



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

Distr.: General
18 April 2019

English only

Committee against Torture

Sixty-sixth session

23 April–17 May 2019

Item 4 of the provisional agenda

**Consideration of reports submitted by States parties
under article 19 of the Convention**

**List of issues in relation to the second periodic report of
South Africa**

Addendum

Replies of South Africa to the list of issues*

[Date received: 2 April 2019]

* The present document is being issued without formal editing.

GE.19-06538(E)



* 1 9 0 6 5 3 8 *

Please recycle The recycling symbol, consisting of three chasing arrows forming a triangle.



Introduction

1. Pursuant to article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”), South Africa is pleased to submit its Reply to the List of Issues (CAT/C/ZAF/Q/2/Add.1)¹ (“LOIs”) in relation to the Combined Second Periodic Report of South Africa,² as adopted by the Committee, at its sixty-fifth session.³

2. South Africa also prepared and submitted to the United Nations a revised Common Core document in 2019. This Reply augments the information submitted in the various reports and the Common Core (Annexure 1).

Reply to the issues raised in paragraph 1 of the LOIs

3. The issues raised in the LOIs will be addressed *ad seriatim* in the replies hereunder.

Reply to the issues raised in paragraph 2 of the LOIs

4. South Africa signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) in 1993 and ratified it in 1998. In 2006 we also signed the Optional Protocol to the Convention against Torture (“OPCAT”) and in 2019 Cabinet approved that OPCAT be submitted to Parliament for ratification.⁴ South Africa considers torture a human rights violation and therefore contrary to the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).⁵

5. Torture is an offence in South Africa⁶ and perpetrators of this specific crime have been charged, prosecuted and convicted under the Prevention and Combating of Torture of Persons Act, 2013⁷ (“the Anti-Torture Act”),⁸ which gives effect to South Africa’s

¹ Dated 14 January 2018.

² Following South Africa’s initial report to the Committee on Torture (“the Committee”) on 28 June 2005, the consideration thereof by the Committee on 14 and 15 November 2006 and the Concluding Observations by the Committee, dated 23 November 2006, South Africa submitted its second periodic report (being a combined report for the second periodic term – due December 2009 – and the third periodic report – due in December 2013) covering the period 2002–2013.

³ 12 November–7 December 2018.

⁴ The South African Human Rights Commission (SAHRC) has been mooted as the National Preventive Mechanism (NPM). See the Cabinet Statement of 27 February 2019 (<https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-27-february-2019>).

Furthermore, in line with, amongst others, the Rome Statute of the International Criminal Court; the Geneva Convention and various Additional Protocols, which were also signed or ratified by South Africa, domestic legislation were enacted to give effect to those Conventions that, among others also have a bearing on torture as contemplated in those Conventions.

⁵ The right to human dignity is a non-derogable right at both the levels of international law and at national level in terms of our Constitution. The Bill of Rights recognises the importance of human dignity and under no circumstances may the right to dignity be limited. Section 12 of our Constitution entrenches the right to freedom and security. This right includes, among others, the right not to be tortured in any way, and the right not to be treated or punished in a cruel, inhuman or degrading way. South Africa’s approach against torture is also aligned to Article 5 of the African Charter on Human and People’s Rights which prohibits torture and the Robben Island Guidelines which provides a guide on preventing torture in Africa.

⁶ Sections 4(1) and 4(2) read with Section 1, 3, 5, 6 and 7 of the Prevention and Combating of Torture of Persons Act 13 of 2013: Committing torture/attempting to commit torture/inciting, instigating, commanding or procuring any person to commit torture and Participating in torture/conspiring with a public official to aid/procure the commission of or to commit torture.

⁷ Act No. 13 of 2013. The Anti-Torture Act criminalises torture in South Africa and provides amendments to other legislation, such as the Criminal Procedure Act 51 of 1977 (to reflect a crime of torture in the schedule of offences). The Anti-Torture Act does, however, not apply with retrospective effect.

obligations in terms of the Convention. In addition, there are various offences on the statute book that have been used to prosecute State officials for acts or omissions that do not strictly fall within the prescription of torture, such as assault, assault with intent to do grievous bodily harm, murder, various sexual offences as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007⁹ and intimidation as contemplated in the Intimidation Act, 1982.¹⁰

6. The Independent Police Investigative Directorate (“IPID”) is mandated by the Independent Police Investigative Directorate Act, 2011¹¹ to investigate cases of assault and torture by members of the police.¹² To prevent or investigate acts of torture by law enforcement officials, the South African Police Service (“SAPS”) has developed internal policies (within the framework of the South African Police Service Act, 1995)¹³ aimed at dealing with all matters relating to torture by its officials.¹⁴ Similarly, the Judicial Inspectorate for Correctional Services (JICS)¹⁵ is mandated to, amongst others, investigate assaults, custodial deaths and the use of force on inmates.

7. The Anti-Torture Act also applies to incidents of torture by soldiers. If convicted of a lesser offence, the Military Court has a prerogative in terms of sentencing, in line with the Military Discipline Supplementary Measures Act, 1999.¹⁶ Members of the South African National Defence Force (SANDF) were charged under the Act for acts committed whilst deployed in the Democratic Republic of Congo and were convicted of assault.

Reply to the issues raised in paragraph 3 of the LOIs

8. With regards to penalties in the Anti-Torture Act, any person found guilty of the offence of torture is upon conviction liable to imprisonment, including imprisonment for life.¹⁷ In terms of the Criminal Procedure Act, 1977¹⁸ (“the CPA”), the Child Justice Act, 2008 (“the CJA”)¹⁹ and general principles of sentencing as developed by the courts, sentences must be proportional to the gravity of the offence and take into account the seriousness of the offence, the interests of society and the personal circumstances of the accused. The Anti-Torture Act provides for specific factors that a court must consider when

⁸ Prior to the Anti-Torture Act coming into effect, torture by State officials was prosecuted under the common law as attempted murder, assault with the intent to cause grievous bodily harm or common assault, depending on the severity of the injuries.

⁹ Act No. 32 of 2007.

¹⁰ Act No. 72 of 1982.

¹¹ Act No. 1 of 2011. Other key state institutions responsible for monitoring, investigating and preventing torture, in addition to IPID, include the Judicial Inspectorate of Correctional Services (JICS) and the South African Human Rights Commission (SAHRC).

¹² IPID has Standard Operating Procedures and Regulations that describe how assault and torture cases must be investigated on receipt of complaints.

¹³ Act No. 68 of 1995.

¹⁴ The policy describes, in practical terms, how the officials should prevent and handle cases that involve torture with specific reference to children.

¹⁵ The statutory mandate of the JICS can be classified into broad operational areas: inspections, investigations, dealing with inmate complaints and enquiring into all custodial deaths, the use of force on inmates and the instances of their segregation or being mechanically restrained. See the JICS 2017/18 Annual Report: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/JICS_Annual_Report_1718_Final.pdf.

¹⁶ Act No. 16 of 1999.

¹⁷ In terms of section 4 of the Anti-Torture Act any person -who commits torture; attempts to commit torture; or incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life; and who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life. The above penalties are the maximum penalties which a court may impose where a person is convicted of the offence of torture. Life imprisonment is the highest sanction in South African law.

¹⁸ Act No. 51 of 1977.

¹⁹ Act No. 75 of 2008.

imposing a sentence for a crime of torture.²⁰ No one shall be punished for disobeying an order to commit torture.

Reply to the issues raised in paragraph 4 of the LOIs

9. Section 18 of the CPA regulates prescription of the right to institute prosecutions and specifically provides that the right to institute prosecutions for the offence of torture never lapses.

10. The investigation of criminal offences and subsequent criminal proceedings are regulated by the CPA and also apply to the investigation of torture. The crime of torture is prosecuted by the National Prosecuting Authority (“the NPA”) before a court with appropriate jurisdiction to adjudicate the matter.²¹ Legislation provides that the offence of torture must be investigated by the South African Police Service (SAPS). The Directorate for Priority Crime Investigation²² has a mandate to investigate national priority offences, which includes any offence which may be punished by life imprisonment. In exceptional cases offences may also be investigated by an Investigating Directorate as contemplated in Chapter 5 of the National Prosecuting Authority Act, 1998.²³ IPID and the military police²⁴ are also empowered to investigate offences which specifically relates to the SAPS and the SANDF, including torture. IPID is specifically empowered to investigate torture allegations against the police and must, after completion of the investigation, submit the docket to the NPA to make a decision on prosecution. The Constitutional Court has furthermore held that SAPS has an obligation under the Constitution, the International Criminal Court, 2002²⁵ and South Africa’s international law obligations, to investigate crimes of torture committed outside the Republic’s borders in circumstances where the State in whose territory the crimes were committed is unwilling or unable to investigate them, and if an investigation would be reasonable and practicable in the circumstances.²⁶

Reply to the issues raised in paragraph 5 of the LOIs

11. Flowing from the fundamental legal rights of accused persons, they have to be informed of their rights upon arrest or within a reasonable time after arrest.²⁷ Law

²⁰ See Section 5. The Anti-Torture Act also provides that the fact that an accused person is or was a head of state or government, a member of government or Parliament or a government or who was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither a defence to a charge of committing an offence nor a ground for any possible reduction of sentence, once that person has been convicted of such offence. No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.

²¹ Since the offence of torture can be punished by a sentence of imprisonment to life these matters will be prosecuted either in a regional court or high court (both which may impose life imprisonment).

²² As established in terms of Chapter 6A of the South African Police Service Act, 1995.

²³ Act No. 32 of 1998.

²⁴ Contemplated in Chapter 5 of the Defence Act, 2002, Act No. 42 of 2002.

²⁵ Act No. 27 of 2002. See <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150512Final.pdf> Gauteng DPCI Head, Major General Shadrack Sibiyi, was found guilty of involvement in the Zimbabwe rendition case in July 2015 in a disciplinary hearing. Major General Sibiyi, Lt General Dramat and Captain Maluleke were later charged criminally. The charges against Dramat and Sibiyi were later provisionally withdrawn, but continued in 2018 against Maluleke. The matter has not been finalised.

²⁶ National Commissioner of the South African Police v Southern African Human Rights Litigation Centre 2014 (12) BCLR 1428 (CC).

²⁷ Section 35(2) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the right:

- (a) To be informed promptly of the reason for being detained;
- (b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) To have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) To challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

enforcement officers inform the suspect orally in a language they understand. In terms of section 35(2)(c) of the Constitution everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of the right promptly. The SAPS therefore has a duty to inform an accused/detained person of the right to apply for legal aid. Other constitutional rights include the right to communicate with, and be visited by, that person's spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.

12. The CJA provides²⁸ for specific procedures to ensure that fundamental rights of accused children, are protected. This includes that a child should only be arrested as a last resort. Children in detention must be permitted visits by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit. The child must also be cared for in a manner consistent with the special needs of children, including the provision of immediate and appropriate health care in the event of any illness, injury or severe psychological trauma.²⁹

(e) To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) To communicate with, and be visited by, that person's;

(i) Spouse or partner; (ii) next of kin; (iii) chosen religious counsellor; and (iv) chosen medical practitioner.

