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**HUMAN RIGHTS SITUATION IN SOUTH AFRICA: SOME AREAS OF CONCERN**

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## **HUMAN RIGHTS SITUATION IN SOUTH AFRICA: SOME AREAS OF CONCERN**

### **A. Introduction**

1. The Community Law Centre (CLC) is a South African non-governmental organisation, based at the University of the Western Cape. It is committed to protecting and promoting human rights and combines a strong academic tradition with a practical hands-on approach to transformation. It is founded on the belief that our constitutional order must promote good governance, socio-economic development and the protection of the rights of vulnerable and disadvantaged groups. CLC has recently been granted an observer status with the African Commission on Human and People's Rights.
2. We welcome the opportunity to participate in the Universal Periodic Review process of the Human Rights Council, as South Africa is one of the countries to be reviewed.
3. Since 1994, South Africa has made significant advances in developing a statutory framework promoting and protecting human rights. The Constitution and the national institutions created to protect and promote human rights are testimony to this. At the same time, it should also be acknowledged that the legacy of apartheid presents substantial challenges in developing a culture of human rights based on transparency and accountability. Hence, despite all the significant strides aimed at realising human rights in South Africa, there are still areas of concern, some of which are highlighted in this submission.

### **B. Ratification of the International Covenant on Economic, Social and Cultural Right**

4. South Africa is internationally renowned for its constitutional protection of a broad range of economic, social and cultural rights, and for the development of a nuanced, sophisticated jurisprudence on these rights.
5. However, we are deeply concerned over the fact that South Africa has signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The ICSECR, along with its sister Covenant, the International Covenant on Civil and Political Rights, 1966 (ICCPR), as well as with the Universal Declaration on Human Rights, constitute the 'International Bill of Rights'. Insofar as the two Covenants are binding law on States Parties, they together constitute, as a whole and indivisible unit, the cornerstone of international human rights law. South Africa has ratified the ICCPR, bringing into the South African legal order one of these two fundamental international human rights law instruments. Ratification of the ICESCR by South Africa would unambiguously signal its commitment to be legally bound by the full range of human rights recognised under international law. It would further affirm the principle recognised internationally that 'all human rights are universal, indivisible, interdependent and interrelated.'
6. The ICESCR clearly served as a major source of inspiration for the drafting of the provisions on social and economic rights in the South African Constitution. The courts have on occasion drawn on the provisions of the ICESCR in developing their interpretation of these rights.
7. We therefore find it perplexing that 13 years after signing the ICESCR, South Africa is yet to ratify this important international human rights treaty, in spite of the fact that the Government has indicated on a number of occasions that it intends to do so 'soon'. Non-ratification of the ICESCR dangerously leaves open a protection gap in the area of fundamental economic, social and cultural rights.
8. Ratifying the ICESCR will help ensure that South Africa's jurisprudence on social and economic rights develops in harmony with the normative standards set by the leading international treaty on these rights. It will also promote the culture of accountability to national and international human rights standards which the South African Constitution encourages.

### Recommendations

We therefore request that the Human Rights Council:

- a. Enquires about the progress and steps currently being taken towards ratification of the ICESCR and the expected time-frame within which ratification will occur;
- b. Urges South Africa to ratify the ICESCR.

