

SHADOW REPORT TO SOUTH AFRICA'S FIRST PERIODIC STATE REPORT TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, TO BE PRESENTED AT THE 38TH SESSION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 21 NOVEMBER - 5 DECEMBER 2005, BANJUL, THE GAMBIA

Prepared by the Centre for Human Rights, University of Pretoria; Socio-economic rights project, Community Law Centre, University of the Western Cape, the Human Rights Institute of South Africa, Lawyers for Human Rights, Central and Gauteng Mental Health Society, Gauteng Children's Rights Committee, Community Law and Rural Development Centre¹

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1 Late submission of report

South Africa's initial report to the African Commission was submitted in October 1998 and was considered by the Commission in May 1999. The report now before the Commission is the first periodic report, was due in 2001. The report is not dated but from the information provided one can conclude that it was written in the beginning of 2002, with some updates made later in the same year. It is unclear why the report was not submitted to the Commission in 2002 or early in 2003, to allow South Africa to be more in line with its reporting obligations under the Charter.

We are concerned about the lack of or the late reporting by South Africa in respect of its obligation under the African Charter and other human rights instruments. The government was originally enthusiastic about human rights the first five years of our democracy. However, NGOs have realised that the euphoria of democracy is reaching attrition. It has been noted that the government is no longer eager to comply with their regional and international obligations especially with regard to the African instruments of human rights.

2 Inaccessibility of and lack of civil society involvement in preparation of periodic report

The South African government did not make known that it was in the process of preparing and submitting a report to the African Commission. Civil society was not involved in the process of drafting the report, and civil society organisations have not been given an opportunity to comment on the draft report. In fact, the report seem to have been kept a guarded secret until 9 November 2005, a few weeks prior to the Commission's session, when the Department of Foreign Affairs provided a copy, at the request of a Forum of Southern African NGOs meeting under the auspices of the

¹ Members of the South African NGO Forum; the shadow report is endorsed by the following members of the SA NGO Forum: Hambanathi Aids Organisation, Faze 2, Coalition for an African Court on Human and Peoples' Rights, Alexandra Children and Youth Tswelopele Projects, National Children's Rights Committee, Swaziland Solidarity Network, Moral Regeneration Movement, Usindiso Ministries, Southern Africa Litigation Centre and International Relations-Wits University.

Human Rights Institute of South Africa (HURISA). This allowed NGOs a very short period to peruse the report and to prepare a response.

South Africa's periodic report should have been distributed among civil society organisations at an earlier stage to provide them with the opportunity to make a meaningful contribution to the process.

3 Report outdated

The present situation also raises the issue of outdated information in the report. Many of the problems discussed in the report, and the legislative and other measures adopted to address them are still valid today. However, there have been significant developments in South Africa in the years since the report was written, both positive and negative. In addition the report uses data that was outdated already at the time of writing. As an example of outdated information can be mentioned that the report uses census statistics from 1996 indicating that life expectancy at birth varied from 62.1 to 69.7 years, depending on 'race'. The estimated life expectancy at birth in 2005 according to Statistics South Africa was 47.1 years. It has thus dropped more than 15 years in less than a decade. This is a national catastrophe and a violation of the right to life under article 4 of the African Charter.

The fact that the report has not been updated to present the position as at the date of its submission also leads to other omissions and inaccuracies. The visit of the African Commission's Special Rapporteur on Prisons and Conditions of Detention, in 2004, as well as the visits of the UN Special Rapporteur on Indigenous Peoples and the UN Working Group on Arbitrary Detention, both in 2005, receive no mention. Numerous "Bills" that have subsequently been enacted (as "Acts") are also incorrectly referred to as "Bills".

There is no clear why the report, which was submitted in 2005, seemingly does not contain developments since the beginning of 2002. The government should be encouraged to ensure that its future reports present the situation as at the time of its submission, thus consolidating the overdue reports.

4 Lack of continuous dialogue

State reporting is understood as a continuous dialogue between the state party and the African Commission. The report does not refer to the examination of the initial report, or to any "concluding observations" adopted by the Commission. Were such comments or observations ever received by the state? Even in their absence, at the previous examination in 1999, the Commission raised some concerns, for example about the inclusiveness of the report's drafting process, about reconciling compulsory education with the fact that it is not free, and about treatment for AIDS.