²⁸ Section 20 of the CJA regulates the arrest of a child. Instances, in which a child can be arrested, are where the offence in question is a serious as contemplated in Schedules 2 and 3 to that Act (which includes the offence of torture). The police official arresting a child for an offence must, among other, explain the child of his or her rights and notify the child's parent, an appropriate adult or guardian of the arrest and must not later than 24 hours after the arrest inform the probation officer in whose area of jurisdiction the child was arrested of the arrest. Any child who has been arrested and who remains in custody must, appear before a magistrate's court having jurisdiction, in as soon as possible but not later than 48 hours after arrest. Section 28 of the CJ Act, regulates the detention of a child after arrest and provides that such a child, among others, must detained in conditions which take into account their particular vulnerability; can be visited by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit; and must receive immediate and appropriate medical treatment for any physical injury or severe psychological trauma.

²⁹ The CJA further provides that if any complaint is received from a child or any other person during an arrest or while the child is in detention in police custody relating to any injury sustained or severe psychological trauma suffered by the child or if a police official observes that a child has been injured or is severely traumatised, that complaint or observation must be recorded and reported to the station commissioner, who must ensure that the child receives immediate and appropriate medical treatment if he or she is satisfied that any of the following circumstances exist:

(i) There is evidence of physical injury or severe psychological trauma;

(ii) The child appears to be in pain as a result of an injury;

(iii) There is an allegation that a sexual offence as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 has been committed against the child; or

(iv) There are other circumstances which warrant medical treatment.

In the event of a report being made that report must, in the prescribed manner, as soon as is reasonably possible, be submitted to the Provincial Commissioner of Police concerned and a copy of the report must be submitted simultaneously to the National Commissioner of Police. Police officers must inform the child and his/her parents/ guardian/ appropriate adult of the alleged charges against the child and of the child's rights in a language that they understand and preferably in a language of their choice and in plain language by using simple vocabulary; and in a manner appropriate to the age, maturity and stage of development of the child and the intellectual capacity of the parent, appropriate adult or guardian.

Reply to the issues raised in paragraph 6 of the LOIs

13. In terms of section 35(2)(c) of the Constitution everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result, and to be informed of the right promptly.³⁰

14. Legal aid mechanisms³¹ for all persons in South Africa (inclusive of foreign nationals) and specific vulnerable groups have been strengthened through Legal Aid regulations by e.g. providing that legal aid may also be provided for maintenance, domestic violence and harassment cases. Legal aid may further be provided to asylum seekers and in Hague Convention cases, also to children in civil proceedings involving the child.³² Legal Aid SA may undertake or fund litigation or other legal work which has the potential to positively affect the lives of a larger number of indigent persons. South Africa has annually increased its budget to ensure an appropriate legal aid footprint country-wide.³³

Reply to the issues raised in paragraph 7 of the LOIs

15. Various initiatives have been implemented to reduce pre-trial detention. South Africa has a comprehensive legal framework aligned to human rights norms and standards, including the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa³⁴ and the Nelson Mandela Rules. Various legislative provisions recognise the fundamental rights of detained persons and provide for alternatives to remand detention. The Justice, Crime Prevention and Security (JCPS) Cluster Departments have put in place various measures to monitor the status of all persons awaiting the finalisation of their cases for long periods.³⁵ Judicial Case Flow Management Committees have also been set up at national, regional and local level to ensure speedier investigation and finalisation of cases; addressing blockages; and improving overcrowding of prisons in relation to unsentenced and pre-trial persons. Legislative measures were enacted³⁶, such as Section 49F, 49G, 49E and 63 of the Correctional Services Act,³⁷ and fully operationalised and are

³⁰ In order to ensure that no accused goes through the criminal justice process unrepresented, Legal Aid SA employs a practitioner court model to ensure that all accused persons in court have direct access to legal representation.

³¹ The current Legal Aid South Africa Act, 2014 (Act 39 of 2014), has brought legal aid provisions in line with the Constitution.

³² Section 28(1) (h) of the Constitution provides that a child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

³³ Contrary to many other countries including the UK, the South African legal aid budget allocations has grown annually to protect the rights of the indigent and the vulnerable, for example, from R1,5 billion in 2014 to R1.95 billion in 2019. Legal Aid South Africa (Legal Aid SA) is an autonomous statutory body established in terms of the Legal Aid South Africa Act, 2014, (Act No. 39 of 2014) to deliver legal aid in South Africa. Legal Aid SA uses a mixed model inclusive of limited *judicare* legal representation and cooperative agreements with universities' legal clinics.

³⁴ Adopted by the African Commission on Human and Peoples Rights in 2014. SA is working, amongst others, with the African Policing Civilian Oversight Forum (APCOF) in this regard.

³⁵ Measures include establishing and strengthening cooperation mechanisms to address causes of delays in the criminal justice system. In this regard we are monitoring on a monthly basis, based on the statistics from the Department of Correctional Services, all long-outstanding cases. This monitoring is done by all the respective role players such as Legal Aid SA, the NPA, SAPS and Justice, and providing such statistics to the Provincial Efficiency Enhancement Committees, led by the respective Judge Presidents of the various Provincial High Court Divisions, as well as to the Regional and District Efficiency Enhancement Committees for direct interventions by the role players. This includes putting in place measures at national and provincial and court level to ensure speedy finalisation of investigations, dealing with blockages such as a lack of foreign language interpretation in specific cases, transcription services, bail set too high, lack of prosecutors and legal aid staff, and case flow management by the presiding officers to curb unnecessary postponements. Part of the measures put in place includes the establishment and continuance of 46 backlog courts to provide additional capacity on contract appointment.

³⁶ Chapters 3 to 6 of the Correctional Services Act deal with offender management and sets clear standards in this regard.

³⁷ Act No. 111 of 1998.

assisting in reducing the number of persons in remand detention. Cases may be referred back to courts by correctional facilities to revisit whether bail can be granted or for a reduction of bail.³⁸ Statistical data on the reduction of pre-trial detention, in particular that of remand children and sentenced children, is provided in Annexure 2: Tables 1–3 and Annexure 3. Noteworthy is that from 2000 to 2017 the average number of remand children reduced by more than 90%.

16. The time spent in pre-trial detention is taken into account as a factor when determining sentence. Sentencing is a matter of judicial discretion. The presiding officer takes a number of factors into account for sentencing. There is legislation prescribing mandatory minimum sentences for certain offences with the severity of the offence and the criminal history of the offender as key factors in determining a sentence. The punishment imposed, including when it is set by statute, must not be disproportionate to the offence. The period spent in custody awaiting trial is a factor³⁹ to be taken into account in determining whether substantial and compelling circumstances exist to allow that a prescribed minimum sentence may be departed from. There is no rule as to how to determine what weight is to be given to that period.⁴⁰

17. The pre-trial detention of children is regulated by the CJA. A child should as a general rule be detained in a child and youth care centre.⁴¹ The CJA furthermore provides for factors to be considered by presiding officers before placing a child in prison.⁴² Presiding officers ordering the detention of a child in prison must direct that the child be brought before them or any other court every 14 days to reconsider the order.⁴³ A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.⁴⁴

³⁸ Section 342A of the CPA.

³⁹ The Supreme Court of Appeal in *S v Radebe* 2013 (2) SACR 165 (SCA), decided as follows:

“There should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced...A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years’ imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.”

⁴⁰ *DPP v Gwala* [2014] ZASCA 44.

⁴¹ Section 29 of the CJA.

⁴² These factors include, the age of the child i.e., the child should be 14 years or older; the child should be accused of having committed a serious offence; the detention should be necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention; and there should be a likelihood that the child, if convicted, could be sentenced to imprisonment.

⁴³ The Department of Correctional Services (“DCS”) monitors the 14-day interval of court appearance of remand detainee children and any interval beyond 14 days is referred to court for implementation of corrective measures.

⁴⁴ Section 77(5).

Reply to the issues raised in paragraph 8 of the LOIs

18. IPID is mandated to ensure effective independent oversight of the SAPS and Municipal Police Services (MPS) through independent and impartial investigations of criminal conduct pertaining to the SAPS and MPS.⁴⁵ The IPID Act sets out the mandate and accountability of IPID.⁴⁶ IPID must report to Parliament twice a year on the number and type of cases investigated, the recommendations, the details and the outcomes of those recommendations.⁴⁷ The 2017/18 Annual Report of IPID is attached (**Annexure 4**) and sets out its financial and human resources. Domestic growth forecasts over the medium term of government's three-year budgeting cycle had to be revised downwards by National Treasury for all departments, including IPID, and IPID's expenditure ceiling was reduced by R15 billion in 2018/19. IPID's budget is as follows:⁴⁸

Budget summary

| R million | 2018/19 | | | | 2019/20 | 2020/21 |
|--|--------------|------------------|-------------------------|-----------------------------|--------------|--------------|
| | Total | Current payments | Transfers and subsidies | Payments for capital assets | Total | Total |
| MTEF allocation | | | | | | |
| Administration | 109.0 | 103.9 | 0.6 | 4.5 | 116.3 | 124.1 |
| Investigation and Information Management | 190.1 | 190.1 | 0.0 | - | 203.1 | 216.8 |
| Compliance Monitoring and Stakeholder Management | 16.0 | 16.0 | - | - | 17.2 | 18.5 |
| Total expenditure estimates | 315.1 | 310.0 | 0.6 | 4.5 | 336.7 | 359.4 |

Reply to the issues raised in paragraph 9 of the LOIs

19. The process of reviewing the South African Police Service Act, 1995 which was enacted before the current Constitution, has commenced. Although the Act has been amended on numerous occasions, the need for an overarching policy framework that captures a democratic approach to policing has been emphasized. The White Paper on Policing seeks to address current lacunas and calls for such a democratic approach in line with the norms and values of the Constitution and emphasises the importance of a policing approach which is demilitarised, community-centred, rights-based and accountable. It stresses the importance of continuous improvement in training and the professionalization of the police service. Cabinet adopted the White Paper in 2016. In the same year, a White

⁴⁵ The Executive Director of IPID must, refer criminal offences revealed as a result of an investigation to the National Prosecuting Authority for criminal prosecution and notify the Minister of Police of such referral; ensure that complaints regarding disciplinary matters are referred to the National Commissioner of the South African Police Service and where appropriate, the relevant Provincial Commissioner; once a month submit to the Minister Police a summary of disciplinary matters and provide a copy thereof to the Secretary of the Civilian Secretariat for Police Service; submit all recommendations which are not of a criminal or disciplinary nature to the Minister of police and provide a copy thereof to the Secretary of the Civilian Secretariat for Police Service; and must at any time when requested to do so by the Minister or Parliament, report on the activities of the IPID to the Minister or Parliament.

⁴⁶ IPID must investigate any deaths in police custody, deaths as a result of police actions, any complaint relating to the discharge of an official firearm by any police officer, rape by a police officer, whether the police officer is on or off duty, rape of any person while that person is in police custody, any complaint of torture or assault against a police officer in the execution of his or her duties, corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be; and any other matter referred to it as a result of a decision by the Executive Director, or if so requested by the Minister, an MEC or the Secretary as the case may be, in the prescribed manner. The Directorate may investigate matters relating to systemic corruption involving the police.

⁴⁷ Section 9 of Act No.1 of 2011.

⁴⁸ 2018 Estimates of National Expenditure, Vote 20.

Paper on Safety and Security⁴⁹ was also adopted by Cabinet. Aligned to the White Papers, a draft Police Bill is being developed.