### C. Challenges in the Prison System – Torture and Deaths

9. While the right to dignity is a founding value of the South African Constitution, the practical application of this right faces particular challenges in the prison system. The South African prison system faces a number of critical challenges, being overcrowding<sup>1</sup>, a growing prison population<sup>2</sup>, increasing sentence lengths<sup>3</sup>, a rapid increase of prisoners serving life imprisonment<sup>4</sup>, a high mortality rate amongst prisoners presumable due to HIV/AIDS<sup>5</sup>, high levels of inter-prisoner violence, the assault of prisoners by officials often with fatal consequences<sup>6</sup>, and an increasingly youthful prison population<sup>7</sup>.
10. We are particularly concerned about deaths in custody and the assault of prisoners by officials. The South African Constitution specifically articulates the right to freedom from torture and cruel, inhuman and degrading treatment or punishment.<sup>8</sup> The Correctional Services Act (111 of 1998) also guarantees the safety and dignity of prisoners.<sup>9</sup> Moreover, South Africa ratified the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment (CAT) in 1998, signifying to the international community that it subscribes to the international ban on the use of torture and that it will implement the necessary measures to give effect to the objectives of CAT.
11. South Africa has not yet criminalised the act of torture as required by Article 4 of CAT. While two earlier draft bills were circulated in 2005 for comment by the responsible department (Justice and Constitutional Development), there has been no reported progress to date (October 2007). The Committee against Torture lamented this shortcoming in its Concluding Remarks to South Africa's Initial Report and urged the South African government to '*enact legislation with a specific offence of torture under its criminal law, with a definition fully consistent with Article 1 of the Convention, which should include appropriate penalties that take into account the grave nature of the offence, in order to fulfil its obligations under the Convention to prevent and eliminate torture and combat impunity.*' This situation remains unchanged.
12. The overall impression is that South Africa has made little progress in taking active steps to prevent and combat torture. Apart from a policy on the prevention of torture developed by the South African Police Service (SAPS), no other legislation, regulations or policies dealing with people deprived of their liberty, and especially prisoners, make mention of the absolute prohibition of torture. This is a regrettable situation as there have been numerous opportunities to change this during the active legislative reform process embarked upon by government after South Africa became a democracy.

<sup>1</sup> Of the total prison population, 58% are housed in prison that are 150% or more full as at February 2007 (Statistics supplied by the Judicial Inspectorate of Prisons)

<sup>2</sup> From 1995 to 2005 the prison population grew from approximately 114 000 to 187 000. A remission in 2005 brought the figure down to 152 000 but it has risen to 162 000 since then.

<sup>3</sup> See C Giffard & L Muntingh *The Impact of Sentencing on the Size of the Prison Population* (2006) Open Society Foundation.

<sup>4</sup> Since 1995 this figures have risen from just more than 400 to over 7500 by 2007 (Statistics supplied by the Judicial Inspectorate of Prisons)

<sup>5</sup> Annual prisoner deaths due to 'natural causes' has increased from 211 in 1995 to 1689 in 2004 (Judicial Inspectorate of Prisons *Annual Report 2005/6* p. 35).

<sup>6</sup> In 2006/7 a total of 62 prisoners died due to 'unnatural causes' (violence, suicide and accidents), a more than 100% increase from the previous year. A total of 1822 assaults were also recorded (Department of Correctional Services *Annual Report 2006/7* (2007) p. 38.)

<sup>7</sup> Of the total prison population, 37% is now under the age of 25 years. (Statistics supplied by the Judicial Inspectorate of Prisons)

<sup>8</sup> Constitution Section 12(1)(d) and (e)

<sup>9</sup> Correctional Services Act (111 of 1998) Section 2(b) The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by- . . . detaining all prisoners in safe custody whilst ensuring their human dignity; . . .

13. Furthermore, there are significant problems with the investigation of cases of alleged torture and deaths in the prison system.<sup>10</sup> These cases are investigated by the SAPS and this situation has raised questions about impartiality, independence and thoroughness of investigations. The Committee against Torture expressed itself as follows on this matter: *'The State party should promptly, thoroughly and impartially investigate all deaths in detention and all allegations of acts of torture or cruel, inhuman or degrading treatment committed by law enforcement personnel and bring the perpetrators to justice, in order to fulfill its obligations under Article 12 of the Convention.'* The situation has remained unchanged and no further measures taken to improve and strengthen investigative measures have been reported.
14. An attempt by a group of non-governmental organisations to engage government in formal dialogue on its obligations in respect of CAT has been unsuccessful. It should, however, be added that the South African Human Rights Commission has established a Section 5 Committee on Torture and this Committee includes representatives of civil society.<sup>11</sup>

#### **Recommendations**

We therefore submit that the Human Rights Council requests the following of South Africa:

- a. That, as a matter of urgency, the Government should enact legislation criminalising torture to comply with its obligations under Article 4 of CAT;
- b. That the Government should conduct a comprehensive independent judicial enquiry to investigate the immediate and underlying reasons for the persistent high number of unnatural deaths and assaults taking place in prisons with a view to develop recommendations for prevention;
- c. That, in compliance with its obligations under Article 17 of the Optional Protocol to CAT (which it signed in June 2006), the Government should enact legislation designating the National Preventive Mechanisms, and in particular the mechanism applicable to the prison system.