The government should take every effort to ensure that the institutional memory of reporting is retained, in order to ensure continuity in its dialogue with the Commission.

5 Lack of realisation of socio-economic rights

5.1 Introduction

Paragraphs 182 – 252 of the Report deal with socio-economic rights. The South African Constitution, 1996 incorporates a number of economic, social and cultural rights.² The obligations that these rights engender have been construed by the Constitutional Court in a couple of cases. The Constitutional Court has held that these rights are capable of judicial enforcement and in this respect are not different from civil and political rights (*In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC)). In *Government of the Republic of South Africa and others v Grootboom and others* (*Grootboom case*)³ owing to the "appalling conditions" in which they were living the applicants moved from an informal settlement onto private land earmarked for low cost housing. They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area and approached the courts to enforce their right of access to adequate housing. They also sought to enforce their children's right to basic shelter.

The Court held that the obligation imposed on the state is to put in place a reasonable programme, subject to available resources, to realise the right in section 26. The Constitutional Court held that a reasonable programme must be comprehensive and well coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; reasonable not only in conception but in implementation as well; and responds to the urgent needs of those in desperate circumstances. The national housing programme was declared to be unreasonable because it did not have an element that responds to the needs of those in desperate need like the applicants. On the issue of the children's rights in section 28(1)(c), the Court held that the section did not confer an unqualified right on children as this would run counter to the constitutional scheme of providing economic, social and cultural rights. The progressive realisation of these rights subject to available resources cannot be trumped over by the rights of children. The primary obligation to provide for children's needs lies with their parents and on the state only when such children have been removed from the care of parents.

The principles enunciated in the *Grootboom* case have been followed in subsequent economic, social and cultural rights cases. In *Minister of Health and Others v Treatment Action Campaign and Others*,⁴ in endorsing the principles enunciated in the *Grootboom* case, the Constitutional added that a programme will not pass the test of reasonableness unless it is made known appropriately. The Constitution and these cases have demonstrated that indeed economic, social and cultural rights are capable

² These include: the right of access to land (s 25(5)); access to adequate housing (s 26(1)); access to health care services, including reproductive health care (s 27(1)(a)); access to sufficient food and water (s 27(1)(b)); access to social security, including appropriate social assistance for those unable to support themselves and their dependents (s 27(1)(c)); right to education (s 29); and children's rights to basic nutrition, shelter, basic health care services and social services (s 28(1)(c)). The Constitution requires the state to undertake reasonable legislative and other measures within its available resources to progressively realise the rights in section 26(1) and 27(1).

³ 2001(1) SA 46 (CC)

⁴ 2002 (5) SA 721 (CC)

of judicial enforcement. However, the dreams of many South Africans are yet to become a reality. The biggest weakness in the Court's jurisprudence is that it does not grant people individual rights. This flows from the Court's rejection of the principles of minimum core obligations as enunciated by the UN Committee on Economic, Social and Cultural Rights while interpreting the International Covenant on Economic, Social and Cultural Rights.

5.2 Lack of implementation of court orders involving socio-economic rights

Though the government in **paragraph 181** reports on the *Grootboom* case, there is no information on the extent to which the orders in this case have been implemented. Additionally, there is no report on the extent to which the right of access to adequate housing has been realised. While the African Charter on Human and Peoples' Rights does not expressly protect the right to housing, the African Commission has read this right into the Charter (in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria*, Communication No.155/96). It is therefore prudent that states report on this right and the right to food as well.

While the right to housing is protected in South Africa the problem lies with the implementation of court orders enforcing this right. The Grootboom community still live in appalling conditions in spite of having had judgment in their favour five years ago. While the government has provided the applicants with rudimentary building materials, it has not adequately implemented the Court's orders including the maintenance of adequate water and sanitation services. Only temporary and inadequate housing has been provided. Some houses are built in water logged places with poor quality housing materials. There is no drainage system in place and the toilets built by government have not been maintained thereby posing a health risk to the community.

