**ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ** **E**

# ЭКОНОМИЧЕСКИЙ И СОЦИАЛЬНЫЙ СОВЕТ

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## ГРАЖДАНСКИЕ И ПОЛИТИЧЕСКИЕ ПРАВА: ВОПРОСЫ ПЫТОК И ЗАДЕРЖАНИЙ

## ДОКЛАД РАБОЧЕЙ ГРУППЫ ПО ПРОИЗВОЛЬНЫМ ЗАДЕРЖАНИЯМ

**Добавление***

## ПОСЕЩЕНИЕ ЮЖНОЙ АФРИКИ

**(4-19 сентября 2005 года)**

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**Резюме**

Рабочая группа по произвольным задержаниям, полномочия которой были последний раз продлены в резолюции 2003/31 Комиссии, посетила Южную Африку по приглашению правительства этой страны 4-19 сентября 2005 года. Рабочая группа побывала в столице страны Претории, Йоханнесбурге и Крюгерсдорпе (Гаутенг), Полокване и Музине (Лимпопо), Блумфонтейне (Свободная провинция) и Кейптауне (Западный Кейп). В этих населенных пунктах она посетила 15 мест содержания под стражей, включая полицейские участки, следственные изоляторы, тюрьмы, места содержания несовершеннолетних правонарушителей и центры для репатриации иностранцев. В этих местах содержания под стражей Рабочая группа смогла встретиться и провести беседы наедине с более чем 500 содержавшимися там лицами, которые произвольно отбирались в соответствующем учреждении.

В докладе в контексте уголовного или иммиграционного законодательства упоминаются различные учреждения и нормы, имеющие отношение к проблемам задержания и прав человека. В нем описываются различные процессуальные действия, которые могут привести к задержанию, а также все участвующие в них субъекты. Рабочая группа отмечает, что правительственные органы всех уровней и органы посещенных провинций сотрудничали с ней в полной мере: она смогла побывать во всех центрах задержания и в других учреждениях, о посещении которых ходатайствовала.

В докладе выражается высокая оценка Южной Африки в связи с теми масштабными переменами, которых она добилась за последние 15 лет, и обращается особое внимание на тот факт, что в стране начала укореняться демократическая культура, способствующая уважению законности и прав человека. Рабочая группа отмечает, что нормы, касающиеся защиты прав человека, и особенно прав арестованных и задержанных лиц, четко закреплены в Конституции и что целый ряд учреждений с различными исполнительными, законодательными и судебными полномочиями, например комитеты по подготовке пакетов законодательных актов, Независимый директорат по рассмотрению жалоб, Управление следственного судьи по тюрьмам, Комиссия по правам человека Южной Африки, а также другие механизмы сдержек и противовесов, направленные на защиту прав человека, действуют в качестве факторов перемен в условиях длительного переходного периода и продолжающегося процесса ментальной эволюции от авторитарного режима к зрелой демократии.

В докладе говорится о преобразовании исправительной системы и улучшении условий содержания осужденных - что принадлежит к числу приоритетных направлений текущих реформ. Нынешняя исправительная политика ориентирована на реабилитацию и реадаптацию. Рабочая группа также отдает должное усилиям правительства, которые позволили создать доступную для всех задержанных систему оказания правовой помощи

в уголовном процессе, не поставив при этом под угрозу независимость юридической профессии.

В докладе отмечается очень широкая распространенность практики лишения свободы в Южной Африке, которая частично обусловлена строгостью и длительностью выносимых судами приговоров и обязательностью вынесения минимальных наказаний за целый ряд преступлений. Это привело не только к пугающе высокой численности отбывающих длительные сроки наказания вследствие серьезности совершенного преступления, но и к тревожно высокому показателю переполненности мест лишения свободы, отражающейся на осужденных, задержанных до суда и несовершеннолетних. Более того, условия содержания задержанных до суда в камерах полицейских участков или в обычных тюремных учреждениях даже хуже, чем условия содержания осужденных. Рабочая группа обратила внимание на отсутствие законоположений или предписаний, которые предусматривали бы учет времени, проведенного под стражей до суда, при вынесении окончательного приговора. Кроме того, Рабочую группу информировали о том, что поведение некоторых сотрудников полиции привело к негативному восприятию ее деятельности.

В докладе упоминается о посещении репатриационного центра Линдела, где содержатся лишенные свободы иностранцы, некоторые из которых имеют официальный вид на жительство, а другие - ходатайствуют о получении убежища, заявляя, что они подверглись произвольному аресту со стороны сотрудников полиции, стали объектами жестокого обращения, не имеют возможности оспорить законность их задержания и рискуют быть высланными из страны, не воспользовавшись в той или иной форме процедурами пересмотра или апелляции. Рабочая группа отметила, что, хотя Конституция и закон об иммиграции позволяют лицам, спасающимся от преследования, добиваться получения убежища или статуса беженца, сделать это, находясь в положении задержанного, на практике почти невозможно.

На основе своих выводов Рабочая группа вынесла правительству рекомендации, касающиеся применения мер, альтернативных задержанию, сокращения сроков задержания до суда, недопущения содержания задержанных до суда в камерах полицейских участков, а также учета времени, проведенного под стражей до суда, при вынесении приговоров. Кроме того, в докладе поддерживаются уже начатые реформы, направленные на улучшение обращения с малолетними преступниками и на создание специализированной системы отправления правосудия для несовершеннолетних. Наконец, что касается задержания в соответствии с иммиграционным законодательством, то Рабочая группа предлагает правительству принять соответствующие меры для создания возможностей реального оспаривания законности задержания незаконно пребывающих иностранцев, с тем чтобы они могли реализовать все права, гарантируемые согласно Конституции.

Annex

# REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION VISIT TO SOUTH AFRICA (4-19 September 2005)

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## Introduction

1. The Working Group on Arbitrary Detention, which was established pursuant to Commission on Human Rights resolution 1991/42 and whose mandate was extended by Commission resolution 2003/31, visited South Africa from 4 to 19 September 2005 at the invitation of the Government. The delegation consisted of Ms. Leïla Zerrougui, Chairperson-Rapporteur of the Working Group and head of the delegation, as well as Ms. Manuela Carmena Castrillo, member of the Working Group. The delegation was accompanied by the Secretary of the Working Group, an official from the Office of the United Nations High Commissioner for Human Rights and two interpreters from the United Nations Office at Geneva.

