



# African Policing Civilian Oversight Forum

## **Statement on the Activity Report of the Committee for the Prevention of Torture in Africa 66<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights**

**July 2020**

### **1. Introduction**

APCOF is a not-for-profit Trust based in South Africa, working on issues of police accountability and governance across Africa. We welcome the opportunity to make this statement to the Committee, and focus our submission during this 66<sup>th</sup> Ordinary Session on the following issues related to the status of torture and other ill-treatment:

- the Covid-19 pandemic and its impact on the prevention of torture and ill-treatment;
- the Committee's 2020 theme of 'prohibition of the use, production and trade of equipment or substances designed to inflict torture or ill-treatment';
- the use of force by law enforcement officials in South Africa; and
- the operationalisation of South Africa's National Preventive Mechanism (NPM).

### **2. Covid-19 and independent monitoring of detention facilities**

Efforts to curb the spread of Covid-19, including the declaration of states of emergency, and the enactment of legislative instruments to limit movement and other rights, raise concerns in

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relation to torture and other ill-treatment across Africa. In our view, one of the most urgent issues is the cessation or limitation of independent detention monitoring. APCOF's concerns regarding the lack of regular and independent monitoring of police custody across Africa pre-date the Covid-19 pandemic, but the current crisis underscores the fragility of mechanisms and arrangements, where they exist, as some Member States have moved to limit or restrict these activities entirely for reasons of public health. APCOF has observed this in South Africa, for example, where the State initially failed to classify the work of the Judicial Inspectorate for Correctional Services (JICS) as a permissible essential service under the country's lockdown regulations.

We urge the Committee to remind Member States of their obligation to ensure the independent and regular inspection of all places of detention, with appropriate measures in place to mitigate risks to staff and detainees. The regular and independent monitoring of police cells, correctional facilities, and other places of detention are needed now more than ever, as access to places of detention are being limited as part of Member States' short- and medium-term Covid-19 mitigation strategies.

### **3. CPTA's 2020 theme, 'prohibition of the use, production and trade of equipment or substances designed to inflict torture or ill-treatment'**

APCOF welcomes the announcement by the Committee of its annual theme for 2020, 'the prohibition of the use, production and trade of equipment or substances designed to inflict torture or ill-treatment' as a critical but often overlooked element of the prevention of torture. We further welcome the linkages made by the Committee in its *Statement Announcing the CPTA Annual Theme for 2020* between the prohibition of equipment and substances, and the requirement restated in the Luanda Guidelines that law enforcement officials use proportionate and necessary force.

APCOF commends the work done to date by the Commission on the issue of the regulation of equipment in the context of the use of force, including in its 2017 *Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa*. Guidelines 21 and 22 provided clear guidance on the means required to ensure a rights-based approach to the use of force and firearms, ostensibly in an assembly context, but with a broad enough scope to include all law enforcement contexts. This includes:

'21.2.5 Weapons that cannot be used safely and effectively in crowd control settings, such as multiple projectile shotguns, must be prohibited from use in the policing of assemblies.

21.2.8 ...Prior to use of [less lethal weapons], there must be in place precautionary measures such as appropriate independent testing of and training in the use of use of each type of device, in a range of situations, and in accordance with international standards.

21.3.1 ...[a]ny equipment or weaponry provided to law enforcement officials must have been independently tested and verified for accuracy, reliability and suitability to crowd control management situations and must comply with regional and international human rights standards.

21.3.2. The use of remote-controlled less lethal weapons for the policing of assemblies is discouraged, and their procurement by State Parties must be subject to independent review of their compliance with regional and international human rights standards. If such weapons are used, law enforcement officials must be trained in the use of such equipment, remain actively in control of the delivery of force, limit the use to circumstances in which it is justified, reasonable, proportionate and necessary, and use equipment in a manner that minimizes the risk of physical or mental harm to all persons.'