In *City of Cape Town v Rudolph and Others*⁵ the court held the government in contempt of the orders in the Grootboom for failure to adopt a policy on emergency housing. The Court ordered the government to adopt and implement this policy. While the Department of Housing in April 2004 adopted a policy on Housing Assistance in Emergency Circumstances, this policy has not been implemented reasonably. Millions of people in dire need for housing remain homeless and still live in appalling circumstances.

<p>The Commission should urge the South African government to implement court orders, including the order in the <i>Grootboom</i> case, within a reasonably short time. The government should also reasonably implement its emergency housing assistance policy.</p>
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5.3 Article 16 – Right to the highest attainable state of physical and mental health.

An inspection of public hospitals in September/October 2005 by the Minister for Health revealed the appalling state in which they are in with lack of adequate staff and

⁵ 2003 (3) All SA 517 (C).

equipment. As a result, the psychiatric ward at the Dr George Mukhadi hospital in Ga-Rankuwa north of Pretoria was for example closed due to unsafe and unhygienic conditions.⁶ The state report lists legislative and policy measures that the government has implemented during the reporting period, but nothing is said with regard to implementation measures.

In view of the condition of public hospitals, what measures has the government put in place to make sure that these problems are addressed **on a consistent basis** and **constant monitoring** of the situation is undertaken?

5.4 Article 17 – Right to education

A report by Human Rights Watch in 2004 “Forgotten Schools – Right to basic education for children on farms in South Africa” highlighted the situation of state run schools on private farms in particular but also the state of rural schools in general. These are reported to run without among other things electricity, water and adequate classroom facilities. The state report merely lists legislative and policy measures. Given that the problem with lack of access to education in rural schools affects some of the most vulnerable members of society as well as issues of equality it requires urgent attention.

What is the current situation in rural schools, and what measures has the government taken to improve the situation?

5.5 Lack of implementation of social grants

Generally, the pace of delivery of services especially around socio-economic rights is slow. The corruption among civil servants within government especially the departments of Health and Social development (the allegation was made that when a person has to apply for a disability grant, she/he should pay R500 to the Social Development Official and R500 to the District Surgeon. As a result some people who receive disability grants are those that do not qualify) this is said to apply to other grants like child support grant and foster care grant. The District Surgeon in question is based at Muchison Hospital, in Kwazulu Natal province.

There is also a high rate of orphaned and vulnerable children within the community that are not receiving assistance from the government. In cases where community members try to assist, social workers will request documents one by one until that person gives up.

The issue of school fees is still a problem. Learners are still chased away from school if parents are not paying.

Rural communities such as Ezingolweni in KZN does not have mobile offices like in other provinces where the department of Home Affairs and Social Development visit the communities for applications of birth certificates and ID documents at the same time applying for social grants.

⁶ http://www.health24.com/news/General_health/1-915,33562.asp

There are grave concerns of inefficiencies and corruption in the system of social security. What is the government doing to address these?

6 HIV and AIDS

Between 28,5 and 30.5 %⁷ of a population of 46.1 millions⁸ are estimated to live with HIV or AIDS in South Africa. To respond to that situation, the government has adopted in 2003 the 'Operational for Plan for Comprehensive HIV and AIDS Care, Management and Treatment in South Africa' which focuses are on prevention of further HIV infections, care and treatment of new infections.⁹

A Joint Civil Society Monitoring Forum was founded to assess the on-going progress for the implementation of the Operational Plan.¹⁰ According to this Forum, among the estimated 750 000 to 837 000 estimated persons who require ARV treatment, only 42 000 were gaining access to ARVs¹¹ at the end of March 2005 and this out of the 54 000 planned by the Operational plan for the end of 2004.¹² Further, it has been reported to the Forum that in some sites (example was given of the province of the Western Cape, information from other provinces were not up to date or not detailed) one in four adults starting ARV has a CD4 counts below 50 cells/ μ l¹³ out of the 250 cells/ μ l recommended by the World Health Organisation. In addition, patients in many sites are put on a long waiting period before getting treatment often resulting in patients being put on treatment too late after they need treatment.¹⁴

