



Understanding impunity in the South African law enforcement agencies

Lukas Muntingh and Gwenaëlle Dereymaeker

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The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

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Executive summary

This paper analyses the underlying structural and functional reasons for *de facto* impunity in South African law enforcement with specific reference to the South African Police Service (SAPS) and the Department of Correctional Services (DCS). While the legislative framework presents no major obstacles to holding state officials accountable for gross rights violations, it remains a rare event that officials are prosecuted and convicted for assault, torture and actions resulting in the death of criminal suspects and prisoners. The paper argues that the reasons for prevailing impunity in respect of rights violations perpetrated by state officials are found across a broad spectrum. These relate firstly to South Africa's historical development and in particular the security forces inherited by the Government of National Unity (GNU) in 1994. The failure by the National Prosecuting Authority (NPA) to prosecute apartheid-era perpetrators of rights violations following the Truth and Reconciliation Commission (TRC) set a particular benchmark that left victims frustrated and, more importantly, a prosecutorial approach tolerant of rights violations. Important legal and policy developments in the police and prison system faltered in material ways and this further undermined accountability. Post-1994 governments' response to or lack thereof, in respect of obligations under international human rights law and treaty monitoring bodies left much to be desired, thus further strengthening a perception that the state is not accountable.

At the functional level it is argued that the state has failed to regard the high incidence of rights violations as a systemic problem and rather opted to focus on managing the media fall-out when high profile violations surface. The manner in which the NPA has dealt with rights violations perpetrated by law enforcement officials clearly indicate that it is reluctant to prosecute, but it has also not been called to account for this trend and explain the reasons why recommendations by oversight structures to prosecute are in the overwhelming majority of cases not followed. Impunity is also enabled by the erratic enforcement of the internal disciplinary codes in SAPS and DCS. Statistics show great variation from year to year, indicative that managers in these two departments do not enforce discipline in a consistent manner. With reference to designated oversight structures, it is observed that recommendations to these two departments are seldom followed. This is particularly the case with SAPS and the Independent Complaints Directorate (ICD). Civil litigation against the two departments in respect of rights violations result in substantial costs to the tax payer, yet the two departments have not regarded this as the result of systemic problems and opted to contest these claims individually.

As a result of *de facto* impunity, law enforcement is increasingly suffering from a legitimacy crisis and public confidence in these institutions are probably at all-time low. To address impunity it is required that transparency and accountability be strengthened to ensure that the transformative ideals of the Constitution are realised.

UNDERSTANDING IMPUNITY IN THE SOUTH AFRICAN LAW ENFORCEMENT AGENCIES

By

Lukas Muntingh¹ and Gwenaëlle Dereymaeker²

"From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in their turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity".³

1. Introduction

The 1994 democratically government inherited a law enforcement apparatus to which the values of the Interim Constitution⁴ and international human rights standards were alien. It was especially on the South African Police (SAP) and the South African Defence Force (SADF)⁵ that the apartheid government relied upon to maintain its version of law and order and keep the regime in power by suppressing political dissent. The Prison Service (later Department of Correctional Services – DCS) was equally utilised and embraced the designs and aims of the apartheid state. Thousands of political activists and protestors were detained without trial in prisons across the country under the state of emergency regulations.⁶ Violence and coercion were part and parcel of law enforcement on the streets as well as behind bars.

Nearly 20 years on, two primary law enforcement agencies, the renamed South African Police Service (SAPS) and DCS, still have extremely poor human rights records and a number widely publicised

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³E/CN.4/Sub.2/1996/18 para 26.

⁴ Act 200 of 1993.

⁵ In democratic South Africa the renamed South African National Defence Force (SANDF) was entirely relieved of law enforcement functions and it is consequently excluded from the analysis below.

⁶One estimate is that approximately 60 000 people were detained without trial over a 34 year period under apartheid rule (Mallinder, L. (2009) *Indemnity, amnesty, pardon and prosecution guidelines in South Africa*, Working Paper No. 2, From beyond legalism: amnesties, transition and conflict transformation, Belfast: Institute of Criminology and Criminal Justice, Queen's University, p.127).

events bear testimony to this. A recent uprising at Groenpunt prison in the Free State left three prisoners dead and scores injured.⁷ A brutal mass assault of prisoners in 2005 at St Alban's prison ultimately led to a decision by the UN Human Rights Committee that South Africa had violated article 7 (the right to be free from torture) of the International Covenant on Civil and Political Rights (ICCPR).⁸ The recent death of a Mozambican citizen, Mido Macia, in Daveyton (East Rand) at the hands of the police again showed a police force that appears to be law unto itself with little regard for the rights of suspects and the minimum use of force requirements in law.⁹ Further indicative of this is that only one conviction was obtained in 217 deaths allegedly at the hands of the police or in police custody investigated by the Independent Police Investigative Directorate (IPID) in Gauteng in 2011/2.¹⁰ The sheer quantum of deaths due to police action and in police custody is staggering: in 2010/11 544 deaths due to police action were recorded.¹¹ In respect of the DCS, the situation is similar and the Office of the Inspecting Judge reported that in ten unnatural deaths of prisoners implicating prison officials recorded since 2010/11, there had not been a single prosecution.¹² The high profile incidents covered by the media obscure to some extent the scope and extent of human rights violations perpetrated by SAPS and DCS. For example, in 2011/12, 1945 complaints alleging assault by a DCS official on a prisoner were recorded by the Judicial Inspectorate for Correctional services (JICS) and the previous year it was 2276.¹³ In respect of SAPS, its oversight body, the IPID, receives hundreds of complaints annually alleging assault and torture, yet prosecutions and convictions of implicated officials are rare creating a *de facto* situation of impunity. Despite constitutional and legislative reform, rights violations in law enforcement remain frighteningly common.

Against this background, this paper will explore a framework for understanding impunity in South African law enforcement with reference to SAPS¹⁴ and DCS. This will be done by unpacking historical developments prior to the dismantling of apartheid as well as developments following the first democratic elections. It will be argued that there is no single factor responsible for general impunity in law enforcement agencies, but rather that the causes are rooted in history and that a combination of events, developments, omissions and inaction created an environment in which law enforcement officers (and their managers) believe, with good reason, that they will not be called to

⁷ "Assaulted Groenpunt prisoner dies" by Kutlwano Olifant and Baldwin Ndaba, *IOL*, 18 January 2013 <http://www.iol.co.za/news/crime-courts/assaulted-groenpunt-prisoner-dies-1.1454220#.UTLx3DcXE7s> (accessed 16 June 2013).

⁸ CCPR/C/100/D/1818/2008.

⁹ Section 49 of the Criminal Procedure Act. See section 32 of the Correctional services act (111 of 1998) in respect of the prison system.

¹⁰ "Just 1 cop 'killing' case ends in conviction" by Brendan Roane, *IOL*, 2 March 2013, <http://www.iol.co.za/news/crime-courts/just-1-cop-killing-case-ends-in-conviction-1.1479556#.UTLwUDcXE7s> (accessed 16 June 2013).

¹¹ For a more detailed analysis of deaths due to police action and in police custody see Bruce, D. (2005) Interpreting the body count – South African statistics on lethal police violence, *South African Review of Sociology*, Vol 36 No. 2, pp. 141-159.

¹² Office of the Inspecting Judge (2012) *Annual Report of the Judicial Inspectorate for Correctional Services 2011/2*, Cape Town: Office of the Inspecting Judge, p. 53.

¹³ Office of the Inspecting Judge (2012) *Annual Report of the Judicial Inspectorate for Correctional Services 2011/2*, Cape Town: Office of the Inspecting Judge, p. 43.

¹⁴ This article will not focus on the municipal and metropolitan police, but many of the elements analysed in this article would apply to this part of the police as well.

account when they violate the rights of the persons in their care and custody. There are thus strong similarities between how law enforcement operated under apartheid and post-1994.

Particular attention will be paid to impunity in respect of human rights violations, and for the purposes of the analysis the emphasis will be placed on torture and deaths at the hands of law enforcement officials.¹⁵ The right to life and the right to be free from torture are non-derogable rights in the Constitution.¹⁶ Moreover, the prohibition of torture carries the status of *jus cogens* under international law. It should be added immediately that compliance with human rights standards is dependent on adherence to principles of good governance. Good governance and human rights standards are inextricably linked and mutually reinforcing. It is indeed difficult to conceive of a situation where the one does not flourish or decline with the other in tandem.