Reply to the issues raised in paragraph 10 of the LOIs

20. The SAPS manually records interviews in writing. Electronic recording (audio or video) are used in exceptional cases of admissions and confessions. Such recordings will be admissible in terms of the Electronic Communications and Transactions Act, 2002,⁵⁰ which regulates the admissibility of electronic evidence in criminal and civil cases. National Instruction 6 of 2014, specifically authorises electronic recording of information pertaining to torture cases, subject thereto that the suspect was informed of said recording. Systems development and resource constraints impacts on roll-out in this regard. Statistical information on disciplinary proceedings and recommendations by IPID is provided in Annexure 2, Tables 4–8.

Reply to the issues raised in paragraph 11 of the LOIs

21. The Prevention and Combating of Trafficking in Persons Act, 2013⁵¹ (“the TIP Act”) came into operation in August 2015. This has ensured that South Africa makes substantial progress towards the full implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United National Convention Against Transnational Organised Crimes.⁵² South Africa now has a comprehensive law addressing all forms of trafficking in persons offences. To enhance the coming into operation of the TIP Act, several structures were put in place, such as the National Inter-Sectoral Committee on TIP, Provincial Inter-Sectoral Committees and Rapid Response Teams.⁵³

22. The TIP Act criminalises trafficking in persons and also provides for related offences, penalties relating to these offences, measures to be put in place to protect both internal and external victims against trafficking, and for coordinated implementation and monitoring.

23. The main objective of the Act is to prevent, protect and prosecute trafficking in persons.⁵⁴

24. South Africa also made significant progress in addressing trafficking due to the GLO.ACT.⁵⁵

⁴⁹ The White Paper on Safety and Security was adopted by Cabinet in April 2016 and seeks to address crime and violence in a proactive manner, and to promote an integrated approach to safety. The implementation is aimed to be dealt with incrementally and in conjunction with relevant role players and stakeholders.

⁵⁰ Act No. 25 of 2002.

⁵¹ Act No. 7 of 2013

⁵² South Africa signed this Protocol on 13 December 2000 and ratified it on 20 February 2004.

⁵³ Rapid Response Task Teams (RRTT’s) consist of representatives from DSD, the NPA, SAPS, the Department of Home Affairs (“DHA”), the DOJCD and the Department of Health (“DoH”). The responsibility of the RRTT’s is to respond to cases of TiP as and when they happen so that victims receive the services available to them, to monitor all cases from reporting to finalisation of cases and to address any blockages in the successful finalisation of these matters.

⁵⁴ The legislation criminalises various acts that constitute or relate to trafficking in persons and imposes harsh penalties for violations – for example, trafficking in persons is punishable by a maximum of life imprisonment, engaging in conduct that causes a person to enter into debt bondage is punishable by up to 15 years’ imprisonment, benefiting from services of a trafficking victim is punishable by up to 15 years’ imprisonment and facilitation of trafficking in persons is punishable by up to 10 years’ imprisonment. The legislation further provides for various measures to protect and assist victims of trafficking in persons, with other departments such as Health and Social Development as well as civil society all playing a major role.

⁵⁵ GLO.ACT - or the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants - is a four year joint initiative by the EU and the UNODC being implemented in partnership with the International Organization for Migration and UNICEF. The programme forms part of a joint response to trafficking in persons and the smuggling of migrants and it is expected to be delivered in 13 strategically selected countries across Africa, Asia, Eastern Europe and Latin America.

25. Regulations and directions were issued in terms of the TIP Act to further regulate the detection, investigation and prosecution of offences; the collection of information relevant to trafficking; and social, health care and psychological services to victims. Standard Operating Procedures and/or guidelines were also developed to guide police, social development officials, prosecutors, immigration officers, medical and judicial personnel to identify and deal with victims of trafficking. A comprehensive National Policy Framework has recently been finalised.⁵⁶

26. In terms of the TIP Act,⁵⁷ the person who has been convicted of any offence under Chapter 2 of the TIP Act, is liable to pay appropriate compensation to any victim of the offence for damage to or the loss or destruction of property, including money; physical, psychological or other injury; being infected with a life-threatening disease; or loss of income or support, suffered by the victim as a result of the commission of that offence. The offences contemplated in Chapter 2 extend beyond the offence of trafficking and includes offences aimed at facilitating trafficking in persons, using the services of victims of trafficking, carriers involved in trafficking as well as participation in any of such offences which provides a broad base for compensation. Though a person must be convicted of trafficking for the court to make the order for compensation, nothing prevents a victim of trafficking from instituting civil proceedings against an accused person for damages irrespective of whether the accused has been convicted in a criminal court or not.

27. Training regarding the TIP Act is being provided to persons involved in the administration and implementation of the Act, including immigration officers, the SAPS, prosecutors⁵⁸ and the judiciary (by SAJEI).⁵⁹ SAPS officials have been trained on human trafficking legislation and SAPS has specialized personnel who are responsible for conducting awareness on TIP and investigating cases regarding human trafficking incidents. The Department of Social Development conducted community dialogues in 5 provinces.⁶⁰

Reply to the issues raised in paragraph 12 of the LOIs

28. In terms of the Domestic Violence Act, 1998⁶¹ one can apply for a protection order against domestic violence.⁶² The Protection from Harassment Act, 2011⁶³ provides for

A focus is being placed on assistance to governmental authorities, civil society organizations, victims of trafficking and smuggled migrants.

⁵⁶ The Framework signals that the Government of the Republic of South Africa is committed to put in place measures to prevent this criminal phenomenon, stepping up its efforts to assist and protect victims of trafficking, while prosecuting the perpetrators.

⁵⁷ Section 29.

⁵⁸ At Justice College.

⁵⁹ The South African Judicial Education Institute, under the Office of the Chief Justice.

⁶⁰ These dialogues aimed to engage communities on the issues of Human Trafficking and took place in five provinces in the second and third quarters of 2017/18 financial year.

⁶¹ Act No. 116 of 1998. The Department of Justice and Constitutional Development is currently reviewing this Act. A protection order is a document issued by the court which prevents the abuser from committing an act of domestic violence, enlisting the help of another person to commit any such act, or entering a residence and workplace. Any person who has a material interest in the well-being of the victim may take this action on behalf of the victim.

⁶² The Domestic Violence Act also permits minors to apply for a Protection Order with or without assistance. It is because our law understands that many children suffer violence at the hands of their parents, guardians or relatives. One can visit the nearest court and the clerk of court will assist with the forms. An interim order will be issued within a day. In terms of the protection order the court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant, including an order to seize any arm or dangerous weapon in the possession or under the control of the respondent. A court may also if it is in the best interests of any child prohibit the respondent contact such child or allow contact with such child subject to conditions as the court may consider appropriate. A person who contravenes a protection order is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

⁶³ Act No. 17 of 2011. It is worth noting recent legislation, which is in the process of being adopted by Parliament, which addresses computer based offences relating to the incitement of violence; threats of damage to property or violence; the distribution of intimate content; and provides for orders by a court to protect the victim against the harmful effect of such communications.

protection orders against harassment. Contravention of these protection orders is criminalised and punishable with a fine or imprisonment for a period not exceeding five years.

29. Government has increased special victim support services, such as case screening services, private waiting areas, court information services, which include court preparation services and specialised domestic violence clerks in every court. Furthermore, in addition to existing shelters for domestic violence victims, the Department of Social Development has a command centre that provides support and counselling to victims of gender-based violence.⁶⁴

30. In addition to passing legislation preventing and prohibiting Domestic Violence, Sexual Offences, Harassment, and Trafficking in Persons, South Africa has various policies and programmes to support victims and to prevent secondary traumatising. Since 2013, the Department of Justice and Constitutional Development (DOJCD) has been progressively establishing new sexual offences courts every year.⁶⁵

31. The Sexual Offences and Community Affairs Unit of the NPA established 55 operational Thuthuzela Care Centres (“TCCs”), linked to the sexual offences courts, in support of victims. TCCs are centres attached to hospitals or clinics where a victim can go to for medical attention and have evidence of the crime collected.⁶⁶

32. The fight against the scourge of Gender-Based Violence (GBV) was strengthened following the inaugural Presidential GBV and Femicide Summit held in November 2018, which provided a firm basis for a coordinated national response as an absolute priority for government. SAPS leads integrated implementation and monitoring of a six point plan on GBV, Sexual Offences and Victim Support, which include:

- Increased training of frontline desk staff in all relevant departments in the dealing of victims in a more sensitive manner;
- Improving the quality of interactions between victims, police and other relevant role players in especially 32 hotspot police stations;
- Increased training of police officials and prosecutors;
- Implementing methods to measure client (victim) satisfaction on how crime incidents and cases are handled;
- Capacitation of the Family Violence, Child Protection and Sexual Offences Units of SAPS; and
- Improving the turnaround time on DNA (SAPS) Forensic Services’ processing of blood alcohol analysis.

⁶⁴ The call centre operates through a toll free number: 0800 428 428 (0800 GBV) or callers can request a social worker to contact them by dialling *120*7867# (free from any cell phone).

⁶⁵ Sexual Offences Courts offer a number of victim-support services, which include, amongst others, court preparation services and intermediaries who convey questions and statements received from court to the victim in a sensitive and age-appropriate manner. They currently appear in cases involving child witnesses and witnesses with mental disabilities. In addition, we make use of in camera testifying services for children, persons with mental disabilities, and all traumatised victims, irrespective of age. These witnesses testify at the private testifying room and out of the physical presence of the accused and other people via a CCTV system. These services are primarily available in sexual offences courts, but the Department is now in the process of extending them to other victims of gender-based violence, where possible.

⁶⁶ The TCC model is a one-stop multidisciplinary service centre for rape care management, hence assisting victims of sexual offences - the focus being on: victim-centred, court-directed, prosecutor-guided investigations with stakeholder cooperation; to reduce cycle period from reporting to finalization of case, minimize secondary victimisation and improved conviction rates, and; to have a site-coordinator, a victim assistance officer at TCC, with a case manager (an experienced prosecutor with specific expertise in sexual offences prosecution), a court preparation officer and two sensitized prosecutors at the dedicated court for sexual offences.

33. SAPS is currently expanding the establishment of Victim Friendly Rooms to a further 110 police stations.⁶⁷

34. In relation to training of officials the NPA's SOCA unit facilitates the research and development of comprehensive training manuals on trafficking in persons and sexual offences and training of prosecutors.⁶⁸

35. The Department of Social Development (DSD) has developed a package of services and capacity building of service providers to support Children who have been Abused, Neglected and Exploited (CANE).⁶⁹

36. The DSD established the *Khuseleka* One Stop Centre model during 2011.⁷⁰ It is a community-based centre where victims receive services through a multi-disciplinary approach comprising of teams of social workers, nurses, doctors, police officers, court preparation officers and prosecutors. The DSD also facilitates the establishment and funding of shelters.⁷¹ There are currently 130 funded shelters across nine provinces, 206 White Doors Safe Spaces of Hope and 6 *Khuseleka* One Stop Centres that accommodate victims of crime and violence.

⁶⁷ This includes prioritising the remainder of hot-spot and rural police stations as well as to ensure optimal utilisation thereof. At 31 March 2018 there were 1 049 Victim Friendly Rooms in SAPS facilities operational throughout the country.