2. The visit included the political capital, Pretoria, and the cities of Johannesburg, Polokwane, Musina, Bloemfontein and Cape Town. During its visit, the delegation met with officials of the national and provincial governments, members of Parliament, members of the judiciary, officials of independent institutions, representatives of civil society, members of academia and other individuals. It was able to visit 15 detention centres, and had meetings, in private and without witnesses, with more than 500 detainees. The Working Group also visited Robben Island, a former prison and labour camp during the apartheid regime, and held a commemoration for the victims who were arbitrarily detained there.

3. The Working Group would like to express its gratitude to the Government of South Africa, to the governments of the provinces of Gauteng, Limpopo, the Free State and the Western Cape, as well as to the United Nations Development Programme, which greatly assisted with the logistics of the visit, and to the South African civil society representatives we met.

## I. PROGRAMME OF THE VISIT

4. The Working Group was able to visit the following detention centres and facilities: the Pretoria Central Correctional Centre, the Leewkop Maximum, Medium and Juvenile Correctional Centres, the Lindela Repatriation Centre, the Gauteng Province Youth Place of Safety near Krugersdorpf, the immigration facilities in Musina at the border with Zimbabwe as well as the police station, the Polokwane Central police station, the Grootvlei Prison in Bloemfontein as well as the Muangang Private Prison and the One Stop Child Centre, the Drakenstein Maximum Prison in the Cape Town area, the Stellenbosch Correctional Centre as well as the Pollsmoor Female Correctional Centre and the Lentegeur Psychiatric Hospital. The Working Group also attended a hearing before the High Court in Pretoria and saw border processing at the immigration facility in Musina at the Zimbabwe border.

5. The Working Group met with representatives of the Ministries of Foreign Affairs and Correctional Services, with judges of the Constitutional Court and of the Supreme Court of Appeal and with representatives of the legislative Portfolio Committees on Safety and Security, and on Home Affairs. The Working Group also met with the Deputy Minister of Justice and Constitutional Development, as well as with representatives of the Ministries of Safety and Security, Home Affairs, Social Development and Health, as well as with representatives of the competent provincial authorities in the provinces of Gauteng, Limpopo, Free State and Western Cape. The Working Group also met with other members of the judiciary,

representatives of the National Prosecution Office, the South African Police Service, the Independent Complaints Directorate, the Legal Aid Board, the South African Human Rights Commission, the Law Reform Commission, the Inspecting Judge of Prisons and with officials from the companies managing the private prisons visited.

6. The Working Group also held meetings with representatives of several non-governmental organizations, including lawyers, and members of the Centre for Conflict Resolution at the University of Cape Town, as well as with United Nations agencies present in South Africa such as the United Nations Development Programme, the International Labour Organization, the International Organization for Migration, the United Nations Programme on Drugs and Crime and the Office of the United Nations High Commissioner for Refugees.

## II. THE LEGAL AND INSTITUTIONAL FRAMEWORK

### A. The institutional framework

7. Since 1948, with the accession to power of the National Party, the apartheid regime was formally declared the official State ideology and policy. The oppression of Black people was intensified, racially based restrictions and segregations, widespread arrests and detentions were imposed, while the criminal justice system became increasingly used as a form of political and social control. In 1990 F.W. de Klerk, the last National Party President, released Nelson Mandela, who after 27 years in jail became the head of the now-legal African National Congress (ANC). In 1993, the South African Interim Constitution was adopted and served as a basis for the entrenchment, promotion and protection of human rights. In 1994 South Africa saw its first fully democratic election bring Mr. Mandela and the ANC to power. Mr. Mandela soon created a Truth and Reconciliation Commission to uncover the crimes committed under apartheid and bring a greater sense of unity to a nation with a long history of bitter divisions. According to the Truth and Reconciliation Commission, some 22,000 individuals or their surviving family members appeared before the Commission.

8. The present Constitution was first adopted by the Constitutional Assembly on 8 May 1996 and signed into law on 10 December 1996. The process of drafting the Constitution involved a large public participation programme in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. The Constitution aims to represent the collective wisdom of the South African people through its finalization by general agreement.

9. The Bill of Rights, contained in articles 7 to 39 of the Constitution, enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. The State is under obligation to respect, protect, promote and fulfil the rights contained in the Bill of Rights, which applies to all laws, and binds the legislature, the executive, the judiciary and all organs of State and the provinces.

## 1. Division of powers

10. The Executive Branch is headed by the President and composed of the Cabinet, which includes all the national departments (Ministries) and agencies. The Ministries of Justice and Constitutional Development, Correctional Services, Safety and Security, Home Affairs, as well as the South African Police Service as an agency, are all under the Executive Branch of the national Government. All the national departments and agencies have their headquarters in Pretoria, the capital of the executive branch.

11. The Legislative Branch consists of the Parliament, which is composed of both the National Assembly, 400 members elected by proportional representation, and the National Council of Provinces, composed of 90 representatives from each of the nine provinces. Both the National Assembly and the National Council of Provinces are located in Cape Town, the legislative capital.

12. In the sphere of criminal law and procedure, legislation lies solely with the national Government and Parliament. All of the administration of justice, i.e. the establishment of courts, nomination of judges and magistrates, the initiation of criminal investigations, indictments, the prosecution of cases at trial, sentencing and corrections, are within the competence of the national Government.

13. There are nine provinces in South Africa, each with its own executive and legislative branch, but appointed directly by the national Government in accordance with the political representation at the national level. The provinces, with their own distinctive parliaments and governments headed by a Premier, all have departments covering their areas of competence. The following areas of interest to the Working Group are of exclusive competence by the provinces: health services, indigenous law and customary law.

14. Municipalities also have competence in strictly local matters affecting their jurisdictions.

## 2. The courts

15. The Constitutional Court, located in Johannesburg, is the court competent in constitutional matters and issues, including whether Acts of Parliament and the conduct of the President and Executive are consistent with the Constitution, including the Bill of Rights. Its decisions are binding on all persons, including organs of State, and on all other courts. Members of the Constitutional Court are appointed by the President, after consultation of its Chief Justice, and with the approval of the leaders of the major parties represented in Parliament, provided that the candidates meet the requirements of other judicial appointments set forth by the Judicial Services Commission.