#### **D. Local government and basic service delivery**

15. Local government is central to the delivery of many of the socio-economic rights, most notably the right of access to water, sanitation and housing. An overall analysis of progress since 1994 produces an impressive record of extension of household infrastructure and service delivery. Basic service delivery has been extended to marginalised communities to an extent that is unprecedented. Between the year 1994 and 2007, 2.35 million houses were built. In the same period, the percentage of people with access to clean water rose from 59 per cent to 86 per cent and electricity supply was extended from 30 per cent of the population to 73 per cent. The percentage of people with access to sanitation rose from 48 per cent in 1999 to 73 per cent in 2007.
16. Government's effort towards eradicating service delivery backlogs, however commendable, is unlikely to result in South Africa achieving the Millennium Development Goals (MDGs). Government's efforts towards eradicating the backlog in access to potable water need to be doubled up and the current rate of eradicating backlogs in sanitation is also too slow to meet MDG targets. Government's own target of eradicating bucket toilets by the end of 2007 will not be met.
17. Government's policy of providing free access to basic water (six kilolitres of water per household per month) has been an important initiative towards realising access to basic rights. However, the amount is insufficient when one considers the size of the average South African household and when one sets off the amount against World Health Organisation standards. Moreover, the legal framework permits disconnection of access to water under strict conditions. Mechanisms such as pre-paid water systems and partial disconnection of water

<sup>10</sup> See submissions by Amnesty International and the Civil Society Prison Reform Initiative, Committee against Torture, 37<sup>th</sup> Session, <http://www.ohchr.org/english/bodies/cat/cats37.htm>

<sup>11</sup> The Committee is established in respect of Section 5 of the South African Human Rights Commission Act 54 of 1994.

connection are used frequently by municipalities to enforce payment. These methods are inconsistent with the right of access to water as access is limited to those who can afford it.

18. South Africa has paid too little regard to the need to establish sustainable and integrated settlements. The past decade has seen little progress in the reversal of apartheid spatial patterns; low cost housing continues to be built on the peripheries. This is resulting in the continuation of marginalised groups living in degrading and dehumanising circumstances, having to spend disproportionate amounts of income on transport to work etc. In addition, the right to a clean and healthy environment is endangered by the lack of effort on the part of government to contain environmental hazards, particularly in poor and marginalised areas.

#### **Recommendations**

We therefore submit that the Human Rights Council request that South Africa should:

- a. Revisit the legal framework for cost recovery around access to water;
- b. Accelerate the extension of basic services, such as water, sanitation and housing;
- c. Renew efforts to protect environmental rights of people living in disadvantaged areas.

#### **E. Realising the Right to Protection against Arbitrary Evictions**

19. The South African Constitution provides for the rights to have access to adequate housing and to protection against arbitrary evictions.<sup>12</sup> The government has put in place a number of measures, legislative and otherwise, towards the realisation of these rights.

20. However, the practice of evictions is a regular occurrence in the country. Between 1995 and 2005, 826 679 people were reportedly evicted.<sup>13</sup> These evictions are not confined to urban areas, as since 1994, large numbers of black farm dwellers are continuously being evicted or displaced. Between 1994 and 2004, 1 679 417 farm dwellers were reportedly evicted.<sup>14</sup>

21. The complexity of legislation on evictions and its allowance of urgent eviction applications, more often than not, result in evictions taking place without adherence to the procedural and substantive requirements. The poorest and most vulnerable members of the society are evicted without given adequate notice or an opportunity to present their case in court (or oppose the eviction) or notice of when the eviction order will be carried out; with some of the eviction orders executed at night.<sup>15</sup> Others have been evicted without the provision of alternative accommodation.<sup>16</sup> This is contrary to the jurisprudence of South African courts, requiring in essence that an eviction cannot take place without a court order and the provision of alternative accommodation for vulnerable groups (those in desperate need), even if temporary.