⁶⁸ These training manuals are revised and updated on an annual basis to ensure that the content is in line with the latest developments in law, but also includes discussions and references to relevant case law and case studies. SOCA is also responsible for the delivery of such training sessions with experts on topics within NPA and or SAPS. Training delivered for the past 3 financial years as from 2015/16 until 2017/18:

- Sexual Offences: 22 sessions, attended by 415 prosecutors;
- Integrated (multi-disciplinary) training with Thuthuzela care centres (TCC) stakeholders: 64 sessions, attended by 1723 delegates (for relevant stakeholders involved at the TCCs).

⁶⁹ This package includes: an Induction programme for Social Service Practitioners in child protection; Safety and risk assessment for purposes of conducting a comprehensive assessment and to develop an appropriate intervention plan; a Therapeutic programme for children and families affected by sexual abuse; Guidelines for notification of CANE to the National Child Protection Register; a practice note for practitioners on unsuitability of persons to work with children; Guidelines for the prevention of and response to child exploitation; a Strategy on prevention and early intervention services, as well as; Guidelines for design and development of prevention and early intervention programmes. The purpose of the Guidelines is to set out good practice standards for practitioners upholding the best interests of children, according to international, regional and national legal frameworks to highlight the issues and services to children who are at risk or victims of child trafficking, child labour, commercial sexual exploitation of children and child pornography/cyber-crime. Training and Capacity Building is undertaken on the Guidelines with representatives from relevant government departments namely the DOJCD and the NPA, on issues of trafficking of children and commercial sexual exploitation of children, the DoL on child labour issues, the DHA on trafficking of children and the repatriation of foreign children, SAPS and the Films and Publications Board on issues of child pornography and cyber-crime of children, and the DSD and the NGO sector to social workers and social service practitioners. The training also focuses on the levels of intervention namely:

- Prevention and Early intervention, with advocacy and awareness raising programmes;
- Identification and immediate care of the exploited child;
- Statutory intervention and the Court processes to ensure the care and protection of children;
- Reunification, Reintegration and Repatriation Process.

⁷⁰ The aim was to expand the integrated service delivery to the victims of crime and violence. *Khuseleka* means to offer a protected environment where victims of crime and violence can be offered a continuum of services. *Khuseleka* provides a basket of services rendered by a multi-disciplinary team and ensure the prevention of secondary victimization. These include the reporting of a case to the police, receiving initial counselling, assessment by a professional social worker, being offered medico-legal services by a qualified nurse and doctor, placement in a shelter in case of a need for removal, access to on-going psycho-social support and counselling and being prepared for court, exposure to capacity building and empowerment with skills development.

⁷¹ A shelter is a temporary residential facility that accommodates victims of crime and violence (abused women and their children) including victims of human trafficking for a period ranging between a day and six months depending on the need.

37. South Africa has commenced with Anti-Femicide initiatives to respond to the recommendations made by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, in a report she submitted to the country in 2016.⁷² The Femicide Watch⁷³ will be the first in the region.

Reply to the issues raised in paragraph 13 of the LOIs

38. The South African Human Rights Commission (“SAHRC”) is an independent institution that supports constitutional democracy, and is established in terms of the Constitution.⁷⁴ Its mandate is stipulated in section 184 of the Constitution and includes promoting respect for human rights and a culture of human rights, promoting the protection, development, and attainment of human rights and monitoring and assessing the observance of human rights. The SAHRC has the power to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research and to educate.⁷⁵ Each year, the SAHRC must require relevant organs of state to provide it with information on the measures that it has taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, and the environment. The SAHRC has additional powers and functions conferred on it in terms of the South African Human Rights Commission Act, 2013,⁷⁶ and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.⁷⁷ In this regard the SAHRC must promote awareness of, and monitor compliance with, these statutes, report to Parliament in relation to these statutes and develop recommendations with regard to persisting challenges related to these statutes and any necessary reform. The 2019/20 budget allocation for the SAHRC amounts to R189 205 000, an increase of 6,9% from the 2015/16 financial year budget. The SAHRC’s latest Annual Report (**Annexure 5**) sets out in detail its resources and activities.

Reply to the issues raised in paragraph 14(a) of the LOIs

39. The principle of non-refoulement has been codified into South African law, mainly by section 8 of the Anti-Torture Act and section 2 of the Refugees Act, 1998⁷⁸ which provide that no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

⁷² The Movement is multi-sectoral in its formation to ensure that the number of femicide cases is dramatically reduced. A Femicide Watch Prototype and Dashboard has been developed. South Africa was requested by the UN to ensure that the Prototype serves as a guiding document for establishing a Femicide Watch in other countries in Africa.

⁷³ It serves as database of cases of femicide, mainly to assist the country to have a reliable figure of these cases, an accurate profile of the perpetrators and the victims, preventative and responsive interventions, and the appropriate channelling of resources to where they are needed most. See Annexure 2 regarding Femicide convictions and sentences.

⁷⁴ Chapter 9.

⁷⁵ The Commission adopted five strategic objectives towards the realisation of its strategic outcome-oriented goals, which includes:

- Promote compliance with international and regional human rights related treaties obligations;
- Advance the realisation of human rights;
- Deepen the understanding of human rights to entrench a human rights culture;
- Ensure fulfilment of constitutional and legislative mandates, and
- Improve the effectiveness and efficiency of the Commission to support delivery on the mandate.

⁷⁶ Act No. 40 of 2013.

⁷⁷ Act No. 4 of 2000 and various other laws which also assign functions to the SAHRC.

⁷⁸ Act No. 130 of 1998.

40. Chapter 3 of the Refugees Act deals with procedural aspects relating to the application for asylum. Section 24, 25 and 26 of the Act specifically deals with the consideration of an asylum application and provides, among others, for the review of a decision of a Refugee Determination Officer who rejects an application as unfounded by the Standing Committee; for the obtaining of additional information relevant to the application; consultation with a UNHCR representative to furnish information on specified matters; and the explanation of the process to the applicant as well as his rights.⁷⁹ Any decision of the Appeal Board may be challenged before a High Court and is subject to further appeal.⁸⁰ All applicants that are rejected by a Refugee Status Determination Officer in terms of section 24 (3) (c) of the Refugees Act, 1998 have the right to appeal to the Refugee Appeal Board.⁸¹

41. With respect to the number of applications made for asylum received, see Annexure 2, Table 9.

42. The Anti-Torture Act provides that no person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁸² For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including the existence, in the State concerned, of a consistent pattern of gross, flagrant or mass violations of human rights.⁸³

43. South Africa's Extradition and Mutual Legal Assistance Agreements provide that extradition may be refused unless the Requesting Party undertakes or gives such assurances as considered sufficient by the Requested Party that the person sought will not be detained without trial, tortured in any way; or treated or punished in a cruel, inhumane or degrading way. The same shall apply to attempt to commit torture and to an act by any person that constitutes complicity or participation in torture. This principle is adhered to closely by both the National Executive in receiving requests and by our courts when considering applications.⁸⁴ In the Constitutional Court judgment of *Mohamed v the President of the Republic of South Africa*⁸⁵ the Court held that prior to deporting or extraditing a person to a country where the death penalty is applicable or where treatment or punishment which contravenes the Constitution may befall the deportee or extradited person, an undertaking must be obtained from the receiving country that no such treatment or punishment or death sentence will be imposed.

⁷⁹ The process is that a hearing takes place and at the conclusion thereof a decision must be made as to the granting of asylum. If an application is rejected written reasons must be furnished to the applicant within five working days after the date of the rejection or referral. An asylum seeker has the right to a review and may appeal a decision to the Appeals Board in accordance with Chapter 4 of the Act. The Appeal Board may invite a UNHCR representative to make oral or written representations; request the attendance of any person who can provide relevant information; or make conduct a further inquiry or investigation. An applicant also has the right to be represented by a legal practitioner.

⁸⁰ Regulations made in terms of section 38 of the Act, provides for the practical implementation of these procedures (GN R366 in GG 21075 of 6 April 2000 as amended and the Refugee Appeal Board Rules - GN 955 in GG 37122 of 6 December 2013).

⁸¹ Nearly all those persons whose applications were rejected submit an appeal. If an applicant submits an appeal, the decision is suspended.

⁸² Section 8.

⁸³ The Refugees Act and the Extradition Act are also consistent with the Constitution as they do not allow any person to be returned to a country where he or she is likely to be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or whole of that country.

⁸⁴ In *Minister of Home Affairs v Tsebe; Minister of Justice and Constitutional Development and Another v Tsebe*, CCT110/11, the court affirmed that "... it would be in breach of the rights to life, dignity and not to be subjected to cruel or inhuman treatment to extradite or deport a person to a country that country refuses to provide the requisite assurance and where the person faces a real risk of the death penalty being imposed and executed. The rights enshrined in the Constitution applied to all persons in South Africa, and not only to its citizens."

⁸⁵ [2001] ZACC 18.

44. Legal aid may be provided to any person arrested in terms of the Extradition Act, 1962.⁸⁶

45. In the case of *Jeebhai v Minister of Home Affairs*⁸⁷ the SCA held that the detention of Mr Rashid at the Cullinan Police Station and his subsequent removal and deportation were unlawful. The Court held that the applicant was to be considered an illegal foreigner and that his arrest was thus authorised for that purpose. However, the subsequent detention and deportation of the applicant was regarded as unlawful on the basis of non-compliance with the Act and the regulations.

Reply to the issues raised in paragraph 14(b) of the LOIs

46. During the period under review the DOJCD received one request for extradition where the possible sentence could amount to torture, cruel, inhuman or degrading treatment or punishment. The crimes involved were robbery and the theft of a motor vehicle and the possible sentence that could be imposed was imprisonment together with corporal punishment.

Reply to the issues raised in paragraph 14(c) of the LOIs

47. The number of asylum applications received during the period under review, is set out in Annexure 2: Table 9. The approvals are based on individual claims based on the provisions of the Refugees Act. As a result of the confidential nature of these applications, information regarding the grounds on which it were approved or rejected or particulars pertaining to the age, sex and country of origin are not recorded for statistical purposes and cannot readably be obtained.⁸⁸ Due to the number of applications for refugee status received by South Africa, Refugee Reception Offices have a substantial workload. There is, however, no substantial backlog at Refugee Status Determination level (in other words, at first instance adjudication level). All applicants that are rejected by a Refugee Status Determination Officer in terms of the Refugee Act⁸⁹ have the right to appeal to the Refugee Appeal Board. Nearly all those rejected submit an appeal. If an applicant submits an appeal, the outcome is suspended.

Reply to the issues raised in paragraph 14(d) of the LOIs

48. Section 2 of the Refugee Act will apply to an asylum seeker whose asylum permit has expired or have not been renewed (section 8 of the Anti-Torture Act places similar obligations on South Africa). In terms of section 32 of the Immigration Act, 2002⁹⁰ illegal foreigners shall be deported. With regards to measures taken to prevent refugees and asylum seekers whose permits have lapsed or have not been renewed from becoming undocumented persons, it is the responsibility of the applicant to ensure that his or her permit is valid at all times. Immigration Services Inspectorate officials will bring persons whose permits are not in order, to the nearest Refugee Reception Centre or office⁹¹ for investigation, renewal where possible or deportation where required.⁹²

⁸⁶ Act No. 67 of 1962.

⁸⁷ [2009] ZASCA 35.

⁸⁸ See section 21(5) of the Act.

⁸⁹ Section 24(3)(c).

⁹⁰ Act No. 13 of 2002.