16. The Supreme Court of Appeal, located in Bloemfontein, the judicial capital, is the highest court in respect of all matters, except constitutional matters. The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a High Court. The decisions of the Supreme Court of Appeal are binding on all courts of a lower level.

17. The High Courts are divided into 10 regional divisions as well as 3 local divisions. A division has jurisdiction in its own area over all persons residing or being in that area. These divisions hear matters that are of such a serious nature that the lower courts would not be competent to make an appropriate judgment or impose a penalty. The decisions of the High Courts are binding on Magistrate's Courts within the respective areas of jurisdiction of the divisions. Judges of the High Courts, as well as of the High Court of Appeal, are appointed by the Judicial Service Commission (with the exception of the Chief Justices, appointed by the President). The Judicial Services Commission is composed of judges, Cabinet members, members of Parliament, lawyers, academics, and other persons nominated by the President.

18. Besides the High Courts, there exist also Magistrate's Courts which consist of regional courts and district courts. These courts, unlike those above, are presided by magistrates. In criminal matters, these courts have jurisdiction over all offences except treason, murder, aggravated armed assault and robbery and aggravated rape. Magistrates are nominated by the Magistrates Commission, a body composed of a High Court judge, magistrates, practising lawyers, members of Parliament, academics and other persons appointed by the President. In the apartheid regime, magistrates were part of the civil service and were not an institution with judicial independence. Their members were selected from the ranks of the prosecutors.

19. Depending on the gravity of the offence and circumstances pertaining to the offender, the prosecutor decides in which court a matter will be heard. In district courts, prosecutions are usually summarily disposed of, and judgment and sentence passed. District courts are competent to hear cases and decide on sentences up to 3 years' imprisonment, whereas regional courts can impose sentences up to 15 years.

20. Bail hearings take place before a magistrate (regional or in most cases district courts) sitting when the motion is presented, usually when the arrested person first appears in court.

### 3. The National Prosecuting Authority

21. The National Prosecuting Authority has the primary function of instituting all criminal proceedings on behalf of the State. Except for prosecutions falling within the exclusive authority of the National Director (extraditions, Constitutional Court matters, matters arising from the Truth and Reconciliation Commission, recommendations for presidential pardon and expunging details of previous offences from official police records), more common criminal proceedings are dealt with by individual prosecutors under the supervision of regional Directors of Public Prosecutions (DPPs). Prosecutors are selected from the ranks of lawyers or persons who hold law degrees.

22. Prosecutors therefore have discretionary powers, amongst others, to lay charges and institute criminal proceedings against a person, to withdraw charges or to stop a prosecution, to oppose or not an application for bail or release by an accused who is in custody following arrest, to divert or not an offender and resolve the case in a manner other than through normal court proceedings, to decide which crimes to charge an accused with and in which court the trial should proceed, to accept which evidence to present during the trial or during the sentence proceedings, in the event of a conviction, to accept or not a plea of guilty by an accused and to appeal to a higher court.

23. In criminal proceedings, the primary function of the prosecutor is not simply to secure a conviction at all costs, but, as representatives of the community in the criminal trials, to assist the court in arriving at a just verdict for those accused of committing crime. In the event of a conviction, the prosecutor should assist the court in arriving at a fair sentence based upon the evidence presented in court.

## 4. The police

24. The South African Police Service (SAPS) and, in large urban centres, the municipal police, investigate and lay charges where they believe on reasonable grounds that an offence has been committed. The rise in the crime rate in the last decade marked important changes in the policing approach in South Africa. Measures such as the National Crime Prevention Strategy (1996), the National Crime Combating Strategy (2000) and other initiatives have had important implications. The Domestic Violence Act No. 116 of 1998, for instance, creates police responsibilities in assisting complainants in domestic violence cases. Also, new regulations governing the use of lethal force for purpose of arrest and the issuing by police of firearms licences have also been passed. To oversee police actions, South Africa has created multiple accountability mechanisms, both political and administrative, at different levels of government and in local communities. These include the Independent Complaints Directorate, national and provincial Secretariats for Safety and Security and in the legislative branch the Parliamentary Portfolio Committee for Safety and Security.

## 5. Institutions supporting human rights

25. South Africa has established since the end of the apartheid regime a number of independent institutions in order to secure, each within its own sphere of competence, the respect and fulfilment of human rights to all its citizens. The South African Human Rights Commission plays a primary role in investigating complaints of human rights violations and offering educational programmes to individuals and public and private institutions. The South African Gender Equality Commission aims to reduce the gender inequalities prevalent in the country by investigating complaints, offering educational programmes and proposing legislative amendments. The South African Law Reform Commission conducts in-depth analysis of all applicable legislation to verify its conformity with international instruments, including human rights treaties. The Parliamentary Portfolio Committees, composed of members of Parliament, ensure oversight of government action, propose and review legislation and ensure overall conformity with their constituents' needs and applicable laws, including the Constitution.

## 6. Legal aid

26. The Legal Aid Board is an independent statutory body established in terms of the Legal Aid Act of 1969 that was primarily applied only to Whites. In 1996 it has been amended and is now applicable to everyone without distinction. The Legal Aid Board provides tax-subsidized legal help to those in greatest need. It does so in accordance with the Constitution and the Bill of Rights. The Legal Aid Board's work covers both civil and criminal cases. Its criminal work supports each person's right of innocence until proven guilty. The Constitution guarantees accused criminals the right to a fair trial and to be assisted by a defence counsel. However, due to resource constraints, not all those who need or require legal aid are able to benefit from the same assistance.

27. Criminal matters handled by the Legal Aid Board include all matters in which substantial injustice would result if legal representation were not provided at State expense. Subject to the ability of the accused to provide his/her legal representation, all matters in the High Court and the regional courts, some matters in the district courts, and less serious matters where the accused, if convicted, would likely to be sentenced to more than three years' imprisonment, are covered by the scheme. The criterion for admissibility for legal aid is based on the financial resources of the accused and his family. When someone who does not meet the legal aid eligibility requirement and does not have a private lawyer, and there is a risk that he may be sentenced to imprisonment, legal aid will be given free of charge.