22. During his visit to South Africa in April 2007, the UN Special Rapporteur on Adequate Housing was particularly concerned about the spate of evictions that were being conducted in clear breach of procedural requirements and through spurious use of 'urgent eviction' provisions where evictions are justified on the grounds of the health threat to the occupants.<sup>17</sup>

#### **Recommendations**

We therefore request that the Human Rights Council urges South Africa to:

- a. Adhere to the call of the UN Special Rapporteur on adequate housing for a moratorium on evictions until all national, provincial and local legislation, policies and administrative actions

<sup>12</sup> Section 26.

<sup>13</sup> J du Plessis 'Forced Evictions: A Global Perspective' (2006) 7 (3) *ESR Review* 3-8 p. 6.

<sup>14</sup> M Wegerif 'Farm Evictions: A Failure of Rights' (2006) 7(3) *ESR Review* 8-11 p. 9; see also Social Surveys and Nkuzi Development Association *Still Searching for Security – The Reality of Farm Dweller Evictions in South Africa* (2005) Blackwell Publishing.

<sup>15</sup> COHRE *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* 17 February 2005.

<sup>16</sup> SAHRC *6th Economic and Social Rights Report 2003-2006* (2006) p. 6.

<sup>17</sup> Preliminary observations as of 24 April 2007 by the UN Special Rapporteur on Adequate Housing, Miloon Kothari in light of his mission to South Africa (12 April – 24 April 2007); see also UN press release 'United Nations expert on adequate housing concludes visit to South Africa', reproduced in (2007) 8(2) *ESR Review* 34-36

- are brought into line with Constitutional provisions and relevant Constitutional Court judgments that protect the right to adequate housing and freedom from evictions.
- b. Restrict the practice of seeking urgent eviction orders without prior and full exploration of all alternatives such as suitable accommodation and without giving adequate notice to those to be evicted.

#### **F. Gender-Based Violence and HIV/AIDS**

23. Gender-based violence (GBV) is one of the most prominent features of post-apartheid South Africa. During 2006–2007, 52 617 cases of rape were reported to the South African Police Service.<sup>18</sup> GBV is a key factor in increasing women’s risk of contracting HIV.
24. South Africa also remains the country with the highest number of people living with HIV in sub-Saharan Africa. UNAIDS estimates that by the end of 2005, 5.5 million people were living with HIV in South Africa, 3.1 million of them women.<sup>19</sup>
25. Furthermore, poverty in South Africa is stratified along gender lines, as indicated by, *inter alia*, the higher unemployment rate for women. Women, particularly black women, typically have lower incomes and less job security than men. Due to this economic disempowerment, women often find themselves dependent on violent partners for access to housing and other resources. Hence, the termination of a relationship may create considerable housing problems for a woman. Workers at shelters for abused women have accordingly observed that women remain in or return to abusive relationships because they have nowhere else to go, thus exposing them to further violence and the risk of contracting HIV.
26. Although the South African government has committed itself under international and regional human rights instruments to realise women’s rights and the right to freedom from all forms of violence is guaranteed in the South African Constitution, these commitments fall down on the level of *implementation*. In spite of sound legislation such as the Domestic Violence Act 116 of 1998 and the Maintenance Act 99 of 1998, both of which can make a great deal of difference to women if properly implemented, there appears to be a lack of political will to commit adequate resources, appoint sufficient officials and conduct thorough training. The fact that draft legislation, aimed at reforming the law on sexual offences, has been under discussion in parliament since 2003 without finalisation, is another example of the lack of sense of urgency on the part of government to take concrete steps to match its rhetorical statements.