⁹¹ The main Refugee Reception Offices or Centres (RRO) are in Port Elizabeth, Pretoria, Musina, Durban and Cape Town. An RRO is a facility run by the Department of Home Affairs and is the primary point of contact for asylum seekers and refugees with the government. It is where asylum seekers must apply for asylum for refugee status, where interviews are conducted, where permits are renewed, and where refugee status documents are handed out.

⁹² In *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) it was decided that:

“[59] The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of article 3 of the European Convention on Human Rights. Nor does the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of which South Africa is a signatory and which it ratified on 10 December 1998. Article 3(1) of this Convention provides:

49. Policy on international migration was previously set out in the 1999 White Paper on International Migration. It was implemented through the Immigration Act, 2002⁹³ and partly through the Refugees Act, 1998. In the recent past, the Department of Home Affairs (DHA) amended the Immigration and Refugees Acts and implemented regulations and strategies to address gaps in legislation. However, what was required is a comprehensive review of the policy framework that can inform systematic reform of the legislation. In this regard, in 2017, a comprehensive White Paper on International Migration for South Africa was approved by Cabinet. The new White Paper affirms South Africa's right to determine the admission and residence conditions for foreign nationals in line with its national interest. It also serves as a policy framework for the review of immigration and related legislation. Draft legislation is currently being developed. In addition, the DHA has developed a White Paper on Home Affairs and has invited comments thereon. This White Paper will clearly identify the envisaged mandate of Home Affairs.⁹⁴

Reply to the issues raised in paragraph 15 of the LOIs

50. Measures were adopted, in terms of the Anti-Torture Act, to ensure that courts have jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 4(1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person is a citizen of the Republic, is ordinarily resident in the Republic, is, after the commission of the offence, present in the territory of the Republic or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention; or has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.⁹⁵ If an accused person is alleged to have committed an offence contemplated in section 4(1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions who must also designate the court in which the prosecution must be conducted.⁹⁶

'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' It makes 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. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case."

⁹³ Act No. 13 of 2002.

⁹⁴ The first mandate is to manage the official identity and status of persons. The current National Population Register is being replaced by a secure and fully inclusive national identity system (NIS), which will reflect key data related to identity, civic and immigration status of all persons. In the digital age, the NIS will be the backbone of a more integrated modern State that provides citizens and other clients, fast access to efficient services. It will thus be a powerful enabler of inclusive economic development and will drastically reduce fraud and other related crimes.

The second mandate of the department is to manage international migration. The 2017 White Paper on International Migration has been incorporated into this policy framework, and aims to regulate international migration in national interest and in the interest of a better and safer world. Migration can be a powerful driver of domestic and regional development, but this requires a State that has efficient systems, professional staff and the capacity to enforce its immigration laws.

The third mandate of Home Affairs is to manage asylum seekers and refugees. South Africa is committed to providing protection to persons who have a well-founded fear of persecution, as defined in the Refugees Act of 1998. This is a responsibility that should be shared with other countries, international bodies and domestic stakeholders. An implementation strategy and a broad road map are provided with the White Paper that show how significant benefits can be progressively realised after the launching of a comprehensive DHA Repositioning Programme.

⁹⁵ Article 5 of the Convention pertains to jurisdiction.

⁹⁶ Section 6.

Reply to the issues raised in paragraph 16 of the LOIs

51. The International Cooperation in Criminal Matters (ICCM) Act, 1996,⁹⁷ allows for mutual legal assistance to be given to foreign states with whom a bi-lateral agreement has not been concluded, provided the request meets the formal requirements as set out in this Act.⁹⁸ Both the Extradition Act and ICCM Act are only applicable between states and it is therefore currently not possible to enter into agreements with international tribunals or institutions. Section 2 of the ICCM Act provides for requests by South Africa and section 7 provides for requests by “a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State”.⁹⁹ South Africa currently has extradition agreements with Lesotho, Malawi, Swaziland, United States of America, Canada, Australia, Israel, Egypt, Algeria, Nigeria, China, India, Hong Kong special administrative Region of the People’s Republic of China, Argentine Republic, Iran, Republic of Korea, United Arab Emirates. South Africa has also designated Ireland, Zimbabwe, Namibia and the United Kingdom in terms of section 3(2) of the Extradition Act. South Africa’s accession to the Council of Europe’s Convention on Extradition entered into force on 13 May 2003. These extradition agreements provides for categories of offences which must be considered extraditable offences and includes the offence of torture.

Reply to the issues raised in paragraph 17 of the LOIs

52. South Africa has Mutual Legal Assistance in Criminal Matters Treaties with Canada, USA, Lesotho, Egypt, Algeria, Nigeria, France, Argentine Republic, Iran, China, India, Hong Kong Special Administrative Region of the People’s Republic of China, Republic of China (Taiwan). A request was also directed to the Council of Europe that South Africa accede to the Convention on Mutual Legal Assistance. The Council of Ministers approved that South Africa accede to the MLA Convention. In terms of the Extradition Act, any arrangement made with any foreign State which, by virtue of the provisions of the Extradition Acts, 1870 to 1906 of the Parliament of the United Kingdom as applied in the Republic, was in force in respect of the Republic immediately prior to the date of commencement of the Act shall be deemed to be an agreement entered into and published on the said date by the President under the Act. Although South Africa has negotiated extradition and mutual legal assistance with Zambia, Hungary, Namibia, Cuba, Belarus, Viet Nam, Pakistan, Ethiopia, the United Kingdom, Mozambique, Brazil and Bangladesh, these were not yet signed. South Africa is currently busy setting up negotiations for the conclusion of extradition and mutual legal assistance treaties with Peru, Venezuela, Chile and Russia. An extradition and mutual legal assistance Treaty between South Africa and United Mexican States has been signed but is still subject to ratification. The SADC Protocols on Extradition and Mutual Legal Assistance in Criminal Matters were ratified by Parliament on 14 April 2003. The Protocol on Extradition entered into force on 18 August 2006. The Protocol on Mutual Legal Assistance entered into force on 1 March 2007.

53. Information on the outcomes of the 87 mutual legal assistance and 46 extradition requests made in 2012 and 2013 is attached as Annexure 6. A list of treaties as at March 2019 is also annexed (Annexure 7).

Reply to the issues raised in paragraph 18(a) of the LOIs

54. Training on the prohibition of torture is a continuous process in the DCS and is part of government’s specific training provided to law enforcement, correctional personnel and other public officials involved in work with persons deprived of their liberty, asylum seekers and migrants on the provisions of the Convention and the absolute prohibition of

⁹⁷ Act No. 75 of 1996.

⁹⁸ South Africa also ratified the Southern African Development Community (“SADC”) Protocol on Mutual Legal Assistance in Criminal Matters on 14 April 2003 and it entered into force on 14 March 2007.

⁹⁹ In terms of section 27 of the ICCM Act the President may on such conditions as he or she may deem fit enter into any agreement with any foreign State for the provision of mutual assistance in criminal matters and may agree to any amendment of such agreement.

torture.¹⁰⁰ The training programmes include the prevention of torture on the part of correctional officials when working with offenders while they are detained in any correctional centre.¹⁰¹ The Anti-Torture Act and – thus the subject-matter of the Convention – also forms part of the SAPS Basic Training Program and the Detective Learning Programmes.¹⁰²

Reply to the issues raised in paragraph 18(b) of the LOIs

55. The Basic Training Programme and the Detective Learning Programme of the South African Police Service, as well as the National Instructions, all include specific references to the provisions of the Convention.¹⁰³

56. Lectures are provided during pre-deployment for internal and external operations conducted by the SANDF to all its members inclusive of medical and legal personnel on the Law of Armed Conflict (“LOAC”), International Humanitarian Law (“IHL”), the Geneva Conventions I to IV and the Additional Protocols thereto. Training for health professionals integrates the prevention of torture, cruel or inhuman or degrading treatment or punishment of mental health care users.¹⁰⁴ Training programmes for officials from the DHA include various aspects pertaining to asylum seekers, human trafficking and torture. The SAHRC has also made available information notices which provide an overview of torture.

Reply to the issues raised in paragraph 18(c) of the LOIs

57. The Constitution places an absolute prohibition on the use of torture and other ill treatment and thus provides a prohibition of torture policy for DCS and law enforcement officials; in addition policy exists for DCS employees in that the Correctional Services Act states that all prisoners must be treated with dignity.

Reply to the issues raised in paragraph 18(d) of the LOIs

58. The Istanbul Protocol forms part of the international instruments and law which are of relevance in the South African correctional and remand setting and is thus part of the training of DCS and police officials, medical professionals conducting examinations and entities involved in the investigation of torture or related incidents.

¹⁰⁰ Training on the provisions of the Anti-Torture Act is provided to all Heads of Correctional Centres and Heads of Community Corrections. The second phase of training was to train all officials from the Emergency Support Teams and officials working in Correctional Centres. The training is also included in the Learnership Programme for Correctional Services.

¹⁰¹ The training programme for DCS includes the following content:

- Definition of torture
- Elements of torture
- Objectives of the Act
- Risks for DCS in terms of the Act
- Offences and penalties
- Responsibility to promote awareness
- Examples of torture.

¹⁰² These two training interventions encompass techniques pertaining to the prevention and investigation of torture. IPID also embarked on information and discussion sessions with the various structures with the SAPS, the Department of Correctional Services and civil organisations on the Anti-Torture Act.

¹⁰³ The National Instructions of the SAPS specifically ensures that police officers are aware of the prohibition against torture. Various other instructions, standing orders and policies explicitly prohibit any conduct which may unjustifiably cause harm to life and limb and control mechanisms exists to identify any injury that was sustained by a subject during arrest or detention (see for instance Standing Order (g) 341- Arrest and Treatment of an Arrested Person; Standard Order G 350 - Use of Restraint Measures; Standard Order G 361 - Handling of Person in Custody). Paragraph 9 of the Consolidation Notice 9 of 2014.

¹⁰⁴ The Mental Health Care Act, 2002 provides that quarterly reports and registers are submitted to the Mental Health Review Boards on seclusion and restraint of mental health care users in psychiatric hospitals, so as to prevent abuse of these interventions and also the use as a form of punishment.

Reply to the issues raised in paragraph 18(e) of the LOIs

59. The DCS does not currently have a training impact assessment framework. SAPS members are assessed on various aspects of their training and assessments are carried out prior to, during and after training to assess members.

Reply to the issues raised in paragraph 19 of the LOIs

60. Segregation is implemented in accordance with the provisions of the Correctional Services Act, 1998.¹⁰⁵ Segregation of an inmate for a period of time¹⁰⁶ and which may include detention in a single cell, other than normal accommodation in a single cell, is permissible: upon the written request of an inmate; to give effect to the penalty of the restriction of amenities to the extent necessary to achieve this objective, if such detention is prescribed by the correctional medical practitioner on medical grounds; when an inmate displays violence or is threatened with violence; if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.

61. An inmate who is segregated must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day; and must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day. Enforced segregation may only be for the minimum period that is necessary and this period may, generally, not exceed seven days.¹⁰⁷

62. Amenities may not be restricted for a period exceeding 42 days. Segregation as a penalty does not amount to solitary confinement under any circumstances. An inmate who is subjected to segregation may refer the matter to the Inspecting Judge¹⁰⁸ (IJ) who must decide thereon within 72 hours after receipt thereof. Segregation must be for the minimum period and place minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.¹⁰⁹ Annexure 2, Table 10 sets out data regarding segregations.