2. Impunity

Much of the literature on the question of impunity deals with large scale and systematic violations, being war crimes, crimes against humanity and grave breaches of the Geneva Conventions. It therefore has a particular slant to it, using terminology such as the reference period (the period during which the violations occurred), reconciliation following liberation, establishing extra-judicial commissions of inquiry and the right to the truth. This article will rather focus on the daily operations of South African law enforcement agencies and assess impunity emanating from that context. The dismantling of apartheid (a crime against humanity), the transition to democracy, the setting up of the Truth and Reconciliation Commission (TRC) and the emphasis on reconciliation are important features of the landscape but will not be the focus here, but rather regarded as important structural aspects in understanding post-1994 impunity. For the purposes of the article it is thus necessary to define impunity and how it will be used in the analysis.

The UN Commission on Human Rights defines impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making

¹⁵ There have been extensive reports on the high levels of corruption (and low levels of convictions) within the police, which is further indicative of a culture of impunity. Many of the reasons for police corruption, and the solutions to addressing it, are similar to those put forward in this article on impunity for police violence. However, police corruption will not be analysed in detail here. For a detailed analysis of the issue of police corruption in South Africa, see Newham, G. and Faull, A. (2012) *Protector or predator? Tackling police corruption in South Africa*, Pretoria: ISS Monograph No. 182.

¹⁶Section 37(5).

reparations to their victims.”¹⁷ Impunity therefore implies a political and social context in which laws against human rights violations are either ignored or perpetrators inadequately punished by the state.¹⁸ To the UNHRC definition, others have added the right to redress and that impunity should also include the lack of effective remedies for victims of rights violations.¹⁹ For the purposes of this paper the narrower definition of impunity will be relied on, agreeing with Hooper that the lack of effective remedies is a consequence of impunity and not an aspect of impunity itself.²⁰

The duty to combat impunity rests firmly with the State and Principle 20 of the 1996 UN Report of the Independent Expert on the Question of Impunity made it clear that impunity is a consequence of “the failure of States to meet their obligations under international law to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, ensure that they are prosecuted and tried and provide the victims with effective remedies.”²¹ The updated UN report on impunity of 2005 omits this particular sentence but explains more clearly what it is that states must do to combat impunity, noting that states have a duty to “undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”²²

The 2005 UN report on impunity furthermore recognises that while the decision to prosecute lies primarily with the state, the state should also not impede other procedures that victims and their families may initiate such as civil actions and private prosecutions (where this is possible, as is the case in South Africa²³). Moreover, states should afford “broad legal standing” to any individual, collective or non-governmental organisation that has a legitimate interest in such as matter.²⁴

Impunity is not easy to measure and in this paper a review of overall trends is undertaken which are regarded as indicative of impunity. The number of prosecutions initiated against law enforcement officials compared to the number of complaints lodged is one such indicator. Similarly, the extent to which and quantum of internal disciplinary actions instituted is a further indicator in this regard. The

¹⁷ E/CN.4/2005/102/Add.1 Definitions. This definition differs slightly from the one adopted in 1996 (E/CN.4/Sub.2/1996/18) by adding the words “if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”

¹⁸ Jorgensen, N. (2009) Impunity and oversight: when do governments police themselves, *Journal of Human Rights*, Vol. 8, p. 386.

¹⁹ Hooper, K. (2006) The ending of impunity and the fight for justice for victims of human rights violations: a chasm too great to cross? *Flinders Journal of Law Reform*, Vol 9, p. 182.

²⁰ Hooper, K. (2006) The ending of impunity and the fight for justice for victims of human rights violations: a chasm too great to cross? *Flinders Journal of Law Reform*, Vol 9, p. 182.

²¹ E/CN.4/Sub.2/1996/18.

²² E/CN.4/2005/102/Add.1 Principle 19.

²³ s 7 Criminal Procedure Act (51 of 1977).

²⁴ E/CN.4/2005/102/Add.1 Principle 19. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.

sanctions imposed, either in criminal cases or disciplinary proceedings, is a qualitative indicator of how rights violations are regarded by the sanctioning authority. How the executive responds to input and recommendations from designated oversight structures as well as the broader civil society is furthermore regarded as indicative of accountability *vis a vis* impunity. In this regard it is important if recommendations are indeed effectively considered, adhered to and followed-up. Ultimately, the question of impunity must be answered by the level of accountability enforced with regard to rights violations allegedly committed by law enforcement officials.

While the primary focus of combating impunity is towards the past by investigating, prosecuting and punishing perpetrators for events that had already taken place, the duty to combat impunity must also keep an eye on the future. Failure to investigate, prosecute and punish perpetrators appropriately sets up a dynamic where a culture of impunity takes root, or is entrenched in organisations, such as a police force. Combating impunity is therefore not only about what has already happened but also about preventing its repetition.

3. A framework for analysis

This paper will argue that to understand impunity in South Africa, it is necessary to assess the situation comprehensively, systematically and to delineate structural and functional aspects from each other, and in respect of each of these to look what are conditions and what are causes of impunity. This framework is borrowed from an analysis done by Viñuales, although used for a slightly different purpose.²⁵ This paper will only deal with state actors and pay particular attention to the police and prison service.

Structural aspects refer to all legal and institutional measures necessary to strengthen accountability. Conditions are those characteristics present that enable impunity but do not necessarily cause it. This would cover, at minimum, measures such as treaty ratification, enacting legislation and improving the prison and police systems. Into this framework are also brought structural conditions of South Africa's recent socio-political history (e.g. the nature of the security forces inherited in 1994 and the legacy of the Truth and Reconciliation Commission -TRC) as they have shaped in a material way how law enforcement is practiced and perpetrators of rights violations are dealt with. As such, history has become an important structural condition in understanding impunity in South Africa. Functional aspects refer to instances where structures are in place but they are not utilised, or perform poorly. The analysis pays further attention to the functioning of oversight and investigative institutions (e.g. JICS and the IPID), as the softer side of combating impunity, as well as the National Prosecuting

²⁵ Viñuales, JE (2007) Impunity: Elements for an empirical concept, *Law and Inequality*, Vol 25, pp. 115-145.

Authority (NPA), the harder side combating impunity, whose task it is, in the final instance, to prosecute alleged perpetrators of rights violations. The analysis points to the fact that laws and institutions (the structural aspects) are not sufficient to combat impunity and that cultural and political circumstances (functional aspects) are equally important.²⁶

The definition of impunity cited above refers to the “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account” and it will be argued below that in the South African context the problem of impunity is not so much one of impossibility, but rather the high improbability of bringing perpetrators to account. It does indeed happen that police officers and prison officials are disciplined and/or prosecuted and convicted, but seen against the quantum of allegations and complaints this is rather the exception than the rule. It is the assessment of the authors that this probability is so low that it effectively amounts to *de facto* impunity. The paper below then attempts to answer the question: why is this probability so low when *de jure* the possibility effectively exists and there are indeed some cases that are successfully prosecuted? The approach adopted here will be by proverbial broad brush strokes. There may indeed be finer and more technical points in post-1994 security sector governance reform that the analysis underplays, but it is submitted that these points do not alter the overall picture.

4. Constitutional requirements

It is important to briefly outline the constitutional obligations in respect of combating impunity as this sets the overall context since the executive derives all its powers from the Constitution.²⁷ While international instruments, such as the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UNCAT), also place a duty on states parties to investigate rights violations and bring perpetrators to account,²⁸ the obligation imposed by the Constitution is direct, immediate and justiciable.

Section 7(2) of the Constitution demands of the state to “protect, promote and fulfil the rights in the Bill of Rights”. The Basic Values and Principles Governing Public Administration enumerated in the

²⁶ Viñuales, JE (2007) Impunity: Elements for an empirical concept, *Law and Inequality*, Vol 25, p. 126.

²⁷ *Kaunda and others v the President of the Republic of South Africa and others* (CCT 23/04) para 228 “It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.”