We encourage the Committee to consider issues of regulation, as well as prohibition, and to ensure that Member States have sufficient guidance in terms of a rights-based approach to the management, deployment, training and accountability for the use of equipment. This will build on the work begun in the Luanda Guidelines and the Guidelines on the Policing of Assemblies to ensure that equipment or substances made available to law enforcement officials are deployed in a manner consistent with the right to life and freedom from torture and other ill-treatment.

APCOF would welcome an opportunity to review and comment on the draft study as part of the Committee's consultations on the thematic report.

#### **4. Use of force and firearms in South Africa**

There remain significant legislative and policy gaps in terms of the use of force in South Africa that raise serious concerns regarding compliance with the African Charter on Human and Peoples' Rights, the Robben Island Guidelines, and the Convention against Torture. Specifically, South Africa's current legislative framework for the use of force allows for unnecessary, excessive or otherwise arbitrary use of force by law enforcement officials, which is incompatible with the absolute prohibition of ill-treatment. Two recent events have brought the issue of amending the law to the fore: the death during enforcement of Covid-19 lockdown regulations, and the

subsequent court decision, of Mr. Collins Khosa, and the announcement by the Deputy Minister of Justice of impending legislative amendment.

The decision of the Gauteng High Court in the matter of Mr. Khosa was significant for human rights and policing in South Africa as the judgment went beyond making a finding in this particular case: it was scathing of the behavior of law enforcement and security personnel during the enforcement of Covid-19 lockdown regulations, and ordered that a code of conduct and guidelines on the use of force be published, along with a mechanism for ensuring that reports can be made where rights are violated.

While APCOF welcomes the decision of the Court, it is concerned that a policy fix does not go far enough: unless the legislative framework for use of force is addressed, deaths like those of Mr. Khosa will continue to happen. Use of force law has come under scrutiny time and time again, and APCOF has previously made statements to the CPTA regarding its concerns about South Africa's lack of action following the massacre of mine workers at Marikana, and the death of Andries Tatane. What is required, as a critical first step, is legislative reform that aligns South Africa's regulatory framework with international human rights law.

Currently, the use of force is dispersed within a range of context-specific legislation, which results in omission of the general principles applicable to the use of force in all circumstances – namely, precaution, non-discrimination, necessity and proportionality. Most concerningly, the law currently allows the intentional use of lethal force to protect property, and in the context of use of force in an arrest (section 49, Criminal Procedure Act), falls short of compliance with international law for failing to include the requirement of imminence of threat.

The recent announcement by the Deputy Minister of Justice of a review and amendment to section 49 of the Criminal Procedure Act provides an opportunity to align South Africa's law in this context to international law – however, wholesale legislative reform is required to ensure that in all contexts, human rights protections in terms of force are guaranteed in South Africa, not just in relation to arrest.

APCOF calls on the CPTA to engage South Africa on the issue of the use of force, and to recommend comprehensive law reform, the effect of which is to ensure that all law enforcement officials exercise their duties in accordance with the African Charter on Human and Peoples'

Rights, and other international rules concerning the use of force (particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

## **5. Operationalisation of South Africa's National Preventive Mechanism (NPM)**

As the CPTA may be aware, in July 2019, South Africa's NPM was launched by its coordinating institution, the South African Human Rights Commission (SAHRC). APCOF welcomes this important development in the prevention of torture in South Africa; particularly as it promises to address a critical gap in South Africa's monitoring framework, namely independent police custody visits. One year on, South Africa is still grappling with the issues of legislation for the NPM, and how to ensure monitoring coverage for all places of deprivation of liberty, including police custody. The delay is partly due to lack of resources made available by South Africa to the NPM, which raises concerns regarding one of the key elements to an effective and functioning NPM – sufficient resources.

APCOF requests that the CPTA remind South Africa of its obligation to ensure independent monitoring of all places of detention, and to make available the resources required to promote a functioning and effective NPM.

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