Reply to the issues raised in paragraph 20 of the LOIs

63. There is currently no specific initiative to reduce the 72 hour period. During 2017/18, 41 inmates appealed to the IJ to contest the decision to place them in segregation. This represents 0,41% of all segregation reports. The IJ ruled that 31 of the 41 decisions to segregate were justified because of the occurrence or threat of violence. A concern is the low percentage of appeals by inmates against segregation, see Annexure 8.¹¹⁰

Reply to the issues raised in paragraph 21 of the LOIs

64. DCS and the JCPS Cluster continue to implement a multipronged strategy to reduce overcrowding in correctional facilities.¹¹¹ See pre-trial interventions above (par15). Other measures include managing levels of sentenced inmates through improving the effective and appropriate use of conversion of sentence to community correctional supervision,

¹⁰⁵ Act No. 111 of 1998.

¹⁰⁶ It may be for part of or for the whole day.

¹⁰⁷ Segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate. However, if the Head of the Correctional Centre believes that it is necessary to extend the period of segregation and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend the period of segregation for a period not exceeding 30 days.

¹⁰⁸ Section 30(7).

¹⁰⁹ Section 30(8).

¹¹⁰ JICS, Annual Report (2017/18).

¹¹¹ This strategy includes which includes managing levels of Remand Detainees through the Integrated Justice System Case Management Task Team, Provincial and District Efficiency Enhancement Committees, and the National Efficiency Enhancement Committee and the Inter-sectoral Committee on Child Justice (ISCCJ).

release on parole and transfers between correctional centres to address overcrowding. The DCS capital works programme envisages the upgrading of existing correctional facilities and the construction of new correctional centres.

65. Four new correctional facilities are being built and existing structures have been upgraded in order to bring them in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). From 2016/17 to 2018/19 the four correctional centres that are currently in construction will be completed, namely at Estcourt,¹¹² C-Max,¹¹³ Standerton,¹¹⁴ and the new Tzaneen correctional centre.¹¹⁵

66. The measures taken to improve the conditions of pre-trial detainees in police cells, and the adoption of the Bail and other Protocols, have led to improved inter-departmental coordination and is contributing to a reduction in overcrowding in police cells.¹¹⁶

67. The Bail Protocol is one of the strategies implemented to contain the population of remand detainees (“RDs”). It allows for an application to court for review of bail of RDs who have been charged with Schedule 7 crimes. The criteria for submitting an application relates to a particular centre/detention facility reaching such inmate proportions that it constitutes a material and imminent threat to human dignity, physical health or safety of RDs. The bail protocol is implemented in conjunction with section 63(1) of the CPA which allows the accused or the prosecutor to apply for the amendment of the conditions of bail. Data regarding applications submitted for bail review appear in Annexure 2, Table 11.

Reply to the issues raised in paragraph 22 of the LOIs

68. The provision of adequate health care in correctional facilities, in particular antiretroviral therapy (ART) for HIV/AIDS and medication against tuberculosis, the DCS’s care programme comprises of healthcare, nutrition and hygiene, continues to make a positive impact on alleviating the effect of these conditions. The early detection of medical conditions accompanied by adequate treatment and the introduction of harm reduction continues to contribute significantly to the health of detained persons. The number of inmates initiated on ART during 2017/18 increased by 1 936 from 24 506 in 2016/17.

69. The implementation of the Universal Test and Treat programme (UTT) for all HIV positive inmates, further contributes to identification and treatment, as indicated in Annexure 2, Table 12. South Africa achieved a positive treatment rate of 87% for offenders against a set target of 86% in 2017/2018. This is an improvement when compared to the 83% recorded in 2016/2017.¹¹⁷ Inmates are screened for TB on admission, during incarceration, biannually and upon release. In compliance with the National Strategic Plan for HIV, TB and Sexually Transmitted Infections (STIs) for 2017–2022, the DCS continued to strengthen mitigation efforts against these illnesses.

Reply to the issues raised in paragraph 23 of the LOIs

70. Lindela implements a health pre-admission process.¹¹⁸ The clinic is operated on a 24-hour basis by nurses and a doctor for those in need of medical services.¹¹⁹ If a patient is

¹¹² Construction of 309 additional bed spaces. The newly upgraded facility will provide a total of 512 bed space, inclusive of the additionally created 309.

¹¹³ Upgrade Project (construction of 12 additional bed spaces, total refurbishment and upgrade).

¹¹⁴ Construction of 787 additional bed spaces and refurbishment.

¹¹⁵ Construction of new facility with an additional bed space capacity of 435.

¹¹⁶ Remand detainees are transported to DCS facilities and courts more speedily. Those that are referred by the courts for psychiatric observation are transferred to psychiatric institutions. In cases where there are persons that have been arrested for being illegal immigrants, such persons are transferred to the Department of Home Affairs. In cases where children are perpetrators of specific crimes, such children are assisted by the DSD.

¹¹⁷ The achievement can be attributed to the improved collaboration between the Department of Correctional Services, support partners as well as the Department of Health.

¹¹⁸ This includes a screening questionnaire to determine existing medical conditions such as diabetes and high blood pressure. Mandatory testing for pregnancy is also conducted.

¹¹⁹ Any medication which is dispensed is strictly for consumption at the clinic and cannot be taken into the detention rooms, to prevent non-adherence to the treatment regime. The clinic porters conduct

treated more than three times for the same condition without any improvement, they must be referred to a secondary health facility. The Department of Health provides guidelines for the management of communicable diseases to the clinic at Lindela and conducts periodic inspections.¹²⁰ The International Committee of the Red Cross (ICRC) also conducts regular oversight visits to assist deportees with basic needs such as telephone contact with family members all over the world, as well as inspections of the Lindela clinic during which interviews are conducted with the deportees.¹²¹ Lindela was found to be compliant with the Nelson Mandela Rules for detention standards during an evaluation by the DCS.

71. Migrants, refugees and asylum seekers all have access to adequate health care in provincial and local hospitals and clinics.

72. The Minister for Home Affairs has not appointed a specific judge to exercise independent oversight of Lindela, however various judges and magistrates have visited and continue to visit Lindela and have issued reports on the outcomes of their visits.¹²² The DHA and the SAHRC have a standing monitoring arrangement regarding Lindela, which includes unscheduled inspections and the submission of monthly reports.

73. The information regarding possible allegations of ill-treatment, harassment or extortion of non-citizens by law enforcement officials, seems not to be readily available, but work is continuing to establish any information available to be presented.

Reply to the issues raised in paragraph 24 of the LOIs

74. With regards to details on the number of deaths in detention, both natural and unnatural, a breakdown of their causes, the number of investigations into such deaths, and prosecutions and sentencing of law enforcement or correctional personnel in this regard, see Annexure 2, Tables 13–24.¹²³

75. With regards to an update on the status of the drafting of guidelines regarding the prevention of the death of persons in police custody, and with regard to any other detention facilities, the SAPS has a number of policies that are aimed at minimizing deaths in police custody. These internal policies include a number of Standing Orders.¹²⁴ The SAPS also has a National Prevention Plan which is also aimed at minimizing deaths and escapes from police custody.

Reply to the issues raised in paragraph 25 of the LOIs

76. A list of finalised torture cases is set out in Annexure 2, Table 25.

77. Historic and current TIP prosecutions are set out in Annexure 2, Tables 26 and 27.

78. With regards to domestic violence and femicide cases, please see Annexure 2, Tables 28–31.

79. With regards to sexual offences and the conviction rates, please see Annexure 2, Table 32.

inspections in the rooms to ensure that there are no deportees who are incapacitated and are unable to go out for meals or recreation outside.

¹²⁰ On their monthly visits to the clinic, the health officials focus on isolation, detention rooms, kitchen, water and sanitation and pest control.

¹²¹ The ICRC provides feedback to the DHA.

¹²² Justice Edwin Cameron conducted an inspection at Lindela in July 2012 and issued a report. Thereafter an unannounced visit was undertaken by Deputy Chief Justice Moseneke in April 2014 and he also issued a report.

¹²³ A successful Workshop on Forensics was coordinated by the DHA with the International Committee of the Red Cross in February 2019 with the aim of defining the processes to be followed in the event of deaths at Lindela and implementing mechanisms to prevent such incidents. The Heads of National Forensics, National Institute of Communicable Diseases, Forensic Pathologists and Legal experts from the DoH were also invited.

¹²⁴ SO(G) 341: measures on searching of persons in custody;

SO(G)345: measures for transportation of persons in custody;

SO(G) 350 for restraining a person in custody.

Reply to the issues raised in paragraph 26 of the LOIs

80. The DCS handed back full control of the Mangaung Correctional Centre (“MCC”) to Bloemfontein Correctional Contracts and G4S Correction Services in August 2014. This was after DCS took control of the facility in October 2013, following the dismissal of 326 employees by G4S who had embarked on an unprotected strike. The DCS is due to take over full management of the facility in 2025. The National Commissioner appointed a Task Team in 2014 to look into all unnatural deaths at MCC. In this regard, all necessary documents were requested from the contractor. Where these documents were not submitted, the matter was referred to the Supervisory Committee in terms of the contract. The Task Team’s report is still under consideration.

Reply to the issues raised in paragraph 27 of the LOIs

81. The case of Khutazile Mbendu was registered and investigated by IPID.¹²⁵ Ten police officials were arrested for the murder and torture. The recommendations were sent to the NPA for the accused to be charged with murder and torture. Following the trial, the accused were acquitted.¹²⁶

Reply to the issues raised in paragraph 28 of the LOIs

82. During April 2016 IPID received three referrals as a result of the student protest at Rhodes University. The three incidents were reported by SAPS and not by individual complainants. One case was closed as unsubstantiated, as there were no police officials identified as suspects in the case. IPID found that in all these cases there was no evidence that police officials had used excessive force.¹²⁷ The other two cases were referred to the NPA for possible prosecution.

83. Members of the Public Order Policing reported referrals of the use of violence against students in more than seven cases of public violence which were allegedly committed by students of the University of the Witwatersrand during 2016. IPID investigated these matters and found that the protests were indeed violent, but that the need to protect life and property necessitated police officers to resort to proportional measures in order to restore law and order. Police used rubber bullets and stun grenades. IPID further found that the methods used to disperse the students during the protest were necessary and proportional. No live ammunition was used. IPID did not receive a complaint from any student that was injured by a stun grenade. Certain investigations have not been finalized due to a lack of witnesses, despite efforts by IPID to trace witnesses.

Reply to the issues raised in paragraph 29 of the LOIs

84. The IJ¹²⁸ has a mandate to inspect, or arrange for the inspection of, correctional centres and remand detention facilities in order to report on the treatment of inmates in such centres and facilities, on the conditions at such facilities and on corrupt or dishonest practices in correctional centres and remand detention facilities.¹²⁹ The IJ must submit an annual report to the President and the Minister of Justice and Correctional Services and the report must be tabled in Parliament by the Minister.

85. The Independent Correctional Centre Visitor (ICCV) programme was established in terms of section 92 of the CSA and has the powers contemplated in section 93 of the CSA.¹³⁰ The ICCV must refer certain unresolved complaints to the IJ.

¹²⁵ In terms of section 28(1) of the IPID Act.

¹²⁶ Ten policemen were formally charged in 2015 for allegedly torturing and killing a suspect in custody. They arrested Khutazile Mbendu in connection with a theft in December 2014.

¹²⁷ Police members used rubber bullets and in some instances also used pepper spray.