²⁸ Article 7(1) 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Constitution require, amongst others, that the public administration must be accountable and transparent.²⁹ Read together, the above two provisions places a clear duty on the state to take measures to combat impunity for it has an obligation to protect and promote the rights in the Bill of Rights by amongst others, ensuring that the public administration functions in a transparent and accountable manner. Where there are reasonable grounds to believe that rights violations have occurred, the state must investigate and bring to account the implicated officials.³⁰ Following from the UN definition of impunity above, it means that where there have been allegations of rights violations the state must investigate, arrest, try, and if found guilty, impose the appropriate punishment and make reparations to victims. Failure by the state to take these steps would be a violation of section 7(2) of the Constitution. The failure to properly investigate rights violations is a critical one, since all other steps flow from this.³¹

5. Structural aspects

This section will deal with five key structural aspects in the analysis of impunity. The first is the security forces that the democratically elected government inherited in 1994. The new government did not inherit a clean slate, but rather security forces that came from a very particular history shaped by the apartheid regime. Second, in order to deal with the past and support nation building, the TRC was established. While the TRC proved invaluable in this process, very few perpetrators of gross rights violations participated in the amnesty process and only a fraction of those who refused to participate, were ultimately prosecuted.³² This development created a situation of *de facto* impunity. Third, policy and law reform in SAPS and DCS faltered in material ways, thus creating a situation that did not assist in combating impunity. Fourth, while South Africa was welcomed back into the international community after 1994, and was indeed instrumental in the drafting of the Optional Protocol to the UN Convention against Torture (OPCAT), it has to date not yet ratified OPCAT. Moreover, while South Africa has ratified all the key UN human rights instruments, its reporting to the treaty monitoring bodies has been extremely poor. Fifth, in the face of rapidly increasing violent crime rates, post-1994 governments increasingly relied on law enforcement and “tough” policing methods as the response to managing the crime problem, shifting away from the transformative ideals imposed by the

²⁹ s195(1)(f-g).

³⁰ In the case of torture UNCAT Article 12 imposes this obligation. See Burgers, J.H. and Danelius, H. (1988) *The United Nations Convention Torture – A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, MarthinusNijhof Publishers, Dordrecht, pp. 144.

³¹ Groome, D. (2011) The right to truth in the fight against impunity, *Berkeley Journal of International Law*, Vol 29 Nr. 1, pp. 175-199.

³² A detailed account of these can be found in Mallinder, L. (2009) *Indemnity, amnesty, pardon and prosecution guidelines in South Africa*, Working Paper No. 2, From beyond legalism: amnesties, transition and conflict transformation, Belfast: Institute of Criminology and Criminal Justice, Queen’s University, pp. 108-124.

Constitution. This emphasis found expression in political rhetoric that became increasingly provocative, attempting to dilute constitutional guarantees and legal prescripts regulating law enforcement and the use of force.

5.1 The security forces inherited

The 1994 democratically elected government inherited security forces that were created for and shaped by the apartheid regime. The police and prison services were paramilitary in character and were there to protect the interests of a racial minority.³³ Apartheid legislation defined the relationship that the police had with black South Africans.³⁴ Marais and Rauch summarise the situation succinctly: “In the context of police power and the legalised use of force for the purposes of dealing with political opposition, brutality towards the black community was tacitly condoned, and seldom resulted in disciplinary action.”³⁵ The prison service was similarly defined.³⁶ Both the police and the prison services were characterised by unbridled brutality and little effort was made to curtail this.

When then President P.W. Botha declared a state of emergency in 1985 (that would only be lifted by his successor in 1990), it entrenched an environment where the state’s security apparatus would operate in even greater secrecy and further shielded from public scrutiny. The media was severely curtailed and the courts were hesitant to deal with serious rights violations. Both the police and the prison services could then, and can still today, be characterised as secretive, conservative, traditionalist and resistant to change.³⁷

Reflecting back on the last years of apartheid, under a state of emergency, it is necessary to assess the use of violence by the police, or more aptly termed by Jaclyn Cock as “the politics of terror”.³⁸ She described the politics of terror as covert, systematic, extrajudicial or linked to the judicial system (e.g. detention), random and arbitrary (all are potential victims), and unconventional (i.e. in breach of

³³ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October, p. 6.

³⁴ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October, p. 6.

³⁵ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October, p. 6.

³⁶ A number of minor reforms were introduced in the late 1980s to remove some of the most offensive provisions. After having being the case for more than a century some reforms in the prison service commenced in 1988 and it was no longer required that white prisoners be detained separately from “non-white” prisoners or that a white official should automatically outrank a “non-white” official. (Van Zyl Smit, D. (1992) *South African Prison Law and Practice*. Durban: Butterworth Publishers, p. 39.)

³⁷ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October, p. 6., Muntingh, L. (2011) *An analysis of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape.

³⁸ Cock, J. (1989) *The role of violence in state security 1984 – 1988*, Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar no. 1, 21 March 1989, p. 11.

societal norms). Police officials (and the notorious *Kitskonstabels*³⁹) were given almost unfettered powers to deal with what was termed “a war-like situation” - it was a total strategy against a total onslaught.⁴⁰ The powers granted to the police and the additional secrecy enabled by the state of emergency regulations became assimilated in the two institutions and suited them well. Post-1994, SAPS and DCS have struggled to transform into transparent institutions and rid themselves of their opaque and unaccountable inclinations.

Overnight the situation changed on 2 February 1990. The enemy was no longer the enemy, the purpose of protecting a regime and its white minority disappeared, and the liberation movements were unbanned. The *raison d'être* had changed but the officials, their skills, the sub-culture, the management and the history remained the same. When the democratic reforms were announced in February 1990 both SAP and DCS found it difficult to grasp the need for reform and preferred to ignore the proverbial writing on the wall. Following the adoption of the Interim Constitution (1993) and the 1996 Constitution it soon became evident that this did not have a material impact on how SAPS or DCS were conducting themselves. This despite the fact that it was common knowledge that the police was in dire need of reform to improve its relationship with the public. In the case of DCS, it soon became clear, especially after 1996, that those in charge of the Department had other interests in mind. Consequently DCS would spiral into a state of chaos where it would be impossible to implement constitutional imperatives, even if management wanted to.⁴¹

While public order policing was brutal, ordinary criminal investigations during apartheid also relied on violence in the form of torture and other expressions of violence exerted on suspects and witnesses. Described as a confession-based mode of prosecutions,⁴² the law (and jurisprudence) was not concerned about where evidence came from or how confessions were obtained. It was only from the early 1990s that a number of decisions emerged from the courts that departed from this position, noting that statements obtained improperly are damaging to the administration of justice and not compatible with a civilised society.⁴³ In a 2008 judgment, Cachalia JA summed it up as follows: “In the pre-constitutional era the courts generally admitted all evidence, irrespective of how it was obtained, if it was relevant.”⁴⁴ This was even more so the case with real evidence (e.g. an object such

³⁹ Directly translated it means “Instant constables” and referred to hastily and thus poorly trained black South Africans that were used to augment the capacity of the police and were deployed in townships where social unrest and public protests were rife.

⁴⁰ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October, pp. 10-11.

⁴¹ Muntingh, L. (2011) *An analytical study of South African prison reform after 1994*, Unpublished PhD Thesis, University of the Western Cape, p. 169-170.

⁴² Bruce, D. (2000) *Effective Crime Investigation and Prosecution - the link between witness and victim issues*, Johannesburg: CSV, p. 6.

⁴³ *S v Khumalo* 1992 (SACR) 411 (N), *S v January; Prokureur-Generaal, Natal v Khumalo*, 1994 (2) SACR 801 (A) at 807g-h. *S v Zuma and others* CCT/5/94; 1995 (2) SA 642 (CC).

⁴⁴ *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008) para 22.

as stolen property) as opposed to a statement by the accused or a witness.⁴⁵ While judges had some discretion in admitting evidence, the impression is rather that there was little judicial control and oversight over how the police obtained and utilised evidence and statements collected, even if by improper means.