One of the problems directly causing such situations are those regarding the insufficient support given to physical infrastructures and the allocation of resources for the recruitment of staff in the facilities providing treatment.¹⁵ Further, the pace of ARV roll-out in the country has been considerably slowed down by the still insufficient number of state accredited facilities involved in the programme¹⁶ because

⁷ Department of Health (2005) 'National HIV and syphilis antenatal sero-prevalence survey in South Africa' last updated on 20 July 2005 available at <<http://www.doh.gov.za/docs/facts-f.html>> accessed 15 November 2005.

⁸ Statistics South Africa (2005) 'Mid-year population estimates 2005' available at <<http://www.statssa.gov.za/Publications/information.asp?ppn=fqtqs>> accessed 15 November 2005.

⁹ An executive summary of the plan is available at <<http://www.info.gov.za/otherdocs/2003/aidsoperationalplan.pdf>> accessed 15 November 2005.

¹⁰ The Joint Civil Society Monitoring Forum was founded by the Aids Law Project, Health Systems Trust, Centre for Health Policy, Institute for Democracy in South Africa, Open Democracy Advice Centre, Treatment Action Campaign, UCT School of Public Health and Family Medicines, Public Service Accountability Monitor and Médecins Sans Frontières.

¹¹ This number has been confirmed by Dr Nomonde Xundu, Chief Director of the HIV/AIDS STD and TB Directorate at the National Department of Health, see Report on 4th meeting of the Forum on 20 May 2005 available at <<http://dedi20a.your-server.co.za/alp/images/upload/JCSMF%204th%20meeting%20resolutions%20FINAL%20AS%20IS.doc>> accessed 15 November 2005.

¹² Note 3 above.

¹³ Report on 5th meeting of the Forum on 29 August 2005 available at <<http://dedi20a.your-server.co.za/alp/images/upload/report5thmeeting.pdf>> accessed 15 November 2005.

¹⁴ Report on 4th meeting of the Forum note 5 above.

¹⁵ Dr Neville Slingers, programme manager of the Western Cape ARV programme as per note 7 above.

¹⁶ According to Amnesty International, they were 108 throughout the country in December 2004, see Amnesty International (2005) 'Report 2005' which covers the period January to December

accreditation, which needs to follow a certain procedure,¹⁷ continues to be a centralised function of the National Department of Health.¹⁸ Finally, public messages delivered by the office of the National Department of Health on exaggerated and unfounded claims on nutrition, particularly vitamins and certain foodstuff such as garlic, are misleading the public into believing that nutrition alone can treat HIV/AIDS or that all persons with HIV require nutritional supplementation.¹⁹ Coupled with certain messages discrediting ARVs, the above results in discouraging patients to enrol in ARV programmes.

With regards to the accessibility of nevirapine and the implementation of the court's order in the *TAC* judgement,²⁰ follow up by the TAC revealed that some provinces, Limpopo and the Northern Cap in particular, were 'not outwardly contemptuous of their duties, their compliance with the court order is inadequate and incomplete. So far they have acted with impunity.'²¹ It is worth recalling that the court order was directed to the national government and the nine provinces. However, although nevirapine is generally accessible and improvement in the access to HIV prevention treatment for rape survivors has been noted,²² there is concern over the quality and availability of nevirapine in Mpumalanga.²³ Furthermore, the model of referral of pregnant women with low CD4 counts to ARV sites is still identified by a number of clinicians in the Western Cape as a problem, thus losing the women most at risk for transmitting HIV to their new born baby.²⁴ Little information concerning other provinces were accessible.

Given that the right to life of many are at stake, and that the Constitution guarantees the right of access to treatment, and considering the discrepancies that exist at provincial level and the lack of measures taken to support 'slower' provinces at the national level, the question arises: What is the level of political commitment of the South African government to be committed to fight HIV/AIDS? What are the reasons for the apparent lack of political commitment?

7 Children

Paragraph 253 of the Report concerns article 18 of the African Charter. The Report acknowledges that the family is a "primary institution for the development of

2004 available at <<http://web.amnesty.org/report2005/zaf-summary-eng> > accessed 15 November 2005.