¹²⁸ The current Inspecting Judge is Justice Johann van der Westhuizen.

¹²⁹ For the purpose of conducting an investigation, the Inspecting Judge may make any enquiry and hold hearings.

¹³⁰ These powers include visits to correctional facilities; interviewing prisoners in private; recording complaints and monitoring the manner in which they have been dealt with; and discussing complaints

86. IPID may investigate, among others, any deaths in police custody; deaths as a result of police actions; complaints relating to the discharge of an official firearm by any police officer; rape by a police officer, whether the police officer is on or off duty; rape of any person while that person is in police custody; and any complaint of torture or assault against a police officer in the execution of his or her duties.¹³¹

87. The Public Protector furthermore has the mandate to investigate, among others, any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. The Public Protector Act, 1994¹³² provides that the Public Protector must receive complaints and investigate such complaints.¹³³

88. The SAHRC has a constitutional mandate to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated.¹³⁴ The SAHRC is accountable to the National Assembly and must report serious human rights abuses to the National Assembly.

89. Representatives of the judiciary, the Public Service Commission, Parliamentary Portfolio Committees, legal representatives and Legal Aid SA are all allowed to carry out visits to places where persons are deprived of their liberty and can receive complaints. Other oversight bodies that operate in the area of monitoring the treatment of persons deprived of their liberty through court orders or state action include, the Military Ombud; the Health Ombud; the Compliance Inspectorate of the Office of Health Standards Compliance (OHSC); the Department of Social Development's secure care monitoring mechanism; and Mental Health Review Boards. As indicated above, Cabinet has approved the tabling of the OPCAT into Parliament. Ratification of OPCAT will ensure the establishment of an independent National Preventative Mechanism under the coordination of the SAHRC.

Reply to the issues raised in paragraph 30 of the LOIs

90. With regards to an independent monitoring mechanism or dedicated oversight structure concerning child and youth care centres in conflict with the law, the Children's Act, 2005,¹³⁵ provides that the provincial head of social development must ensure that a quality assurance process is conducted in respect of each child and youth care centre.¹³⁶ The

with the Head of the Correctional Centre with a view to resolving the issues. The ICCV must be given access to any part of the correctional centre and to any document or record.

¹³¹ The IPID is obliged to make recommendations to the SAPS on the outcome of investigations and must, twice a year, report to Parliament on the number and type of cases investigated, the recommendations, the detail and outcome of those recommendations.

¹³² Act No. 23 of 1994.

¹³³ The Public Protector has broad powers to investigate complaints, including the powers to enter any place and to attach an article relevant to its investigation. The Public Protector is accountable to the National Assembly. Any report of the Public Protector must be open to the public.

¹³⁴ In terms of section 13(3) of the SAHRC Act, the SAHRC has the power on own initiative or on receipt of a complaint, to investigate any alleged violation of human rights, and to assist the persons adversely affected thereby, to secure redress including the funding of legal proceeding, and to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons. In terms of sections 15 and 16 of the SAHRC Act, the SAHRC have broad powers to investigate human rights abuses including the powers to search and attach articles relevant to its investigation.

¹³⁵ Act No. 38 of 2005.

¹³⁶ A team connected to the child and youth care centre must conduct an internal assessment of the centre, then a team not connected to the centre must conduct an independent assessment of the centre, an organisational development plan for the centre containing the prescribed particulars must be established between the teams by agreement; and the team not connected to the centre must appoint a mentor to oversee implementation of the plan by the management of the centre. The management board of a child and youth care centre must without delay, after completion of the quality assurance process, submit a copy of the organisational development plan established for the centre in terms of the quality assurance process to the MEC for social development in the province.

DSD is working on a dedicated oversight structure concerning Child and Youth Care Centres.

Reply to the issues raised in paragraph 31 of the LOIs

91. Prior to the Anti-Torture Act coming into effect, torture was prosecuted under the common law and other statutory offences. Prosecutions were instituted in the PEBCO 3¹³⁷ matter, but the charges were subsequently withdrawn in June 2009. With regards to the 362 applicants who were refused amnesty by the Truth and Reconciliation Commission and the list of 800 cases which required further investigation and consideration for prosecution, prosecutions are instituted in deserving cases and several matters are currently under investigation. Regarding the case of Ahmed Timol, a former apartheid security branch officer, Sergeant Joao Rodrigues, has been charged with the murder of Ahmed Timol and with defeating the ends of justice.¹³⁸ The NPA decided that Msebenzi Radebe, Willem Coetzee, Anton Pretorius and Frederick Mong be indicted in the High Court on charges of murder, and that Msebenzi Timothy Radebe be indicted on an additional charge of kidnapping, in relation to the death of Nokuthula Simelane. The matter has been set down for hearing in April 2019.¹³⁹ Regarding Nokuthula Simelane, prosecution has been instituted against the law enforcement officials implicated, but the matter has not been finalised.¹⁴⁰

Reply to the issues raised in paragraph 32 of the LOIs

92. Acts of torture carried out by non-state actors can be prosecuted in terms of the Anti-Torture Act, other applicable laws and even the common law. In terms of section 9 of the Anti-Torture Act, various awareness raising and public education initiatives have taken place to promote awareness of torture and to encourage the reporting of such conduct to the authorities.

Reply to the issues raised in paragraph 33 of the LOIs

93. With regards to abuses reportedly committed by South African peacekeepers whilst deployed in the Democratic Republic of Congo, in the case of *S v Matsekoleng* and 15 others, 11 members were convicted and their sentences ranged from a reduction in rank, to the imposition of fines and detention. Five members were acquitted. In the matter of *S v*

¹³⁷ The Pebco Three were three black South African anti-apartheid activists – Siphon Hashe, Champion Galela, and Qaqawuli Godolozzi – who were abducted and subsequently murdered in 1985 by members of the South African Security Police. The TRC refused to grant amnesty to the three perpetrators (Van Zyl, Nieuwoudt and Lotz) citing that the three had failed to make a full disclosure in the case of the PEBCO Three.

¹³⁸ This follows the re-opening of the inquest into the death of Mr Timol and the finding that he did not commit suicide, but died after being tortured and pushed from a window by security branch police officers. Mr Rodrigues brought an application for a permanent stay of prosecution on the basis that he is the only witness still living from the 1971 murder and therefore, the lengthy delay in instituting a prosecution would be unfair and result in an unfair trial. The State opposed the application, as did the family of the deceased whom the court has granted permission to participate as intervening party. The judgment is still awaited. The outcome of this case is important for other Truth and Reconciliation Commission (“TRC”) matters that may be prosecuted.

¹³⁹ Messrs Coetzee, Pretorius and Mong applied to the SAPS to fund their legal fees, but SAPS refused and the three lodged a review application for SAPS pay their legal fees. In June 2018 the High Court directed the SAPS to pay for their legal fees. In the interim, Mr Radebe, requested access to further information – the correspondence and investigating diary of the docket. This was declined, and Mr Radebe lodged an application to the court to order the prosecution to disclose this information. After initially being set down for hearing on 13 December 2018 and the judge raising certain concerns regarding jurisdiction to hear the application, the matter was postponed to 29 April 2019 for hearing of the application. Once the interlocutory applications have been dealt with the matter can be set down for trial.

¹⁴⁰ The Gauteng High Court in Pretoria, in June 2018, ordered the police to pay the legal costs of the three former security policemen accused of Ms Simelane’s murder. This ruling will now pave the way for the case to go to trial and for the family to get closure.

Matlaila and 4 others, the accused were charged in terms of the Anti-Torture Act and the matter will proceed to trial in March 2019.

94. South Africa is fully committed to a zero-tolerance policy against sexual exploitation in peace-keeping operations and has taken strong, immediate and decisive action against those found guilty of such abuses.¹⁴¹ In response to fighting sexual exploitation and abuse, Cabinet approved the Military Discipline Bill in August 2018.¹⁴² The UN follows a “Zero-Tolerance” policy towards sexual exploitation and abuse cases committed by its peacekeepers and requires stronger enforcement action against perpetrators. South Africa has come under scrutiny in this regard. Nonetheless the UN regards South Africa as a best practice model in the manner in which we conduct investigations and prosecutions within the mission areas. In 2018, the Minister of Defence and Military Veterans directed the Chief of the Defence Force to issue a Defence Force Instruction on sexual exploitation and abuse in mission areas. If a perpetrator is found guilty, he or she must be dishonourably discharged.¹⁴³

Reply to the issues raised in paragraph 34 of the LOIs

95. With regards to redress and compensation measures, Part III of the Robben Island Guidelines provide for reparation for victims of torture. However, the Guidelines do not specify what this reparation entails or what it should look like.¹⁴⁴ Though the Anti-Torture Act does not contain specific reparations for torture victims, compensation can be claimed through a civil claim of damages instituted in South African courts. In addition, the CPA makes provision for the award of compensation to victims of crime, who have suffered damages because of the criminal conduct of an accused.¹⁴⁵

96. Should a torture victim also be the victim of a sexual offence, he or she will be able to access the medical and psycho-social services. Should a torture victim also be a victim of trafficking, a court may, on its own accord or at the request of the victim of trafficking or the prosecutor, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for damage to or the loss or destruction of property, including money; physical, psychological or other injury; being infected with a life-threatening disease; or loss of income or support. Victims of trafficking may be referred to an accredited organisation for services.¹⁴⁶

97. Since the Anti-Torture Act does not specifically mention compensation, there is no data readily available on the number of requests for compensation made and granted and the amounts ordered and provided.

Reply to the issues raised in paragraph 35 of the LOIs

98. With regards to the status of redress, including compensation, provided to persons who were victims of acts of torture under the apartheid regime, regulations enabling the

¹⁴¹ This is in line with the South African government’s position on gender equality and women in peace and security matters as committed by the President of the Republic of South Africa when joining the Circle of Leadership and endorsing Action for Peacekeeping’s Joint Declaration of Commitment.

¹⁴² The Bill addresses the administration of the military judicial system, creation and appointment of military police services and disciplinary hearings. The new Bill, when enacted, will repeal the current Military Discipline Supplementary Measures Act, 1999. This Bill will align SANDF military discipline to the UN, important given South Africa’s involvement in peacekeeping and peace support missions run under the auspices of the world body, especially with soldiers deployed on peacekeeping.

¹⁴³ Address by Minister for Defence and Military Veterans during the debate on the Defence and Military Veterans Budget Vote 2018, Parliament, Cape Town, 18 May 2018.

¹⁴⁴ There is a general belief that the term reparation is synonymous with compensation. Although compensation is key, reparation and adequate remedy for victims go beyond compensation.

¹⁴⁵ Section 300.

¹⁴⁶ An accredited organisation must offer a programme aimed at the provision of accommodation to adult victims of trafficking; the provision of counselling to adult victims of trafficking; and the reintegration of adult victims of trafficking into their families and communities; and may offer a programme aimed at the provision of rehabilitation and therapeutic services to adult victims of trafficking; or the provision of education and skills development training to adult victims of trafficking (section 26).

payment of individual reparations of R30 000-00 were published in November 2003.¹⁴⁷ Out of the 21 676 victims that were identified in the TRC report, 17 409 victims who applied, received the set individual reparation amount, while 4267 victims did not apply.

99. Two sets of regulations dealing with education assistance to victims came into effect in November 2014. For the number of verified applications by the TRC Unit under basic education and those who met the criteria for funding see Annexure 2, Table 33. For the number verified by the TRC Unit under Higher Education and Training and those who met the criteria for funding see Annexure 2, Table 34.