The 1994 Government of National Unity (GNU) inherited police and prison services that were, firstly, comfortable with relying on torture, violence and brutality to achieve its objectives and that this was part and parcel of the fabric of these two institutions. This applied to both public order policing and criminal investigations. Secondly, both institutions were closed, secretive, conservative and resistant to change. Thirdly, both the police and prison service were entirely unfamiliar with accounting for their actions where it concerned human rights violations. In short, impunity was necessary for their functioning and this was the GNU's inheritance. In the analysis of impunity to follow, this inheritance must be regarded as an important structural condition in understanding the problem. The Committee against Torture (CAT) later confirmed this.⁴⁶

5.2 The TRC and its legacy

The GNU established the TRC in 1995, by means of the Promotion of National Unity and Reconciliation Act (34 of 1995). For national reconciliation to take place it was necessary to establish the truth and to facilitate this, the trade-off would be the granting of amnesty for "acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past".⁴⁷ Part of the Commission's work was therefore to facilitate amnesty for those persons who made a full disclosure of their actions and political motivations.⁴⁸ The agreement was that those who did not apply for amnesty or who did not make full disclosure, would be prosecuted. Following the conclusion of the TRC's work, it became increasingly clear that prosecutions were not taking place as expected, although a limited number were undertaken.⁴⁹ In 2006, the NPA amended its prosecutions policy, creating a special dispensation for crimes committed prior to 11 May 1994.⁵⁰ According to the

⁴⁵ *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008) para 22.

⁴⁶ CAT/C/ZAF/CO/1 para 11. "The Committee recognizes that the heritage of the apartheid regime, in which torture and cruel, inhuman or degrading treatment, including arbitrary detention, enforced disappearances and other grave human rights violations, were widespread and institutionalized, continues to have some impact on the State party's criminal justice system and presents obstacles impeding the full implementation of the Convention."

⁴⁷ Preamble to the Promotion of National Unity and Reconciliation Act (34 of 1995)

⁴⁸ S 3(1)(b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (Promotion of National Unity and Reconciliation Act (34 of 1995).

⁴⁹ CSVR (2007) *Submission by the Centre for the Study of Violence and Reconciliation to the United Nations Human Rights Council Universal Periodic Review (UPR) pertaining the situation of human rights in South Africa*, Prepared by Amanda Dissel, David Bruce, Carnita Ernest and Angelica Pino.
http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/CSVR_ZAF_UPR_S1_2008_CentrefortheStudyofViolenceandReconciliation_uprsubmission.pdf

⁵⁰ CSVR (2007) *Submission by the Centre for the Study of Violence and Reconciliation to the United Nations Human Rights Council Universal Periodic Review (UPR) pertaining the situation of human rights in South Africa*, Prepared by Amanda

Centre for the Study of Violence and Reconciliation (CSVR), in its 2007 submission to the UN Human Rights Council, the change in the policy mandated the National Director of Public Prosecutions (NDPP) to refrain from prosecuting on the basis that a full disclosure is made by the perpetrator for an offence with a political objective committed prior to 11 May 1994. The effect was that the NDPP obtained powers similar to the TRC and gave perpetrators who did not participate in the TRC process another chance at obtaining amnesty. The changes in the policy were successfully challenged in the North Gauteng High Court in December 2008.⁵¹ The State appealed but the appeal was denied in May 2009 by the High Court.⁵² Despite this, there had been few prosecutions subsequently. These developments also did not escape the attention of CAT, which referred to the failure to prosecute apartheid era perpetrators of torture under the apartheid regime as a “situation of *de facto* impunity”.⁵³ The few applications for amnesty and even fewer prosecutions left victims of gross rights violations in an extremely unsatisfied position despite the legitimate expectation that the TRC process would bring forth the truth and result in redress.

Despite the thousands of cases of serious rights violations under apartheid that were brought to the attention of the TRC, few perpetrators came forward⁵⁴ and the NPA had subsequently failed to investigate and prosecute those who did not apply for amnesty. In 2003 the TRC submitted a list of 300 names of people to be investigated and prosecuted for crimes committed during the apartheid era, but, with a few exceptions, this was not pursued by the NPA.⁵⁵ The overall impression is thus that perpetrators of gross rights violations during apartheid, on both sides, were consequently let off the hook. In the search for reconciliation, the South African government had failed to abide by the rules of the amnesty process. The NPA’s reluctance to prosecute apartheid-era perpetrators of gross rights violations created a high threshold of tolerance for human rights violations. What should have been a hallmark for justice for apartheid-era victims, became the benchmark for impunity.

Dissel, David Bruce, Carnita Ernest and Angelica Pino.

http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/CSVR_ZAF_UPR_S1_2008_CentrefortheStudyofViolenceandReconciliation_uprsubmission.pdf

⁵¹ *Thembisile Phumelele Nkadimeng et al v National Director of Public Prosecutions et al*, High Court of South Africa, Transvaal Provincial Division, Case No 32709/07, 12 December 2008.

⁵² Court Clears Way for Prosecution of Cases from Apartheid Era in South Africa, *New Liberian*, 5 May 2009, <http://newliberian.com/?p=801> Accessed 1 April 2013.

⁵³ CAT/C/ZAF/CO/1/para18: “While noting with appreciation the remarkable work of the Truth and Reconciliation Commission and its role in the peaceful transition in the State party, the Committee notes that *de facto* impunity persists regarding persons responsible for acts of torture during apartheid and that compensation has not yet been given to all the victims (arts. 12, 2 and 14).”

⁵⁴ At the cut-off date for amnesty applications (30 September 1997) a total of 7116 applications were received. However, it turned out that between 4000 and 5000 of these applications came from common criminals and were thus excluded from consideration for amnesty as a political motive could not be shown. (Mallinder, L. (2009) *Indemnity, amnesty, pardon and prosecution guidelines in South Africa*, Working Paper No. 2, From beyond legalism: amnesties, transition and conflict transformation, Belfast: Institute of Criminology and Criminal Justice, Queen’s University, p. 80.)

⁵⁵ Mallinder, L. (2009) *Indemnity, amnesty, pardon and prosecution guidelines in South Africa*, Working Paper No. 2, From beyond legalism: amnesties, transition and conflict transformation, Belfast: Institute of Criminology and Criminal Justice, Queen’s University, p. 112.

5.3 Law and policy reform falters after 1994

After 1994 it was necessary to not only dismantle the apartheid era legislative and policy frameworks across the public service, but also to develop new policies and enact enabling legislation that would be aligned with the Constitution. This section will assess these developments with reference to the prison system, police and the much-delayed legislation criminalising torture in domestic law.

5.3.1 The prison service

Between 1990 and 1994 a number of legislative amendments to the existing prison law were pushed through but none of these were comprehensive and had particular aims in mind.⁵⁶ The net result was that the Department was trying to tweak the 1959 Correctional Services Act (formerly Prisons Act) to meet the requirements of the emerging democratic order. The need for new and comprehensive legislation was acknowledged only after the 1994 elections, in the Introduction to the 1994 White Paper by the National Commissioner.⁵⁷ The 1994 White Paper was a total failure and did not steer the Department in a new direction. In 1996 drafting on new prison legislation commenced which was adopted by Parliament in 1998 as the Correctional Services Act (111 of 1998). The 1998 legislation sets clear standards for the treatment of prisoners and describes their rights in detail. It was designed to redefine the prison system by establishing a legal framework that would be diametrically opposite to the 1959 Prisons Act by emphasising rights, minimum standards of detention, transparency and accountability. However, the bulk of the 1998 Act (especially the chapters dealing with prisoners' rights) would remain in limbo until October 2004, when the full Act was eventually promulgated. While the Interim Constitution and the 1996 Constitution afforded prisoners clear and detailed rights, the enabling legislation remained wanting for six years.⁵⁸

The effect was that the lives of prisoners were for the first ten years of democratic rule determined by, on the one hand, the new Constitutions and, on the other hand, apartheid era legislation dating back to 1959. In the absence of clear standards, it was almost impossible to hold the Department accountable for the treatment of prisoners.

⁵⁶ Most notable among them were: the removal of any references to racial discrimination, which thus abolished de jure apartheid in the prison system in 1990; the renaming of the Prison Service to the Department of Correctional Services, and the Prisons Act to the Correctional Services Act; the introduction of legislative provisions on correctional supervision; the establishment of correctional boards; and a relaxation of the use of prison labour in order to enhance commercial activities. (Van Zyl Smit, D. (1992) *South African Prison Law and Practice*, Durban: Butterworth Publishers, p. 42)

⁵⁷ Department of Correctional Services (1994) *White Paper on the policy of the Department of Correctional Services in the new South Africa*. Pretoria: DCS, p. 2.