¹⁷ Note 3 above.

¹⁸ In particular, the following facilities are ready to treat patients but cannot do so because of lack of accreditation: Khensani, Botlokwa, Sheshego (Limpopo), Hewu (Eastern Cape), Athlone Park Clinic and Richmond (Kwazulu-Natal), Life care and Witbank (Gauteng) and Sanderton (Mpumalanga), as per note 5 above.

¹⁹ Note 8 above.

²⁰ *Minister of Health v Treatment Action Campaign and Others* 2002 BCLR 1033 (CC) available at accessed 15 November 2005.

²¹ Mark Heywood (2003) 'Contempt or compliance? The TAC case after the Constitutional Court judgement' available at <http://www.communitylawcentre.org.za/ser/esr2003/2003mar_tac.php> accessed 15 November 2005.

²² Amnesty International Report note 10 above.

²³ Note 7 above.

²⁴ As above.

children.” Under article 18, the family, as “a natural unit and basis of society”, shall be protected by the state and the state has the duty to assist the family. However, the report is curiously quiet on two salient issues concerning the family and child development; 1) the lack of availability of social assistance grants for children in poor families, and 2) an increasing number of children in devastating circumstances.

Approximately 18 million children are facing tremendous difficulties that hinder their development and even threaten their survival.²⁵ One of the ways to protect the “physical health and moral” of the family, hence promoting the development of children, would be to provide financial assistance to the family in need of help. Currently, the Child Support Grants (CSG), which is the main social assistance grant for children in poor households, is available to children under age of 14.²⁶ The limitations of the CSG are the age limits, the means test and the administrative barrier, such as requirement of birth registration.²⁷ The age limit leaves three million children aged from 15 to 18 in poverty and 2.5 million of them in extreme poverty.²⁸ Furthermore, the requirement of birth registration disqualifies 51% of children from accessing the grants.²⁹

The recommendation is made from various NGOs- to scrap the means test, extend the CSG to children under 18 years and introduction of the universal basic income grants of R 100 a month for everyone.³⁰ The Government Committee Inquiry into Comprehensive Social Security (the Taylor Committee Report) also recommended “comprehensive social protection” that should include among other things, measures to provide income support for unemployed adults and people who are affected or infected by HIV/AIDS.³¹ The measures targeting unemployed adults and people who are affected or infected by the HIV/AIDS will be able to reach many people who fall outside of the current social assistance system.

There are many children on the streets in places such as Hillbrow and begging children in the north of Johannesburg, Randburg. Begging is prohibited by municipal by-laws. These children are exposed to the risk of security and safety, rape being the most common one. The children are abused by both their parents and strangers who made them beg for money or food in the streets. Begging is prohibited by municipal by laws however children are not protected from this abuse.

²⁵ J Streak, “Progress towards a conceptual framework and data system for measuring child vulnerability in South Africa,” Child Poverty Monitoring # 2, Child Budget Unit, IDASA Budget Information Service (05/10/2005)

²⁶ Social Assistance Act 2004 (Act no 13 2004) Sec 6

²⁷ S Rosa, “Extending the child support grant to all children under 18 years” prepared by Alliance for Children’s Entitlement to Social Security (ACCESS) [http://www.access.org.za/documents/extending_grant.pdf] (accessed on 15 Nov 2005) Also see BIG Fact Sheet # 3 Children, Extension of the CSG and the BIG, South African Council of Churches [<http://www.sacc-ct.org.za/BIGFACT3.html>] (accessed on 15 Nov 2005)

²⁸ BIG Fact Sheet # 3 as above

²⁹ As above

³⁰ N 3 above

³¹ The Taylor Committee on Comprehensive Social Security for South Africa: Submission made by IDASA, Budget Information Service to the Social Development Portfolio Committee (09 June 2003)

The reform of the social security grants system to reach a wider range of children is particularly important as the HIV/AIDS epidemic is forcing more and more children into extremely difficult situations. Although a comprehensive nationwide survey has not been done on child-headed families, it is evident that the number of child-headed household will continue to increase as the epidemic progresses.³²

Children in the child-headed households are especially vulnerable to sundry threats, such as poverty, physical, sexual and psychological abuse. Under the Social Assistance Act 2004, the “primary care giver” is defined as “a person older than 16 years, whether or not related to a child, who takes primary responsibility for meeting the daily care needs of that child,”³³ Applying the provision, a child under 16 years who is performing a role of primary care giver is not qualified to apply for the CSG. This means that children in child-headed households are often left with little financial help from the government, and more often than not, in dire poverty.