28. The Legal Aid Board is currently reviewing the whole system so as to make it more efficient and cost-effective.[1]

## B. The legal framework of detention

### 1. International instruments ratified by South Africa

29. South Africa has ratified most major international human rights treaties, including the International Covenant on Civil and Political Rights. However, it has not ratified the International Covenant on Economic, Social and Cultural Rights (signed only) or the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. South Africa has also recognized the Standard Minimum Rules for the Treatment of Prisoners, which resulted in the abolition of solitary confinement in 1993. Corporal punishment for prisoners and the death penalty were also abolished to comply with decisions of the Constitutional Court.

### 2. The Constitution and the Bill of Rights

30. The Constitution is the supreme law in South Africa. In its preamble it acknowledges the injustices of the past and dedicates the nation to building a democratic and open society. The Constitution contains 14 chapters and 7 schedules. Chapter 2 (sects. 7-39) contains the Bill of Rights, which is regarded as one the most progressive of the world. Chapter 8 (sects. 165-180) defines the functioning of the courts and of the administration of justice. Chapter 9 (sects. 181-194) lists the State institutions which support the constitutional democracy.

31. The Bills of Rights (chapter 2, sections 7-39 of the Constitution) defines the human rights which are to be protected in South Africa. Section 7 affirms the importance of the Bill of Rights itself defining it the "cornerstone of democracy in South Africa". Section 8 deals with the application of the Bill of Rights in relation to the legislature, the executive, the judiciary and all other organs of the State. Sections 9 to 22 enumerate in detail a broad range of rights and civil rights and liberties that apply to everybody and to which everybody is entitled. Most relevant to the legal framework of detention are sections 12 and 35. Section 12 deals with freedom and security of the person and states that "Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause (...) not to be detained without trial".

32. Section 35 concerns the rights of arrested, detained and accused persons and stipulates, amongst others, that everyone who is arrested for allegedly committing an offence has the right to remain silent; to be informed promptly of the right to remain silent and of the consequences of not remaining silent; not to be compelled to make any confession or admission that could be used in evidence against that person; to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest. Section 35 also details all the rights of detained persons, namely, to be informed promptly of the reason for being detained; to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; 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; to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released; to conditions of detention that are consistent with human dignity. The rights of an accused person to a fair trial are also detailed explicitly in section 35.

## 3. Detention in the context of criminal proceedings

### (a) Custody before sentence

33. According to the Criminal Procedure Act, when the police arrest or detain an individual, they must explain the reasons for the arrest or detention and of the right to remain silent before the interrogation. They must also without delay inform the detainee that he has the right to consult a lawyer and about legal aid services available. Within 48 hours, the arrested person must be presented before a magistrate where the detainee must be charged or released. If the police authorities want to detain someone for more than 48 hours without charges, section 50 (6) of the Criminal Procedure Act (CPA) stipulates that permission must be given by a prosecutor and restricts this practice to limited situations (e.g. in order to obtain identity or address of the person).

34. The arresting police can grant bail to an accused for certain minor offences. For more intermediary offences, the prosecutor can agree to grant bail, but this decision must be validated before a magistrate. Finally, for more serious offences, and if this is contested between the two parties, a magistrate (usually from the District Court) will decide, after a bail hearing, whether to release or not an accused awaiting trial, except for the most serious charges that specifically require pretrial detention (treason, murder, aggravated armed assault and robbery and aggravated rape). The main criteria for considering bail and granting it are the gravity of the charge and whether the prosecutor convinces the magistrate that the accused is a danger to the community. There are no set amounts of money corresponding to the gravity of the charges laid, so it is up to the discretion of the magistrate to fix the amount. There are no provisions for appeal or review of a bail hearing. As well, the magistrate at bail hearing can order a variety of other conditions such as reporting to the police at regular intervals, remaining within a specific territory or area, drug or alcohol treatment, etc.

35. It is during the first appearance before a magistrate that the arrested person will be asked about legal representation, and if unable to afford a private lawyer, will be assigned assistance from the local Legal Aid Board to prepare for his or her defence, whether or not the accused is kept in detention awaiting his trial. After this initial period of 48 hours of detention at a police

station, the persons should be transferred to a prison while awaiting trial but remain under the custody of police. It happens however, that because of prison overcrowding, the pretrial detainees are kept in police cells.

### (b) Detention while serving a criminal sentence

36. In the 1990s, the crime rate in South Africa had been steadily increasing and sentencing for the offences committed differed greatly. In order to come up with a more uniform sentencing for the same offences, in 1998 new legislation came into effect which imposed minimum sentences of 5, 7, 10, 15, 20, 25 years and life imprisonment and which covered a variety of offences, including theft, corruption, drug trafficking, assault, rape and murder. This measure imposes upon the judge or magistrate to sentence the offender not less than the prescribed minimum sentence unless compelling substantial circumstances can justify a lesser sentence. This legislation, although enacted as an emergency measure in 1997 at a time when criminality was increasing rapidly, has been extended and remains in effect. It also renders bail and parole more difficult to grant. This has resulted in an exponential rise in the number of sentences of more than 7 and 10 years.[2] Overall, the growth of prison population has been affected by this legislation. With a growth of around 7,000 new detainees each year, South Africa has an imprisonment rate of 402 per 100,000 people, the sixth highest in the world and the highest in Africa.

37. If a sentence has been handled by a magistrate with less than seven years' experience, section 304 of the Criminal Procedure Act will have the sentence reviewed automatically by a High Court Judge. For minor offences, section 63 A of the CPA also allows the prison authorities to report to a magistrate a list of persons under their custody who should be released, pending review and approval.

38. Prisoners serving their sentence are classified according to different risks they pose to fellow prisoners, personnel and the community and placed accordingly in one of the four different categories of prisons: minimum security, medium security, maximum security and closed-maximum security (c-max.). Each detention facility is identified according to these different categories, and the nature and degree of physical or other such barriers available to prevent escape and to control inmate behaviour determine the security level of a prison.

39. The Government has outsourced operations and management of some detention facilities to private companies, however, the Ministry of Corrections still decides which categories of inmates will be sent to each prison (public or private), use of force and disciplinary measures, classification of inmates and matters relating to the parole board.