⁵⁸ Muntingh, L. (2011) *An analytical study of South African prison reform after 1994*, Unpublished PhD Thesis, University of the Western Cape, p. 448.

At implementation level the DCS was floundering, engaging in various initiatives that had little basis in policy or founded in the transformative mission of the Constitution.⁵⁹The problems in DCS can at least in part be ascribed to leadership instability. From 1994 to 2011 the DCS has had eleven National Commissioners, of which seven were permanent appointments and the others acting National Commissioners.⁶⁰The Jali Commission found ample evidence of corruption, maladministration and human rights violations.⁶¹ In an effort to steer the ship in a new direction DCS released in 2004 *The White Paper on Corrections in South Africa*. Instead of tackling the core human rights problems prevalent in the prison system and confirmed by the Jali Commission, it put forward a 20-year vision proclaiming that the core business of the Department is offender rehabilitation.⁶²Detached from the realities of the prison system, the White Paper has not steered the Department in a new direction. The 2004 White Paper by and large ignored the burgeoning awaiting trial population; it did not provide solutions for prison overcrowding; it was not costed, and it did not address widespread human rights violations. Further, rights violations (often with fatal consequences) continue and it is seldom that implicated officials are held accountable. In many regards, the White Paper can be regarded as a distraction from fulfilling the primary obligation imposed by the Constitution, namely to promote and protect the human dignity of all prisoners by ensuring safe custody under humane conditions in a prison system characterised by transparency and accountability.

5.3.2 The police service

As was the case with the prison system, the police also required new legislation to align its legal framework and mandate with the new constitutional order, which determined the mandate of, political responsibility for, control and oversight over the police service.⁶³ Much of the focus in law reform was therefore to bring about transparency, accountability, oversight, respect for the fundamental rights of all South Africans and, importantly, the involvement of the public in a transformed police force that would be in service of all South Africans. The first major change was that of a name shift: from a police *force*, law enforcement officially became a police *service* in 1995. The democratic dispensation brought the adoption of the South African Police Service Act (68 of 1995) (the SAPS Act), and repealed the Police Act (7 of 1958). The SAPS Act determines powers, duties, functions and

⁵⁹ Sloth-Nielsen, J. (2003) *Overview of Policy Developments in South African Correctional Services*. CSPRI Research report No. 1, Bellville: Community Law Centre.

⁶⁰ Muntingh, L. (2011) *An analytical study of South African prison reform after 1994*, Unpublished PhD Thesis, University of the Western Cape, p. 136.

⁶¹ Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - "the Jali Commission" (2006).

⁶² Department of Correctional Services (2004) *White Paper on Corrections in South Africa*, Pretoria: DCS, para 4.1.2.

⁶³ Sections 205 to 207 of the Constitution. Section 205 of the Constitution provides that the police is in charge of (i) preventing, combating and investigating crime, (ii) maintaining public order, (iii) protecting and securing the inhabitants of the Republic and their property, and (iv) upholding and enforcing the law.

conditions of service of each police officer in the country, from the National and Provincial Commissioners of police to that of ordinary members of SAPS and of the metropolitan police, and establishes the Directorate for Priority Crime Investigation,⁶⁴ Community Police Forums (CPFs), and, until 2011, governed civilian oversight over the SAPS and municipal and metropolitan police.

Section 222 of the 1993 Interim Constitution⁶⁵ required that an independent complaints mechanism for offences and misconduct allegedly committed by SAPS members be established. Although not as clearly worded, the obligation to set up an independent oversight mechanism was further reflected in section 206(6) of the 1996 Constitution.⁶⁶ The ICD was then established through the SAPS Act.

The ICD mandate included the investigation, on its own initiative or upon receipt of a complaint, of (i) any misconduct⁶⁷ or alleged criminal offence⁶⁸ committed by a police official, and of (ii) any death in police custody (whether natural or unnatural) or as a result of police action.⁶⁹ The investigation into the first category was optional, whether the ICD had the obligation to investigate all deaths in custody or as a result of police action.⁷⁰ In return, SAPS had the obligation to inform the ICD of any death in police custody or as a result of police action.⁷¹ At the conclusion of an investigation, the ICD could make a recommendation for disciplinary action to SAPS or refer the matter to the NPA for prosecution.⁷²

Following criticism on the effectiveness of the ICD, a new oversight structure, the IPID, was set up in 2012, with the adoption of the Independent Police Investigate Directorate Act 1 of 2011 (IPID Act), promulgated on 1 April 2012.

⁶⁴ The DPCI is a specialised body, commonly called the “Hawks”, mandated to prevent, combat and investigate ‘national priority offences’, i.e. organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, and which replaced the Directorate of Special Operations, or “Scorpions”, a unit within the National Prosecution Authority which was mandated to investigate organised crime and corruption. The replacement of the Scorpions by the Hawks was seen by many as a move, following the 52nd ANC National Conference held in Polokwane in December 2007, by the newly elected ANC President Jacob Zuma and his team to disband a unit that had been behind the charging of Zuma for corruption. See Basson, A. (2012) *Zuma Exposed*, Johannesburg and Cape Town: Jonathan Ball Publishers.

⁶⁵ “There shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner.”

⁶⁶ The 1996 Constitution only obliges to set up a complaints mechanism activated by a complaint from a provincial executive. Section 206(6) reads, “On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.”

⁶⁷ Misconduct includes unsatisfactory investigation, improper performance of duties or improper conduct, dereliction of duty, failure to assist or follow up with victims,

⁶⁸ Criminal offences for which SAPS members have been charged include murder, attempted murder, culpable homicide, rape, indecent assault, assault with intent to cause grievous bodily harm (includes torture), common assault, kidnapping, intimidation, reckless and negligent driving, driving under the influence of alcohol or drugs, corruption, fraud, extortion, malicious damage to property, robbery, theft, harassment, crimen injuria, defeating the ends of justice, etc.

⁶⁹ Deaths can result from assault, shooting with private or service firearm, injuries, poisoning, suffocation, suicide, vehicle collision, assault with intent to cause grievous bodily harm, illness, etc.

⁷⁰ SAPS Act 68 of 1995, section 53(2). The Domestic Violence Act 116 of 1998 (DVA) also mandated the ICD to investigate all failures by a police member to comply with an obligation imposed by the DVA. The latter will not be reflected in this report as it has limited impact on assessing whether a culture of impunity prevails within the police service.

⁷¹ SAPS Act 68 of 1995, section 53(8).

⁷² SAPS Act 68 of 1995, section 53(6)(g) and (j).

With more powers, the IPID mandate remains the designated independent oversight mechanism of the SAPS and municipal and metropolitan police services.⁷³ One aim of the new legislation was to focus IPID's activities on the most serious allegations against the police. It now has the *obligation* to investigate serious allegations of criminal offences, including deaths in police custody and as a result of police action, assault, rape by a police officer or in police custody, torture,⁷⁴ and corruption by an individual police member. The IPID Act *authorises* it to investigate systemic corruption within the police.⁷⁵ It is therefore also no longer mandated to investigate minor criminal offences or allegations of misconduct. It may still recommend either internal disciplinary action to SAPS or prosecution to the NPA.⁷⁶ To conduct their investigations, IPID investigators have also been granted more powers than what was granted to the ICD under the SAPS Act, powers which are now clearly outlined in the legislation and include that of search and seizure and arrest.⁷⁷ Furthermore, police officials now have the obligation to immediately notify the IPID after becoming aware of an alleged offence falling under the mandatory investigative mandate of the IPID⁷⁸ and must cooperate with the IPID,⁷⁹ but most importantly, the failure on the police to report any alleged offence as prescribed commits a criminal offence, punishable by a fine or a sentence of imprisonment not exceeding two years.⁸⁰ Importantly, the police is now also obligated to act upon IPID's recommendations regarding disciplinary matters within 30 days, and the NPA will have to notify the IPID regarding cases it intends to prosecute. The Minister of Police, the Civilian Secretariat for Police and the IPID must be notified of the disciplinary or prosecutorial steps taken.⁸¹

The 1996 Constitution provides for the establishment of a police civilian secretariat, but its establishment precedes the Constitution. Indeed, the SAPS Act of 1995 provides for the creation of a Secretariat for Safety and Security (which became the Civilian Secretariat for Police in 2011), mandated to conduct research and provide advice to the Minister of Police on developing and implementing policing policies.⁸² The mandate and functions of the Civilian Secretariat for Police were re-defined through the adoption of the Civilian Secretariat for Police Service Act 2 of 2011 (Civilian Secretariat Act), and its mandate remains to exercise civilian oversight over the police service, provide strategic and technical advice and produce quality evidence-based research to the

⁷³ IPID Act, section 2.