100. Draft regulations pertaining to medical benefits are awaiting the amendment of the National Health Act, 2003¹⁴⁸ to include a proposed new model on which medical benefits to victims must be based, namely, to define victims and their relatives as an additional category of persons who qualify for free public health care.¹⁴⁹ A draft Housing reparation guideline to cover, amongst others, the scope of the housing assistance to be provided to beneficiaries and the criteria and conditions of assistance has been developed and is scheduled for consultation with Department of Human Settlements.

101. Government's Gallows Exhumation Project entails the exhumation of the human remains of 83 political prisoners who were executed by the apartheid regime and buried in unmarked graves. A total of 130 political prisoners were hanged at the then Pretoria correctional centre¹⁵⁰ between 1960 and 1990. The remains of 47 political prisoners were exhumed and given a dignified reburial. The remains of 83 prisoners remain buried in unmarked graves. The TRC also recommended that government must continue trying to trace people who disappeared during apartheid and the NPA's Missing Persons Task Team has so far found the remains of 138 people murdered by apartheid forces.

Reply to the issues raised in paragraph 36 of the LOIs

102. With regards to the integrated Victim Empowerment Programme and the Integrated National Policy Guidelines for Victim Empowerment, the DSD coordinates the integrated Victim Empowerment Programme management structure.¹⁵¹ This structure meets on a quarterly basis to share progress and best practice models. The DSD has reviewed the Integrated National Policy Guidelines through the process of developing and promoting a Victims Support Services Bill and a Draft Victim Empowerment Support Services Bill. DSD introduced the Victim Support Services Bill to regulate the services rendered to the victims of crime and violence. Internal and external consultations were held on the Bill and it is currently on route to Cabinet for approval to publish the Bill for public comment.¹⁵²

103. A revised Victim Support Services Policy is in place which covers all victims of crime and violence, including victims of torture. South Africa has also implemented, and is continuing to promote, a special focus on victim empowerment and ensuring that victims and witnesses are treated fairly and are fully supported through, amongst others, our Charter on the Rights of Victims. South Africa also has a Service Charter for Victims of Crime as well as Minimum Standards for services to victims of crime and a number of SAPS instructions to support Victim Empowerment.¹⁵³

¹⁴⁷ Numerous initiatives were undertaken throughout the years to trace beneficiaries or their rightful next-of-kin in the case of deceased beneficiaries who could not be found and therefore not paid.

¹⁴⁸ Act No. 61 of 2003.

¹⁴⁹ Once the amendments to the Act have been approved by Parliament, the finalisation of the draft regulations will receive further attention.

¹⁵⁰ Now renamed the Kgosi Mampuru II Correctional Centre

¹⁵¹ The structures also include the SAPS, the Department of Justice and Constitutional Development, the Department of Correctional Services, the NPA, the Department of Health, the Department of Basic Education, the Department of Higher Education and Training and civil society organizations.

¹⁵² All Bills not yet finalised will only be dealt with after the new Executive Authority has taken office after the 8 May 2019 national elections.

¹⁵³ National Instruction 2/2012 – Victim Empowerment.

National Instruction 7/1999 - Domestic Violence.

National Instruction 3/2008 - Sexual Offences.

104. With regards to the Shelter Strategy for abused women, the Domestic Violence Act, 1998 places a duty on SAPS to assist domestic violence victims to find a suitable shelter. The National Instructions¹⁵⁴ make provision for the police to assist with finding a shelter, making contact on behalf of the victim and transporting the victim to the shelter. The DSD's policy on Minimum Standards on Shelters for Abused Women requires it to facilitate and fast-track the provision of shelters. The Minimum Standards specify that shelter services must provide for basic needs (e.g. accommodation, food, and clothing) as well as support, counselling and skills development. South Africa's Integrated Programme of Action Addressing Violence against Women and Children' (2013–2018) sets out a number of intervention targets in relation to shelter services.¹⁵⁵ The DSD has also put in place a 'National Strategy for Sheltering Services for Victims of Crime and Violence' (2013 – 2018) which sets out the roles of different government departments as part of an attempt to encourage inter-departmental collaboration.

Reply to the issues raised in paragraph 37 of the LOIs

105. With regards to raising awareness about the provisions of the Convention, the Constitution mirrors many of the provisions of the UNCAT and therefore constitutional awareness and human rights education assists, both directly and indirectly, to raise awareness of the provisions of the UNCAT. A recent survey found that slightly more than half (51%) of respondents had heard of either the Constitution or the Bill of Rights.¹⁵⁶ This has led to ongoing human rights education, with initiatives like the National Schools Moot Court¹⁵⁷ and Let's Talk Justice¹⁵⁸ and a focus on human rights in the school curriculum. Events aimed at learners take the form of learner dialogues where learners are told about human rights and can ask about questions about their rights.

106. In addition, during key months such as Human Rights Month and Freedom Month (April) various initiatives take place to promote human rights. South Africa also honours 26 June as International Day in Support of Victims of Torture. The prevention of torture (and thus the provisions of the Convention) is one of the seven focus areas identified by the SAHRC in order to effectively fulfil its mandate of promoting, protecting and monitoring the realisation of human rights in South Africa.

National Instruction 2/2010 - Children in Conflict with the Law.

National Instruction 3/2010 - The Care and Protection of Children in terms of the Children's Act.

Standing Operating Procedures for the reporting of FCS-related Crimes (FCS = Family Violence, Child Protection and Sexual Offences Unit).

¹⁵⁴ (7/1999).

¹⁵⁵ These targets include: harmonise, regulate and scale-up the provision of provincial safe house models (the white door/green door model; scale up capacitated halfway-houses using the Khuseleka model with linkages to existing Thuthuzela Care Centres and other one-stop response services, and empower survivors of violence through long-term life skills, social and economic programmes to reduce their vulnerability and build on their resilience.

¹⁵⁶ Socio-Economic Justice for All (SEJA) Baseline Survey, 2018.

¹⁵⁷ The National Schools Moot is collaboration between a number of role-players – from the University of Pretoria, the Foundation for Human Rights, the South African Human Rights Commission and the Departments of Basic Education and Justice and Constitution Development. This annual competition was established in 2011 to create a greater understanding of human rights in South African schools. The competition has over the last seven years proven itself to be a powerful tool to popularize human rights and to ensure that young people and their communities have a better understanding of human rights. Such a moot, reaching all 4 million secondary learners, generation after generation, can play a central role in enhancing human rights awareness.

¹⁵⁸ The DOJCD has undertaken a community radio programme called "Let's Talk Justice" which reaches approximately 65 community radio stations countrywide. The radio show is interactive, allowing a principal/official from the DOJCD to educate the public and to answer questions which come in live as part of the show. The reach of the radio show (and all communications efforts) is augmented through the use of social media (Facebook and Twitter) as well as the Department's website.

Reply to the issues raised in paragraph 38 of the LOIs

107. Any evidence unconstitutionally obtained is to be excluded – this includes evidence obtained through torture.¹⁵⁹ In *Mthembu v S*¹⁶⁰ the Supreme Court of Appeal excluded evidence of a witness for the prosecution, as the witness had been beaten and tortured before providing the crucial evidence to the police that was used at the trial. The Court held that improperly obtained evidence, in a deliberate or flagrant violation of the Constitution, is to be excluded. The court held that –“The absolute prohibition on the use of torture in both our law and in international law therefore demands that “any evidence” which is obtained as a result of torture must be excluded in any proceedings.”¹⁶¹

Reply to the issues raised in paragraph 39 of the LOIs

108. With regards to steps taken to implement the Abolition of Corporal Punishment Act, 1997,¹⁶² the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child.¹⁶³ The Constitutional Court has prohibited corporal punishment in detention settings in 1995¹⁶⁴ and, in 2000, corporal punishment was banned in schools.¹⁶⁵

109. With regards to the use of corporal punishment in the home, the common law defence of ‘reasonable chastisement’ allows parents to use corporal punishment with the justification of it being a form of discipline. In October 2017, the South Gauteng High Court ruled that the common law defence of reasonable chastisement no longer applied in law and was unconstitutional.¹⁶⁶ The court emphasised that the intention was not to charge parents with a crime, but to support them in finding more positive ways of disciplining children. The matter is now before the Constitutional Court.¹⁶⁷ The DSD has also published the draft Children’s Third Amendment Bill for public comment to, inter alia, remove the common law defence of reasonable chastisement and thus prohibit corporal punishment in the home.

110. The South African Schools Act, 1996¹⁶⁸ provides that no person may administer corporal punishment at school to a learner.¹⁶⁹ In order to promote children’s rights and well-being, the Children’s Act provides a legal framework to guide persons who are involved in the care, development and protection of children on the actions and steps they must take to secure children’s rights. The new National Care and Protection Policy was approved by Cabinet in 2018 and states that no child shall be subjected to corporal punishment or be punished in a cruel, inhuman or degrading way.

Reply to the issues raised in paragraph 40 of the LOIs

111. With regards to the use of equipment designed to inflict torture or other cruel, inhumane and degrading treatment, certain devices such as electric shock devices, tonfas, battons, pepper spray and rubber bullets are classified as non-lethal weapons and therefore are assumed to be a safer alternative to firearms. The use of non-lethal weapons in prisons is governed by the Correctional Services Act, 1998.¹⁷⁰ If warders intend to use force to deal with an inmate, a minimum degree of force must be used and the force must be proportionate to the objective.¹⁷¹

¹⁵⁹ Section 35(5) of the Constitution and section 217 of the Criminal Procedure Act, 1977.

¹⁶⁰ [2008] 4 All SA 517 (SCA).

¹⁶¹ Para 32.

¹⁶² Act No. 33 of 1997.

¹⁶³ Section 28(2).

¹⁶⁴ *S v Williams* 1995 (3) SA 632.

¹⁶⁵ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

¹⁶⁶ *YG v S* [2017] ZAGPJHC 290.

¹⁶⁷ The central question before the Constitutional Court is whether this practice should continue to be allowed or whether it needs to be prohibited since it violates children’s rights.

¹⁶⁸ Act No. 84 of 1996.

¹⁶⁹ Section 10.

¹⁷⁰ Act No. 111 of 1998.

¹⁷¹ Section 32(1) (b).

112. Non-lethal incapacitating devices may only be issued to a correctional official on the authority of the Head of Prison.¹⁷² Whenever such devices are used, their use must be reported in writing. Teargas grenades and cartridges fired by firearms or launch-tubes may not be fired or launched directly at a person or into a crowd. Whenever a correctional official decides to use teargas he or she must be convinced that its use in the specific situation meets the requirements of minimum and proportionate force. If a prisoner has been affected by teargas he or she must receive medical treatment as soon as the situation allows.¹⁷³ The only devices currently authorised for use in prisons are shields and hand-held electronic immobilizing stun devices.¹⁷⁴

¹⁷² Such devices may only be used by correctional officials specifically trained in their use and used in the manner prescribed and in limited circumstances only, such as if a prisoner fails to lay down a weapon or some other dangerous instrument in spite of being ordered to do so; if the security of the prison or safety of prisoners or others is threatened by one or more prisoners; or for the purpose of preventing an escape.

¹⁷³ Section 33.

¹⁷⁴ ISS (Institute for Security Studies) Policy Brief, June 2016.