40. After having served half (or two thirds) of their sentence (with the exception of mandatory minimum sentences), each prisoner is entitled to have the sentence reviewed by a parole board composed of persons appointed by the Department of Corrections.

41. Throughout the country, each prison is regularly visited by an Independent Prison Visitor who reports to the Judicial Inspectorate of Prisons. The mission of this independent institution is to monitor the conditions of prisons, to ensure the dignity of detainees and help them preparing their rehabilitation into society. Prisoners may also register their complaint on any of these matters.

### 4. Anti-terrorism legislation

42. The newly enacted criminal anti-terrorism legislation came into effect in 2004 but has not yet been widely used. This legislation, which has been declared in conformity with the Constitution by the Constitutional Court, falls within the regular criminal procedure sphere.

### 5. Detention of minors

43. Although the South African Constitution, in section 28 (1) (g) does not prohibit detention of minors, it specifies that detention should be used as a last resort and when applied, in separation from adults and for the shortest period of time possible. There is at present no provision for a separate juvenile justice system, although a Child Justice Bill, which would establish such a separate system, is being discussed and amended by the Parliamentary Portfolio Committee.

44. The minimum age for criminal responsibility is at 14 years, except for offences which carry a life sentence where it is at 16 years. At 14 years a minor can be sentenced to a detention sentence and also spent time in a pretrial detention centre. The decision to prosecute a minor (a person who at the time of committing an offence was less than 18 years old) depends on the Prosecutor.

45. In some cities or neighbourhoods, programmes have been set up where places of safety for children have been created, which provide facilities where young offenders are brought in after arrest instead of police cells, and where social workers, along with prosecutors, interview, provide counselling, offer education and social work programme to juveniles for less serious offences in order to avoid prosecution and detention. Where one-stop child centres have been established, only in cases of murder, aggravated rape and assault will minors be sent to prison while awaiting trial. Minors sentenced to prison will be separated from adults. In other regions, local authorities have set up closed places of safety that function like boarding facilities where pretrial juveniles are offered educational, social and recreational programmes according to their age, so that when they will go to court they will be able to demonstrate integration and rehabilitation into the community. These reforms have contributed to a decrease in the number of minors in detention, but not yet covered all the young offenders.

### 6. Administrative detention of migrants and asylum-seekers

46. Immigration arrest and detention are governed by the Department of Home Affairs (DHA) under the Immigration Act No. 13 of 2002 (last modified by the Immigration Amendment Act No. 19 of 2004), which provides the legal ground for the arrest and detention of illegal non-citizens. The Act applies to all non-citizens without a permanent resident permit in South Africa. According to section 49 of the Act it is an offence to enter or remain in the country without the proper permit and papers. Anyone who fails to provide valid documents entitling him to be in the country can be arrested by an immigration officer or a member of the police, can thus be arrested without warrant for purposes of identification and producing the valid documents to remain legally in the country (sect. 41).

47. Section 34 of the Immigration Act stipulates that, after 48 hours, a court warrant must be issued in order to confirm detention of an illegal foreigner at a place administered by the Department of Home Affairs for the purpose of deportation, for up to 30 days. The court can extend the detention for up to 90 days. Although the illegal foreigner can challenge the legality of his detention, in practice it is rarely effective since there is no appearance at Court (the procedure is done in writing), and immigration detainees do not benefit from the services of Legal Aid. The competent court for immigration matters is a Magistrate's Court (defined in sect. 2).

48. The Immigration Act also defines which foreigners are considered to be prohibited from admission into the country (sect. 29) and which are considered to be undesirable (sect. 30), namely, foreigners convicted of serious crimes or carrying serious diseases which would automatically be considered illegal foreigners.

49. In practice, a person is arrested on the grounds that he or she is not carrying identity documents, has a particular physical appearance, does not speak any of the main national languages fluently, or fits a profile of suspected undocumented migrants. The process puts the onus of proof on the person rather than on the immigration officer and requires the person to satisfy the immigration officer that he or she is legally entitled to remain in the country. Neither the arresting police nor the Ministry of Home Affairs would allow these persons to go to their homes to look for identification.

50. Section 34 of the Act allows immigration officers to detain illegal foreigners pending deportation in "a place under the control or administration of the Ministry of Home Affairs". In practice, the Government has outsourced the largest repatriation centre, Lindela, to a private company for its operations.

### 7. Detention in psychiatric hospitals

51. Placement and detention in psychiatric hospitals and mental health institutions are regulated by the Mental Health Care Act, which came into effect in 2004. Admission of a person on an involuntary basis after commission of a criminal offence is decided by the judge or magistrate at the first court appearance if the accused does not appear in sound mental health. The person can be placed in observation for a period not exceeding 30 days. After this, a decision is taken by a Mental Care Review Board (composed of mental health specialists and the justice system) either to have the accused charged and sent back for trial within the justice system, or if the person is found to be of unsound mental health and unfit to stand trial, to proceed with admission in a closed mental health facility. After placement, a review of admission is conducted on a regular basis.

## III. POSITIVE ASPECTS

### A. Exemplary transition to a full democracy

52. In setting forth the positive aspects arising from the visit to South Africa, the Working Group on Arbitrary Detention must start by stressing the context in which South Africa has evolved over the last decade, in completing an exemplary pacific transition from the apartheid regime, in which arbitrary deprivation of liberty was widespread and institutionalized, to the

democratic regime established since 1994. The Working Group was impressed by the continuing efforts made by the Government and the civil society to change not only the legal framework and the practices but also the mentalities. However, with the advent of democracy, in a developing country with huge disparities and a legacy of inequality and poverty, new problems and big challenges emerge. The evolution of the South African criminal justice system from one inherently biased and racist, to one respectful of the principle of equality and human rights, is not an easy task. The Working Group has been informed that the impact of past injustices on the South African criminal justice system is long-lived and the resistance to transformation within the judiciary is persistent. It is also alleged that the transformation in the transitional stage has impacted negatively in the functioning of the judiciary.