As the Report rightly points out the family is “a primary institution for the development of children” the deserved the assistance and protection by the state. One of the most basic protection and assistance can be done through effective distribution of social assistance grants.

The government of South Africa should carry out through assessment on the effectiveness of the current social assistance grants system in protecting and assisting poor families.

The following questions can therefore be posed: What is the government’s position on the implementation of Basic Income Grants (BIG) as recommended by the Taylor Committee report (2002) and other various NGOs, such as ACCESS, BIG Coalition, Children’s Institute, UCT? **Paragraph 253** of the Report states that orphans and child-headed families should be protected by the State. What steps is the South African government taking to protect those children?

8 Sexual violence against women in South Africa

Sexual violence against women and girls is a problem of epidemic proportions in South Africa. According to the crime statistics for 2004/2005 released by the South African Police Service there were 55, 114 reported rapes during that period.³⁴ In the majority of cases the perpetrators reportedly go unpunished. These unacceptably high statistics are an alarming indication that South Africa is failing to meet its national, regional and international obligations.

For example rape is a violation of the constitutionally enshrined rights to safety, privacy, dignity, bodily and psychological integrity, health and in many instances life,

³² S Rosa, *Counting on children: Realising the right to social assistance for child-headed households in South Africa*, Children’s institute working paper number 3, University of Cape Town (August 2004) see Abstract & p. 3

³³ N 2 above Chapter 1 Definitions, application and objects of the Act

³⁴ Crime Information analysis Centre – South African Police Service http://www.saps.gov.za/statistics/reports/crimestats/2005/_pdf/crimes/rape.pdf (accessed 17 November 2005).

particularly in light of the prevalence of HIV/AIDS in South Africa. Also, as a signatory to the SADC Declaration on Prevention and Eradication of Violence Against Women, South Africa has committed itself to eradicate violence against women and children. South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and accordingly has undertaken to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public."³⁵

Whereas sexual violence against women and girls in South Africa is an issue of the utmost priority, South Africa lacks an effective national strategy to deal with this problem. This is obviously a very serious problem but the South African country report to the African Commission on Human and Peoples' Rights does not address it. What steps is South Africa taking to deal with this problem of sexual violence against women and girls – especially given that it is a state party to the Protocol on the Rights of Women in Africa, which will very soon enter into force. ?

9 Treatment of people with disability, particularly those on wheelchairs

It has come to the attention of some NGOs that although the government seeks to enforce equality across the spectrum, people with disability are not afforded rights accorded in the constitution. Most public and private building do not have ramps to afford access to people on wheel chairs. Also the public transport particularly in the big cities such as Johannesburg, Pretoria, Cape Town and Durban do not afford access to people with disabilities, especially on wheel chairs. There was an incident that transpired in the Johannesburg area where the bus driver treated the passenger who happened to be on wheel with degrading and inhuman way. The driver refused to allow the passenger in question even though assisted by a family member.

What steps are taken to ensure that the rights of disabled persons are effectively guaranteed and that redress for violations are accessible?

10 Mentally disabled

The South African constitution adopted in 1996, is known as a progressive and human rights orientated constitution. A cornerstone of this Constitution, the Bill of Rights, applies to all in South Africa, including persons with mental disabilities. In addition, the Mental Health Care Act of 2002, promulgated in December 2004, is a further piece of legislation which promotes the rights and dignity of persons with mental disability. It will however be a long time before the Act is implemented in its entirety with all rights of the mentally disabled upheld.