⁷⁴ 'Torture' is not defined in the IPID Act; it is therefore unclear what definition the IPID has used in its investigations of such allegations since April 2012. Once the Torture Bill is promulgated, the IPID will be able to rely on that definition.

⁷⁵ IPID Act, section 28.

⁷⁶ IPID Act, sections 7(4) and 7(6).

⁷⁷ IPID Act, section 24; Berg, J. (2013) "Civilian oversight of police in South Africa: from the ICD to the IPID" *Police Practice and Research* at 7.

⁷⁸ IPID Act, section 29(1).

⁷⁹ IPID Act, section 29(2).

⁸⁰ IPID Act, section 33(3).

⁸¹ IPID Act, sections 7(4), 7(5) and 30.

⁸² SAPS Act, sections 2 and 3(1). Section 2 was repealed by the Civilian Secretariat for Police Service Act 2 of 2011; section 3 was not, despite its mandate having been amended by the Civilian Secretariat for Police Service Act 2 of 2011.

Minister of Police for the development and implementation of policing policies.⁸³ Therefore, where the ICD/IPID is in charge of receiving and investigating individual complaints of police misconduct, the Civilian Secretariat should look at systemic issues and direct policing policy by making recommendations and developing performance indicators in order to improve service delivery, effectiveness, and compliance with the rule of law within the police.⁸⁴ The ICD/IPID and the Civilian Secretariat should closely cooperate with each other to fill all gaps in civilian oversight over the police, and several mechanisms have been put in place to ensure that both exchange relevant information to that effect. The powers of the Civilian Secretariat are, however, not as far-reaching as those of the IPID, and generally consists of it collecting information from the relevant authorities.⁸⁵

Finally, the SAPS Act provides for the establishment of Community Police Forums (CPF) in order to put in place a formalised liaising structure between the police and communities, for the latter to be able to voice their concerns, facilitate the identification of security challenges specific to a community, and allow communities to hold the local police accountable, and ensure transparency.⁸⁶ The aim of the CPFs was to build a closer, more constructive and trusting relationship with local communities, and depart from a relationship of authority and dominance on the part of the police that marked police-community relationships under apartheid.⁸⁷ However, this change of philosophy has had little impact in practice due to, at least, a lack of a change in mentality of the police and a lack of effective involvement by communities.⁸⁸ To remedy this situation, the Civilian Secretariat of Police, legally mandated to support these local community oversight structures, has developed policies and guidelines to provide such support; these are gradually being rolled out.⁸⁹

A further legislative aspect to be mentioned relates to the use of force by the police. Despite the SAPS Act stipulating that use of force by the police must be minimal, the police have a history and predisposition to use excessive force, often with fatal consequences, including the abuse of service firearms off-duty.⁹⁰ In this context, the legislature amended section 49 of the Criminal Procedure Act (51 of 1977) on two occasions, which governs the use of force, including deadly force by the police when effecting arrest. Following the *Govender* decision by the Supreme Court of Appeal⁹¹ and the *Walters* decision by the Constitutional Court,⁹² section 49 was amended to reflect the necessity and

⁸³ Civilian Secretariat Act, section 5(a) and (b); Civilian Secretariat for Police, *Annual Report 2011/12*, p. 6.

⁸⁴ Civilian Secretariat Act, section 6(2).

⁸⁵ Civilian Secretariat Act, sections 9 and 32.

⁸⁶ SAPS Act, section 18 and 19.

⁸⁷ Marais, E. and Rauch, J. (1992) Policing South Africa – reform and prospects, Paper presented at IDASA Conference *Policing in South Africa in the 1990s*, Van der Bijl Park, October.

⁸⁸ Pesler, E. and Rauch, J. (2001) South Africa's Criminal Justice System: Policy and Priorities, Paper presented at the South African Sociological Association Annual Congress 1-4 July 2001, p. 30. APCOF and the Civilian Secretariat for Police, *Reorganising the Secretariat of Police: Consultations with Civil Society in January and February 2010*, p. 21.

⁸⁹ Civilian Secretariat for Police, *Annual Report 2011/12*, pp. 18, 26 and 27.

⁹⁰ Jaynes, N., *Illegitimate policing practices in a democratic state*, 1 March 2013, at <http://reconciliationbarometer.org/2013/03/illegitimate-policing-practices/> (accessed 7 June 2013).

⁹¹ *Govender v Minister of Safety and Security* 2001 (4) 273 (SCA).

⁹² *Ex parte Minister of Safety and Security: In re S v Walters and Another*, 2002 (4) SA 613 (CC).

proportionality tests on the use of deadly force and align it with constitutional precepts and regional and international law and jurisprudence. However, in 2012, Parliament adopted a new amendment to section 49 of the Criminal Procedure Act, which significantly lowers the threshold in using deadly force when effecting arrest. The latest amendment departs from the test set in *Walters* by the Constitutional Court, and runs the risk of being declared unconstitutional if challenged. Most importantly, it facilitates the use of deadly force by the police, which might in turn impact on how society perceives the use of deadly force by the police, and the lack of accountability for such use.⁹³ The new provision has been extensively criticised by civil society organisations as allowing the police to use force too easily.⁹⁴

SAPS adopted a series of policies since the 1990s, including several green and white papers, some of which addressed issues of accountability and oversight. For example, the White Paper on Safety and Security 1999-2004 recognised that institutional reform was needed to change the culture of weak accountability inherited from apartheid-era police. It set out clear responsibilities for the various security role players and their oversight mechanisms, including the Minister, the SAPS, the National Crime Prevention Strategy Centre, the Secretariat for Safety and Security (which became the Civilian Secretariat for Police in 2011), and the Independent Complaints Directorate (ICD) (which became the IPID in 2012).⁹⁵ The White Paper is, however, under review,⁹⁶ and is yet to be tabled in Parliament. However, Van der Spuy notes that the sheer number of policy documents and the engagement with civil society on these led to “policy fatigue”, and subsequent disengagement of the police, on these documents.⁹⁷ Moreover, police behaviour (i.e. continued excessive use of force and corruption) has also not instilled a sense of confidence with external stakeholders that new and revised policies will indeed have an impact.

SAPS is, however, the only government department that has adopted a policy on the prevention of torture and the treatment of persons in its custody. The policy covers most duties of State Parties to the UNCAT and details how people should be treated when in police custody, how the police should conduct questioning and the procedure to be followed when lodging a complaint alleging tortures or ill-treatment at the hands of a SAPS member. The policy also requires that it be included in the

⁹³ CSPRI, submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Procedure Amendment Bill B39-2010, 24 August 2011, in particular paragraphs 7, 14, 16, 17 and 22.

⁹⁴ See, for example, CSPRI, submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Procedure Amendment Bill B39-2010, 24 August 2011; Institute for Security Studies, submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Procedure Amendment Bill B39-2010, 24 August 2011; Bruce, D. (2010) Shoot to kill – the use of deadly force by police, paper presented at ISS conference *Policing in South Africa. 2010 and beyond*, Muldersdrift, 30 September and 1 October 2010, p. 8; Bruce, D. (2011). *Beyond Section 49. Control of the use of lethal force*, SACQ No. 36, pp. 3-12.

⁹⁵ *White Paper on Safety and Security 1999-2004* (1998), Section IV, available at <http://www.info.gov.za/whitepapers/1998/safety.htm#Section4> (accessed 7 June 2013).

⁹⁶ “White Paper on Safety and Security under review”, 6 May 2012, <http://www.sanews.gov.za/south-africa/white-paper-safety-and-security-under-review> (accessed 7 June 2013).