53. The Working Group would like to stress, however, the acknowledgment of the problems by the Government and its goodwill effort to meet the great challenges lying ahead and addressing human rights issues. This has been shown through various signs of clear and decisive progress towards better protection of human rights. The Working Group specifies that, in this matter, the commitment of South Africa to reinforce human rights protection is not only perceptible in the domestic policy of the Government, but it is also implemented in its policy at the regional and international levels. It should be noted that South Africa was one of the first African countries to issue a permanent invitation to all the thematic mechanisms of the Commission on Human Rights, which allowed the Working Group to conduct its first visit to an African country.

### B. Strong institutions and safeguards for the protection of human rights

54. The Working Group can only commend the Government and the South African institutions when looking at the Constitution, which contains all the necessary provisions to protect and safeguard human rights, including the guarantees against arbitrary detention and the right to a fair trial.[3] As well, the Criminal Procedure Act and other laws that regulate detention of juveniles and the mentally ill have been modified or re-enacted so as to guarantee conformity with the international instruments for the protection of human rights, to which South Africa is a party.

55. In this context, it is worth highlighting the efforts made by the Constitutional Court and other State institutions such as the Law Reform Commission or the South African Human Rights Commission, which ensure that the applicable laws and the newly enacted bills and acts of Parliament are in conformity with the principles set forth in the Constitution and respect South Africa's international obligations, in particular with international human rights instruments. The Working Group has also noticed a great variety of institutions of the different executive, legislative and judicial powers such as the Public Protector, the Legislative Portfolio Committees, the Independent Complaints Directorate, the Investigating Judge of Prisons and other checks and balances dedicated to the protection of human rights, which also act as factors of changes in the context of the longer transition and evolution of mentalities from an authoritarian regime to a mature democracy, a continuing process.

56. The Working Group has noticed, as an example concerning convicted persons serving their sentence, that the transformation of the correctional system and the improvement of conditions of detention are among the priorities set forth in the current reforms, bearing in mind

that most of the current officials in South Africa experienced detention in the apartheid regime. This is how the rights of detainees, which are solidly specified in the Constitution, have been consolidated with the adoption of the Correctional Services Act of 1998[4] and that a long-term strategy has been announced by the publication, in February 2005, of the White Paper on Corrections, in order to improve the conditions of detention and channel the system towards rehabilitation and reinsertion in society.

### C. Emphasis on a correctional policy geared towards rehabilitation

57. As part of this constant evolution, the Working Group supports the orientation of the current correctional policy geared towards rehabilitation and reinsertion that is taking place in the correctional system, where education and vocational programmes are being offered to sentenced detainees. This evolution has taken place also towards young offenders with the One-Stop Child Centres and Places of Safety, to protect children and juveniles and as far as possible avoid placing them in the judicial process and the correctional system, an effort applauded by the Working Group.

### D. Legal aid

58. The legal profession in South Africa has a long history of engagement in voluntary legal service. During the apartheid era, it was largely pro bono lawyers who actively challenged the racist and oppressive laws of the time. The Working Group would like to recognize the efforts of the Government for having moved from an ex officio legal aid system to a salaried public defender system, without affecting the independence of the legal profession by setting up an independent legal aid board to coordinate legal aid services in the country. This has been largely due to the Constitutional requirement of State-funded legal representation to guarantee the right to a public defender to every person accused of a criminal offence who cannot afford a private attorney. While in principle very fair, we have noticed that legal aid is in most cases only available to detainees at the trial stage, and not in the initial arrest when placed in a police station or at the bail hearing.

59. The Working Group has been given the impression that legal aid lawyers are understaffed and have to deal with a very high number of cases. As well, the negative perception of legal aid lawyers amongst the detainees, but also in the courts, account for the fact that some detainees, even juveniles, have waived their right to a public defender and decided to defend themselves alone, not even knowing the inevitable complexities of criminal procedure. The Working Group also points out that legal aid is not available for persons detained in the Immigration Act who would desperately benefit from legal assistance.

### E. Cooperation of the Government

60. During the entire visit and in all respects, the Working Group enjoyed full cooperation by all levels of government and all the provinces visited. The Working Group was able to visit all the detention centres and other facilities that it requested to see. In all these facilities, the Working Group has been able to meet with and interview whoever it wanted - police cells, pretrial detainees, convicted persons serving their sentence, repatriation centres, women, minors, persons held in disciplinary quarters and psychiatric hospitals, all chosen at random. In this

context, it is particularly relevant to stress that the Government allowed the Working Group to change its itinerary and adapt it before and during the visit so as to maximize the number of detention centres to visit and authorities to meet, all at the request of the Working Group. The Working Group wishes also to acknowledge the good interaction it had with all detainees interviewed; all welcomed the visit of the Working Group and were very keen to give their testimonies and state their complaints in a very open and transparent manner. The Working Group reiterates its gratitude for the authorities' transparency and cooperation.

61. The Working Group is well aware that all these changes that the country is facing require exceptional efforts and resources, not only political but particularly economical and financial, and that the constraints that the country is facing are numerous. The Working Group has taken into account the difficulties faced by the Government and civil society and the numerous challenges lying ahead in expressing the concerns noticed throughout its visit.

## IV. ISSUES OF CONCERN

### A. The high rate of incarceration

62. In the context of economic difficulties and persistent inequalities rooted centuries ago, the alarming high rate of criminality has led the Government - under pressure from the public and the media - to adopt a tough-on-crime approach that resulted in a very high rate of incarceration. According to statistics given to the Working Group, on 19 August 2005, the total inmate population was 155,447, including 45,547 awaiting trial, with an overcrowding rate of 164 per cent. Meanwhile, the total number of juveniles in detention reached 2,227, of whom 1,210 were unsentenced.

63. Another significant factor affecting the size of the prison population has been the harsh and long sentences given by the courts and the mandatory minimum sentences that are applicable to a range of offences, the most common amongst them being murder, aggravated rape and aggravated armed assault. This situation has led not only to a worrisome number of persons in detention serving long sentences compared to the gravity of the crime committed, but it has led to an alarming rate of overcrowding in detention facilities, affecting the convicts, pretrial detainees and in particular juveniles. The Working Group is aware that the minimum sentencing legislation was introduced in 1997 to reduce the possibility of discrimination, a legacy of the racial history of the criminal justice system. The Working Group is, however, concerned by its multiple negative impacts.

