 4(3)(b), since it appears to equate the guilt of a foot-soldier or functionary who, perhaps under immense pressure, commits an offence of torture, with the guilt of the person giving the order. This makes no allowance for the unequal power-relationships that characterise military, quasi-military, police and political hierarchies. When a junior official unwillingly carries out an act of torture under orders from a superior (especially when disobeying the order risks punishment) there is a distinct difference in moral blameworthiness; and differences in degrees of moral blameworthiness are always taken into account in the imposition of punishment. We submit that there is no reason why reduced moral blameworthiness should not also be taken into account in the offence of torture.

2.4. National security no justification

Clause 4(4) provides that neither a state or threat of war, nor political instability, nor any other public emergency may be invoked as a justification for torture. We support this provision, and suggest that the notion of 'national security' should be added to the list. As we saw in testimony to the Truth and Reconciliation Commission; as we see even today in the activities of American interrogators at Guantanamo Bay; and as we have noted with some alarm in the Protection of State Information Bill currently before Parliament, the mantra of national security is regularly invoked to justify egregious violations of human rights. For that reason, it should be expressly ruled out as a justification for torture.

2.5. General responsibility to promote awareness

There is abundant evidence that state officials, particularly in the police and prison services, commit acts of torture as defined in the Bill. In most cases, no doubt, the officials concerned would not see their actions as amounting to torture; beatings, threats, violations of dignity and privacy, are all seen as 'part of the job' of dealing with suspects and offenders. For this reason it is vital that state officials are made properly aware of what constitutes torture, and of the consequences of involvement in acts of torture.

Accordingly, we strongly support clause 8, particularly 8(2)(b), and we urge the Committee to exercise proper oversight and follow-up on this aspect of the Bill, once it is enacted.

3. Conclusion

As with so many other laws, especially those that create offences, the real test for this legislation will be whether or not it manages to eradicate the practices and activities that it proscribes. This will require a concerted education and training effort from the Ministries of Police, Correctional Services, and Justice and Constitutional Development, among others; and it will equally require the diligent oversight of the relevant portfolio committees.

We wish the Committee well in its deliberations and we would be happy to make an oral submission if requested.

Adv Mike Pothier
SACBC Parliamentary Liaison Office
Cape Town
31st July 2012