⁹⁷ Van der Spuy E., presentation on “Overview of policing in 2010 and the vision for the future”, ISS conference *Policing in South Africa. 2010 and beyond*, Muldersdrift, 30 September to 1 October 2010, p. 7.

training curriculum at all SAPS members. However, the policy is not publicly available,⁹⁸ not is it possible to assess if it has been included in training or if copies are readily available at police stations. There is thus little reason to conclude that SAPS management has taken any concerted actions to implement the policy and monitor performance. Indicative of this is that SAPS annual reports (from 2007 to 2012) has not reflected on the implementation of this policy and it must therefore be concluded that it has not been a priority.

In 2006 SAPS adopted new disciplinary regulations, listing transgressions warranting disciplinary action, as well as the procedure to follow for such actions. An important omission is that the regulations do not specifically list torture or other ill-treatment as acts warranting disciplinary actions. It can be assumed that torture and other ill-treatment would fall under the failure to comply with, or the contravention of, “an Act, regulation or legal obligation”. In late July 2013 the President assented to the Preventing and Combating of Torture of Persons Act (13 of 2013) and torture will now also fall under the commission of “any common law or statutory offence”.⁹⁹

While SAPS did not experience the same level of turnover in National Commissioners as DCS did, its problems were of a different nature concerning its most senior official.¹⁰⁰ There has been increasing politicisation in the appointment of the National Commissioner of Police, who is ultimately responsible for discipline within police ranks.¹⁰¹ Since 2000 these have been inexperienced civilians, with “disastrous consequences for the morale and performance of the police”.¹⁰² Jackie Selebi was National Commissioner from 2000, suspended in 2008 and dismissed in 2009, when he was charged and ultimately found guilty of corruption in 2011. Bheki Cele was appointed National Commissioner in 2009, suspended in 2011 and dismissed in 2012, following an inquiry into his role in two police office lease deals. That two of the four National Police Commissioners since 1995 lost their positions due to involvement in corruption is not only a grave indictment on the police’s leadership, but also on its ability to comply with good governance requirements. It was indeed on Selebi’s watch that the SAPS internal Anti-Corruption Unit was disbanded, despite it being reportedly highly effective.¹⁰³ Also, the continuous poor leadership of the police impacts on the morale and overall performance of members of the police, as well as public trust in the police.¹⁰⁴ A 2012 survey by the

⁹⁸The SAPS website only summarises the policy document:

http://www.saps.gov.za/docs_pubs/legislation/policies/torture.htm (accessed 7 June 2013).

⁹⁹Department of Safety and Security, Regulations for the South African Police Service No. R.643, 3 July 2006, Regulation 20.

¹⁰⁰ The permanently appointed National Police Commissioners since 1995 were: George Fivaz (1995 to 2000); Jackie Selebi (2000 to 2008); Bheki Cele (2009 to 2012) and Ria Phiyega (2012 to present).

¹⁰¹SAPS Act, section 11(1).

¹⁰²Tamukamoyo, H. and Mofana, R. “South Africa needs credible leaders at the helm of its criminal justice system” 7 May 2013 at <http://www.issafrika.org/iss-today/south-africa-needs-credible-leaders-at-the-helm-of-its-criminal-justice-system> (accessed 7 June 2013).

¹⁰³Newham, G. and Faull, A. (2012) *Protector or predator? Tackling police corruption in South Africa*, Pretoria: ISS Monograph No. 182, p. 29 to 35.

¹⁰⁴Newham, G., “Roots of the crisis facing the South African police” 7 March 2013 at <http://www.issafrika.org/iss-today/roots-of-the-crisis-facing-the-south-african-police> (accessed 7 June 2013); Burger, J. “How poor leadership

Human Sciences Research Council found that the police were perceived by the public as the most corrupt government officials.¹⁰⁵ Finally, Selebi's decision to go on a massive recruitment drive, which has led to recruitment of almost 70 000 new police officials since 2002, also led to the recruitment of the "wrong" candidates, who entered the SAPS not by vocation but merely to have a job, and whose profile did not match that of police officials of integrity. Senior police officials have started to recognise that this matter of "quality recruits" needed to be addressed.¹⁰⁶

Against this background, there has been mounting criticism of SAPS caused by a continued disregard for the law by police officers in the execution of their duties and a lack of accountability for their actions. Individual complaints against police officers mostly relate to allegations of corruption, misconduct, and the excessive use of force, including police brutality and deaths in custody. As a result of the lack of action taken to remedy these violations of the law, it is often claimed that South Africans have lost confidence in their police service, and do not trust those that are supposed to ensure that the law is respected.¹⁰⁷ While SAPS senior officials have admitted to some level of corruption and abuse within the police, they claim that the situation does not reflect a systemic problem within the police, but is only a sign of some of its members being "rotten apples", who must be identified and dismissed.¹⁰⁸ The "rotten apple" theory is, however, without factual basis given the large number of individual complaints against police officers, high level corruption and a rapid decline in the trust that the public has in the police.

5.3.3 Torture legislation

The Interim Constitution¹⁰⁹ and the 1996 Constitution¹¹⁰ enumerated the right to be free from torture and not to be punished in a cruel, inhuman or degrading manner. Moreover, the right to be free from torture is included in the list of non-derogable rights, a position in line with the status of the absolute prohibition of torture as a peremptory norm under international human rights law.¹¹¹ In December

undermines the work of the South African Police Service" 19 April 2012 at <http://www.issafrica.org/iss-today/how-poor-leadership-undermines-the-work-of-the-south-african-police-service> (accessed 7 June 2013).

¹⁰⁵ Corruption Watch "SA sees SAPS as most corrupt within the state – survey" 27 June 2012 at

<http://www.corruptionwatch.org.za/content/sa-sees-saps-most-corrupt-within-state-survey> (accessed 7 June 2012).

¹⁰⁶ Newham, G. and Faull, A. (2012) *Protector or predator? Tackling police corruption in South Africa*, Pretoria: ISS Monograph No. 182, p. 11 and 12 ; Newham, G., "Roots of the crisis facing the South African police" 7 March 2013 at <http://www.issafrica.org/iss-today/roots-of-the-crisis-facing-the-south-african-police> (accessed 7 June 2013).

¹⁰⁷ Faull, A. and Rose, B. (2012) *Professionalism and the South African Police Service. What is it and how can it help build safer communities?* Pretoria: ISS Paper No. 240 at 5, 11 and 15.

¹⁰⁸ Williams, D. "DA, Zuma at odds over SAPS" 22 March 2013 at <http://www.timeslive.co.za/thetimes/2013/03/22/da-zuma-at-odds-over-saps>

¹⁰⁹ s 11 Act 200 of 1993.

¹¹⁰ s 12(2)(e) Act 108 of 1996.

¹¹¹ See the House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at Paras 147-157.

1998 South Africa ratified UNCAT. Article 4 of UNCAT requires that State Parties to the Convention criminalise torture in domestic law. Being a dualist constitutional state it is not sufficient that the right to be free from torture is contained in the Bill of Rights – it still did not create the crime of torture and enabling legislation was necessary to enable the prosecution of perpetrators of torture. Despite the extensive use of torture by the previous regime and early signs that the police continued to utilise torture and other ill treatment, legislation to criminalise torture was not forthcoming. As noted above, SAPS did, however, develop an internal policy on the prevention of torture, which was incorporated into the Police Standing Orders. The overall impression is rather that the need to criminalise torture and take other measures to prevent torture and other ill treatment found little traction with politicians and bureaucrats alike.

Draft legislation to criminalise torture was circulated informally for comment in mid-2003 by the Department of Justice and Constitutional Development. Two years later, in 2005, another version of the draft legislation was again selectively circulated for comment. In 2006, CAT reviewed South Africa after submitting its initial report some six years late.¹¹² South Africa reported that draft legislation to criminalise torture was in development but failed to commit to a time line.¹¹³ The draft legislation would ultimately be tabled in Parliament six years later in 2012 as the *Prevention and Combating of Torture of Persons Bill* [B 21 of 2012]. In July 2013, the President signed it into law, as noted above. This was only after much pressure from civil society organisations and the South African Human Rights Commission (SAHRC). At the time of writing the Bill had been adopted by Parliament and referred to the President for signature. However, given South Africa's history with torture, and continued reports of police brutality and assault of prisoners at the hands of DCS officials, government's foot dragging is indeed telling of an apparent unwillingness to hold perpetrators of torture accountable. The ratification of UNCAT in 1998 provided the appropriate platform and context for the swift enactment of legislation criminalising torture in domestic law which would have demonstrated, at least in part government's commitment to promote constitutional rights and combat impunity. Instead the continued absence of such legislation became an increasingly embarrassing missed opportunity.