64. All the judges and lawyers met by the Working Group were very critical about this legislation. They denied its effectiveness and, according to them, it undermines the principle of equality before the law, since it is applied only to certain categories of severe offences. This legislation is also criticized as restricting the discretionary power of judges in giving an appropriate sentence that would take into account the circumstances of each case and the character of the accused. The Working Group has thereby noticed with concern that pretrial detention is being applied in a systematic manner even for minors, when these are accused of a crime that falls under the application of the mandatory minimum sentencing.

## B. The situation of pretrial detention

65. The Working Group is particularly concerned about the situation of persons deprived of their liberty awaiting trial. Besides the factors mentioned above, the bail laws, as well as the delays in finalizing cases, have impacted significantly on the number of persons awaiting trial. In 1997, an amendment to the Criminal Procedure Act shifted the burden of proof to persons charged with certain particularly serious offences. The accused now has the burden to show why he should not be detained before and during trial.

66. The Working Group is primarily concerned about the conditions of detention affecting these persons, either when placed in police cells or in regular prison facilities. Not only are the conditions much worse than those affecting sentenced detainees, but the lack of adequate facilities is so blatant that they do not meet minimum standards enshrined in the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

67. The situation of persons awaiting trial in police stations is of particular concern since, according to the Constitution (art. 35 (d) (i)), the duration of detention there should not exceed 48 hours, covering only the time between initial apprehension and the first appearance in Court. However, the Working Group noticed that persons were returned to the police station after the first appearance before the court and detained there for months in totally inadequate facilities. Quite apart from the inappropriate conditions for long periods in detention, holding people in police cells beyond the legal limits for detention in custody is incompatible with the notion of a fair trial. Accused individuals being held by the police are vulnerable. They can be put under pressure to confess or to renounce some of their rights.

68. The amount of time in pretrial detention - although not very long (about 29 per cent of the total inmates population is awaiting trial) in comparison with other countries - is worrisome, because not only are pretrial detainees held in very bad conditions, but also because this period is not always taken into account in the definitive sentence. No activities whatsoever are offered, and detainees have very limited access to medical facilities and treatment. For those suffering from illnesses, this results in the aggravation of their health problems or even the death of some persons. The Working Group gained the impression that a person presumed to be innocent until found guilty is treated more harshly than one who has been found guilty and convicted.

69. The Working Group has also noticed that, despite the overcrowding problems in pretrial facilities, bail is seldom granted even for minor offences, or when it is, the amount exceeds what the accused or his family can afford to pay. According to statistics given to the Working Group by the Prosecutor's Office and the Inspecting Judge, more than 5,000 inmates are in pretrial detention because they were too poor to pay an amount of bail that range from rands 100 to 1,000.

70. Even though the Judicial Service Amendment Act of 2001 allows the head of a prison to bring an application to a magistrate to have a prisoner released when this person cannot afford to pay bail, or when he considers that the overcrowding is so serious that the human dignity, physical health or safety of the prisoner is threatened, the Working Group was under the impression that in practice this mechanism is rarely implemented.

71. The Working Group wishes to mention that delays affecting cases before courts are due in most part in the management of the courts and concern mainly cases under appeal. The Working Group is also concerned about juveniles detained awaiting trial in police cells or in maximum security prisons, and would like to stress that no minor should be detained in these conditions, even for the most serious charges.

### C. The calculation in the final sentence of time spent in pretrial detention

72. The Working Group has also noted that there was no legal stipulation in the law or a directive that takes into account in the final sentence time spent in pretrial detention. Although many magistrates and judges have been reassuring in explaining that they personally did take into account the period spent in pretrial detention, and deducted this time from the final sentence, all agreed that in law and in practice it is the discretion of the sentencing magistrate or judge to decide. Many detainees have confirmed that the months and even years in some instances spent in pretrial detention have not been accounted for in their sentence.

73. The Working Group would like to stress that pre-sentencing custody is time actually served in detention, and often in harsher circumstances than the sentence will ultimately call for. The Working Group wishes to mention that, in many countries, not only is the time spent in pretrial detention accounted for in the sentence, but because of the harder conditions and the absence of any remission or parole programmes in this regime, this period usually is multiplied by two or even three times and deducted from the final sentence given.

74. Although the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not specifically emphasize the need to take into account time spent in pretrial detention for computation of the sentence, human rights doctrine (from the European Court of Human Rights, the United Nations Human Rights Committee, the Inter-American Human Rights Court and this Working Group) has concluded that the courts should take into account this period and credit their sentence accordingly. Some even add that not observing this principle could amount to a violation of article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which declares that “no one shall be liable to be … punished again for one offence for which he has already been convicted”.

### D. The police

75. The Working Group has been made aware that the behaviour of some police officers has led to a negative perception of police activities. In particular, the cases of police brutality have created an image of the police acting with brutality and impunity. The Working Group is particularly concerned about the high number of deaths in police custody or as a result of police action.[5] The Working Group is also concerned about the numerous cases of police arresting legally established foreigners (from other African countries), throwing out their residence papers and putting them in custody or even handing them to immigration authorities for forced deportation.

76. Although the Working Group commends the mandate and the activities of the Independent Complaints Directorate (ICD), which oversees the behaviour of police officers and receives complaints from the public, it regrets that the scope of its mandate which allows for

automatic review and inspection covers only for the most serious cases of police brutality (death in police custody or aggravated assault). The Working Group has been informed that, with the exception of deaths in custody, many of the cases referred to ICD are referred back to the police for investigation and there is limited capacity to monitor these investigations. It is also stated that police are not compelled to report back to ICD. As a result, people have little confidence in the effectiveness of the oversight on police and do not believe that police can be held accountable.

### E. Detention under immigration law

77. The Working Group noticed during its visit to the Lindela Repatriation Centre that many foreigners were deprived of their liberty, some with legal residence papers, some seeking asylum and claiming they had been arbitrarily arrested by police officers, ill-treated, not able to contest the validity of their detention and that they could subsequently be expelled from the country with no form of review or recourse. The Working Group has noticed that, although the Constitution and the Immigration Act allow persons fleeing persecution to claim asylum or refugee status, it is almost impossible to do so when in detention. What occurs in reality is that these persons either live illegally in the country or, when arrested, are sent to a repatriation centre and deported with no other form of process or recourse, sometimes having spent months in detention awaiting removal. The right to a lawyer or to legal aid is not covered for such situations.