#### **Recommendations**

- We recommend that the Human Rights Council should urge the South African Government to:
- a. Scrap the inappropriate provisions relating to compulsory HIV testing of alleged sex offenders from the Criminal Law (Sexual Offences and Related Matters) Amendment Bill B50-2003 and instead, take concrete steps to improve the provision of post-exposure prophylaxis to all victims of sexual assault;
  - b. Take urgent steps to see the Criminal Law (Sexual Offences and Related Matters) Amendment Bill B50-2003 enacted into law and implemented as speedily as possible;
  - c. Take steps to improve the well-documented shortcomings in the implementation of the Domestic Violence Act by the South African Police Service;
  - d. Ensure that provincial and local housing departments put in place ‘Special Needs’ housing policies that make provision for women experiencing domestic violence, amongst others;
  - e. Improve access to justice for women with disabilities;
  - f. Work in consultation with and provide financial support to civil society organisations that render legal, counselling, shelter and other services to women experiencing gender GBV.

<sup>18</sup> See South African Police Service *Domestic Violence Report: 1 July–31 December 2006* (2007) Report submitted to the National Assembly Portfolio Committee on Safety and Security on 12 September 2007, <http://www.pmg.org.za>; South African Police Service *Rape in the RSA for the period April to March 2001/2002 to 2006/2007* (2007), available on [http://www.saps.gov.za/statistics/reports/crimestats/2007/\\_pdf/category/rape.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2007/_pdf/category/rape.pdf).

<sup>19</sup> UNAIDS *2006 Report on the global AIDS epidemic* (2006) p. 17.

## G. Children's rights against violence and to education

27. The South African Constitution guarantees a range of children's rights and a key success has been the finalisation of the Children's Act 38 of 2005. However, some practical challenges remain, some of which are stated below.
28. First, although the promulgation of some parts of the Children's Act is still pending, there is considerable political will behind this endeavour. However, the same cannot be said of the Child Justice Bill 49 of 2002, another key child rights legislation, which continues to languish as a Bill for almost a decade.
29. Second, the ills of the education system such as poor facilities, fee requirements at primary level, and inadequate teacher support and training are routinely documented in media reports. Fee requirements at primary level imply that South Africa does not comply with the international treaty law requirement of *free* and *compulsory* primary education.
30. Third, an attempt through the Children's Amendment Bill of 2006 to ban, among others, domestic corporal punishment and remove the 'reasonable chastisement' defence was to be discussed by Parliament this year (2007) but has been deferred for next year (2008).
31. In addition, South Africa ratified the Convention on the Rights of the Child (CRC) on 16 June 1995,<sup>20</sup> and submitted its initial report in December 1997. However, no periodic reports have been submitted since then.<sup>21</sup>

### Recommendations

We recommend that the Human Rights Council should urge the South African Government to:

- a. Take urgent steps to see the Children's Act promulgated in full and the Child Justice Bill 49 of 2002 and the Children's Amendment Bill of 2006 enacted into law and implemented as speedily as possible;
- b. Take urgent steps to comply with international treaty law requirement of *free* and *compulsory* primary education;
- c. Submit the periodic reports that are due to the CRC Committee as urgently as possible.

## H. Conclusion

32. The recommendations made, if implemented, will go a long way to address the concerns highlighted in this submission and definitely improve the human rights situation in South Africa.
33. It is also noticeable that South Africa has had a rather lax relationship with its obligations in respect of international human rights law, signing treaties such as CAT, Optional Protocol to CAT and ICESCR but then failing to follow through with ratification or abiding by the provisions of the applicable treaty. The reasons for this may be political but it is also our submission that the monitoring of international human rights obligations is not monitored by government in a comprehensive and consistent manner by a centralised structure. This has the consequence that civil society organisations find it extremely difficult to engage government on these important issues. There may be thus good grounds for the Human Rights Council to engage the South African government on its overall mechanisms and strategies in complying with international human rights law obligations.
34. We thank the Human Rights Council for this opportunity and remain committed to constructive dialogue with government in the furtherance of South Africans' rights in line with international human rights.

<sup>20</sup> Among others, the African Charter on the Rights and Welfare of the Child (ACRWC) was also ratified in January 2002.

<sup>21</sup> To date (November 5, 2007), the CRC Committee's schedule under the Office of High Commissioner website does not indicate that a periodic report by South Africa has been submitted.