Despite progressive legislation, the constitution or the Bill of Rights is not a lived experience for persons with mental disability. Media coverage highlighted the plight of groups of mentally ill persons who are chained by a church to exorcise them of

³⁵ Art 4(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at http://www.achpr.org/english/_info/women_en.html (accessed on 17 November 2005)

demons. The particular church conducts this practice on a wide scale at most of its branches and construes this as a service to the community.

The practice of restraint to the extent of chaining individuals with mental disability for periods on end is widespread in our communities. Many incidents of intellectually disabled children being chained/tied to trees or left alone in shacks and out buildings have been reported. This practice is more common in rural communities. Again, the rationale is often that no other services exist or families of the mentally disabled and their communities are left to manage on their own with little or no support from formal structures.

The practice of restraint and seclusion of persons with mental disability is a point of discussion in hospitals and other institutional settings. These practices are however subject to stringent policy on restraint, seclusion and sedation.

If these rights apply to every person without discrimination, then why are the rights of persons with mental disabilities not sufficiently protected?

12 Detainees and conditions of detention

The Commission's Special Rapporteur on Prisons and Conditions of Detention visited South Africa from 14 to 30 June 2004. One of its findings was that prisons were vastly overcrowded, and that the very high percentage of unsentenced detainees was especially worrying. The issue of gangsterism also received much attention. Numerous recommendations are made to the South African government. The South African government is the explicitly requested to "report on the implementation of these recommendations during the submission of its next report to the African Commission".³⁶

In another visit by an international human rights mechanism, the UN Working Group on Arbitrary Detention, concern was also expressed about conditions of detention—especially of those detainees awaiting trial, who are presumed to be innocent.³⁷ The irony is, the Working Group found, that in South Africa these trial awaiting detainees are mostly detained under conditions that are much worse than those under which sentenced prisoners are detained.

How has South Africa implemented the recommendations of the African Commission's Special Rapporteur on Prisons and Conditions of Detention? What is being done to address the discrepancy between being presumed innocent and the harshness of detention conditions?

13 Detention of "illegal immigrants"

In October 2005, it was reported that 53 deaths were recorded between January and August 2005 in the Lindela Repatriation Centre for "illegal immigrants".³⁸ A commission of inquiry found that that most of the 28 deaths it investigated could have

³⁶ Page 66 para I(l) of the report, DOC/OS(XXXVI)/387i.

³⁷ "UN slams SA prisons" *Cape Times* 20 September 2005.

³⁸ See "Repatriation centre to improve after probe into 28 deaths" (www.irinnews.org, dated 17 November 2005).

been avoided if proper medical care had been provided to inmates. Staff shortages (one resident nurse and two visiting doctors for about 6500 inmates), poor staff training and overcrowding were also contributing factors.

What has the government done to implement the recommendations of the commission of inquiry and what precautions are **in place now** to avoid the recurrence of the unfortunate events?

14 Matters arising from ratification of the Protocol establishing an African Court on Human and Peoples' Rights

South Africa became a state party to Protocol establishing an African Court on Human and Peoples' Rights, but it did not make a declaration under article 34(6), allowing individuals and NGOs to approach the Court directly, rather than first taking the matter to the African Commission.

Why did South Africa not make such a declaration? Is it considering making this in the future?

15 Reservations to the Protocol to the African Charter on the Rights of Women in Africa

South Africa also entered a reservation to article 6(d) of the Protocol on the Rights of Women in Africa, requiring that marriages be recorded in writing and registered according to national laws. The text of the reservation further explains that according to the law governing customary marriages in South Africa, section 4(9) of the Recognition of Customary Marriages Act 120 of 1998, failure to register customary marriages does not render them invalid, and that "it is considered to be a protection for women married under customary law". This position deviates from the position before the 1998 Act. This position is set out in paragraph 272 of the Report, which states as follows: "All customary marriages entered into before the operation of the Act will continue to be governed by customary law, with the requirement that such marriage have to be registered."

On face value, the guarantee that the age of marriage for women "shall be 18 years" (in article 6(b) of the Protocol) can only be made effective if all marriages are registered. In the light of the above, could the South African reservation be justified?