78. The Working Group understands and respects the immigration policy of the Government and is also aware of the important migration flows which hinder the respect of the legal procedure. However, the Working Group considers that this practice cannot be justified. The Working Group would like to remind South Africa of its international obligations, not only under international instruments it has adhered to, but also according to the South African Constitution, which stipulates "that every person detained has the right to challenge the lawfulness of the detention in person before a Court and if the detention is unlawful to be released" (chap. 2 of the Constitution, Bill of Rights, sect. 35 (2) (d)).

79. The Working Group would like to commend the work done by the South African Commission on Human Rights in its investigation of the events that took place at the Lindela Repatriation Centre in 1999 and in 2000 and recalls its finding: "The arbitrary and indiscriminate detention of undocumented migrants has become a commonplace, everyday occurrence. This practice flies in the face of the many universally recognized human rights that migrants are entitled to, whether they are documented or not. When asylum-seekers are affected, such detention becomes a serious violation of their special right to international protection. Even ordinary South African citizens are not spared the humiliation of having to prove to arresting officers that their presence in the country is legal. What is more alarming are the dangerously high levels of xenophobia and the callous attitudes of officials during the arrest and detention procedures. Unfortunately, the principal driving force behind the present immigration control system is the misplaced human deterrent policy, which contributes to blurring the already difficult distinction between asylum-seekers and economic migrants."

80. As we have pointed out to many of our interlocutors, South Africa has come a long way from the apartheid regime that it was under only 15 years ago and the Working Group is fully aware that democracy was only implemented 11 years ago. The evolution of society and

mentalities is a much longer process and it is in this context, helping South Africa to improve and to become a model for other countries, that we are expressing the above concerns, taking into account the situation the country is facing, where it has come from and also the positive aspects that need to be commended.

## V. CONCLUSIONS

81. The Working Group visited South Africa at the invitation of the Government and enjoyed the fullest cooperation of the authorities in all respects. The Working Group reiterates its gratitude to the Government and to all other authorities for their transparency and cooperation. The Working Group was able to visit all the detention centres and other facilities that it requested and meet with and interviewed whomever it wanted. The interaction with all detainees interviewed was very positive, as all welcomed the visit of the Working Group and were very keen to give their testimonies and state their complaints in a very open and transparent manner.

82. The Working Group commends the dramatic changes that have taken place over the last 15 years, from the abolition of the apartheid regime to the establishment of a genuine democratic society where human rights are solidly enshrined in the Constitution and where all levels of governments, independent institutions and NGOs are committed to the respect of the rule of law and democratic principles. The Working Group observed that the changes initiated are still being implemented, and it takes into account the many constraints the Government and civil society are facing for these values to take root.

83. The Working Group welcomes the transformation of the criminal justice system, including the correctional system and the improvement of conditions of detention for convicted prisoners, which are among the priorities set forth in the current reforms. The orientation of the current correctional policy is geared towards rehabilitation and reinsertion. The Working Group also recognizes the efforts of the Government in having established a legal aid system available to all detainees in the criminal process without jeopardizing the independence of the legal profession.

84. The Working Group notes that a high rate of incarceration, in the context of a high level of criminality due to economic difficulties and persistent inequalities, has led to a very large prison population. The Working Group noted that many convicts served long sentences and that time spent in pretrial detention was often not taken into account. Moreover, the situation of pretrial detainees is worse than that for convicts, particularly when they are held in police cells. The Working Group is also worried about the high rate of police brutality, including deaths of suspects in custody. Also of concern is the situation of young offenders, often charged with serious crimes, but for whom no separate justice system is yet established.

85. The Working Group is also concerned about the situation of foreigners detained under immigration laws, as the procedure does not make it possible to effectively challenge the lawfulness of detention and places the burden on the person concerned to prove the right to remain in the country. Moreover, legal aid is not available for immigration matters. In addition, the conditions of detention in the Lindela Repatriation Centre do not meet international standards.

## VI. RECOMMENDATIONS

86. **While the Working Group recognizes the efforts of the Government to seek ways to improve the conditions of detention and to reduce the prison population, it is essential that urgent measures be taken to address the overcrowding in pretrial facilities and police stations, by making more use of alternative measures to detention and by taking whatever steps are necessary to reduce the duration of pretrial detention and, as far as possible, to avoid holding pretrial detainees in police cells. In addition, an independent inspecting body should be set up to visit police cells and immigration detention centres; alternatively, the competence of the Inspecting Judge be extended to cover this area.**

87. **Laws and practice in the criminal justice system should be reviewed to ensure that, in sentencing a person convicted of an offence, the court takes into account any time spent in pretrial detention, even if it appears to reduce the sentence below the mandatory minimum. The practice of sentencing should seek to avoid a situation where people may be incarcerated simply because of their poverty. The use of alternative sentencing options should be encouraged when financial circumstances render a person unable to pay a fine or fulfil a sentence that contains some monetary obligation.**

88. **The Working Group encourages the Government to continue the reforms already engaged in order to improve the treatment of young offenders and to set up a specialized justice for minors in conformity with articles 37, 39 and 40 of the Convention on the Rights of the Child, to which South Africa is a party. The Working Group therefore recommends that pretrial detention for minors be practised as an exceptional measure applied only in last resort, that minors under the age of 16 be excluded from the correctional system and that separate institutions be established for minors under 18 who are sentenced to detention.**

89. **Concerning the persons detained under immigration legislation, the Working Group invites the Government to take the appropriate measures to allow for an effective challenge of the detention of illegal foreigners so that they may be able to exercise all the rights guaranteed in the Constitution.**

### Notes

[1] See CERD/C/461/Add.3, para. 135.

[2] See Office of the Inspecting Judge, Annual Report 2004/2005, p. 24-25.

[3] Act No. 108 of 1996.

[4] Act No. 111 of 1998, as amended by the Correctional Services Amendment Act No. 32 of 2001.

[5] For the period 2003-2004, there were 334 deaths in police custody, and 714 deaths as a result of police action; 24 police members were convicted. See Independent Complaints Directorate, Annual Report 2003-4, p. 48, 60.

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