5.4 OPCAT

In 2002 the UN General Assembly adopted the Optional Protocol to UNCAT (OPCAT), which would, firstly, establish at the international level the Sub-Committee for the Prevention of Torture (SPT), which would have the power to conduct announced and unannounced visits to any place of

¹¹² CAT/C/52/Add.3.

¹¹³ CAT/C/ZAF/CO/1 and CAT/C/SR.739 para 4.

detention under the authority of a state party to the Protocol. Secondly, OPCAT would oblige State Parties to establish at the domestic level a National Preventive Mechanism (NPM), which would also have the authority to conduct announced and unannounced visits to any place of detention. The motivation for OPCAT lies in the well-established conclusion that visits to places of detention are the most effective means of preventing torture and other ill treatment.¹¹⁴

There was indeed much expectation that South Africa would be amongst the first countries, and almost surely the first African country, to sign and ratify the OPCAT since it played an important role in the drafting of the Protocol through its then ambassador to the UN, Jackie Selebi. Four years after the UN General Assembly adopted OPCAT, South Africa signed OPCAT in 2006, but seven years later has not yet ratified it (June 2013). The reasons for the delay are not clear and may relate to concerns held by the state that it requires considerable administrative and bureaucratic investment to ensure that a well-functioning NPM is indeed established. Nonetheless, the situation remains that with the exception of the prison system, all places of detention, and especially police holding cells¹¹⁵ are without dedicated, independent and proactive monitoring and oversight mechanisms.¹¹⁶ While ratification of OPCAT itself would not solve the problem, it creates obligations for the state and would have been an important structural advancement in promoting transparency and accountability. Even if the aim of OPCAT (and thus the NPM) is primarily preventive in nature, it adds to the pressure on the state to implement measures, in line with article 2 of UNCAT, to prevent and eradicate torture and other ill treatment. Government's slow and stop-start response to OPCAT is again regarded as indicative of reluctance in addressing impunity by advancing transparency and accountability in law enforcement agencies.

5.5 Government's response to crime

By 1994 violent crime had spoiled the fruits of the new democratic order and continued to do so¹¹⁷ – the public was fearful and demanded action from government. It was in fact President Mandela who framed the problem in a particular manner, portraying a war-like situation of criminals versus law-abiding citizens.¹¹⁸ The ensuing government response was focused on improved law enforcement

¹¹⁴ Ludwige, F. (2006) OPCAT – a major step forward in global prevention of torture. *Helsinki Monitor* Vol 17, no. 1, p. 70.

¹¹⁵ A pilot project by the then ICD to proactively monitor police holding cells in Gauteng elicited a strong negative response from SAPS management and the project was halted. (Berg, J. (2013) "Civilian oversight of police in South Africa: from the ICD to the IPID" *Police Practice and Research*, p. 4.)

¹¹⁶ For a more detailed description of other places of detention see Muntingh L and Fernandez L (2008) 'A review of measures in place to effect the prevention and combating of torture with specific reference to places of detention in South Africa' *SA Journal of Human Rights* Vol. 24.

¹¹⁷ Sarkin, J. (2000) Fighting crime while promoting human rights in the police, the courts and the prisons in South Africa, *Law Democracy and Development*, Vol. 4 No. 2, pp.151-153.

¹¹⁸ 'The situation cannot be tolerated in which our country continues to be engulfed by the crime wave which includes murder, crimes against women and children, drug trafficking, armed robbery, fraud and theft. We must take the war to the

embodied in the National Crime Prevention Strategy (NCPS) of 1996, although the NCPS still balanced this with social crime prevention. However, the focus on law enforcement became overt after a review of the NCPS in 1998.¹¹⁹ Political rhetoric, espousing a tough-on-crime approach, found popular support and in his 1999 State of the Nation Address President Mbeki was convinced that more effective law enforcement would reap dividends.¹²⁰ At an earlier opportunity Mbeki (then Deputy President) likened criminals to "barbarians in our midst".¹²¹ The new Ministers of Justice and Safety and Security in the first Mbeki Cabinet were explicit in how they saw the required response:

As our country embarks on the second democratic term, we have to reflect on the shortcomings of the previous term and resolve to improve significantly on performance. While over the last five years the Department [of Justice] was able to lay a solid legislative and indeed infra-structural foundation for a strong and responsive justice system, many problems continue to plague our justice system and at times evoking public sentiments that the new democratic order is more sympathetic to human rights concerns of criminals and less sensitive to the plight of victims of crime and the general sense of insecurity that continues to besiege our country. (Minister of Justice, Penuel Maduna, June 1999)¹²²

The criminals have obviously declared war against the South African public. ... We are ready, more than ever before, not just to send a message to the criminals out there about our intentions, but more importantly to make them feel that 'die tyd vir speletjies is nou verby'.¹²³ We are now poised to rise with power and vigour proportional to the enormity and vastness of the aim to be achieved. (Minister of Safety and Security, Steve Tshwete June 1999)¹²⁴

Minister Maduna was evidently frustrated with the rights to which offenders and suspects were entitled. In 1999 Steve Tshwete, Minister of Safety and Security, reportedly suggested that police officers deal with criminals "in the same way a bulldog deals with a bull".¹²⁵ Calls for the return of the death penalty were also frequent despite it having been declared unconstitutional in 1994. Throughout

criminals and no longer allow the situation in which we are mere sitting ducks of those in our society who, for whatever reason, are bent to engage in criminal and anti-social activities. Instructions have therefore already gone out to the Minister of Safety and Security, the National Commissioner of the Police Service and the security organs as a whole to take all necessary measures to bring down the levels of crime.' (Opening of Parliament address by President N. R. Mandela, 17 Feb 1995, Cape Town). Also Cavadino, M. and Dignan, J. (eds) (2006) *Penal Systems – a comparative approach*, London: Sage Publications, p. 95.

¹¹⁹ Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*. Johannesburg: CSVR, p. 10.

<http://www.csvr.org.za/docs/urbansafety/1996nationalcrime.pdf> Accessed 16 June 2013.

¹²⁰ Address of the President of the Republic of South Africa, Thabo Mbeki at the Opening of Parliament: National Assembly, Cape Town, 25 June 1999.

¹²¹ Speech by ANC President, Thabo Mbeki, at the Fourth National Congress of the South African Democratic Teachers Union, Durban, 6 September 1998.

¹²² Cited in Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*. Johannesburg: CSVR, p. 10.

<http://www.csvr.org.za/docs/urbansafety/1996nationalcrime.pdf> Accessed 16 June 2013.

¹²³ 'The time for fun and games is over' (own translation).

¹²⁴ Cited in Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*. Johannesburg: CSVR, p. 10.

<http://www.csvr.org.za/docs/urbansafety/1996nationalcrime.pdf> Accessed 16 June 2013.

¹²⁵ ANC Daily News Briefing 8 January 2006 citing article by W. Roelf. <http://www.e-tools.co.za/newsbrief/2006/news0108.txt> Accessed 16 June 2013.

the 1990s and later, political rhetoric framed crime and human rights in a particular manner, attempting to drive a wedge between the Constitution (applicable to the just and innocent) and offenders (who should have limited protection under the Constitution).¹²⁶ The language of violence, and the reference to the war against crime and criminals has continued to be used by the current Minister of Police (which replaced the Minister of Safety and Security in 2009), Nathi Mthethwa.¹²⁷

Few statements by a politician were so telling of sentiments within government than that of the Deputy Minister of Safety and Security, Susan Shabangu who, when addressing a group of police officers, explained that they must shoot to kill “the bastards” (criminals).¹²⁸ Seen together, the message to specifically the police was that the police should do what they deem necessary and not concern themselves too much with constitutional and other procedural safeguards protecting suspects. For a police force of which many members still had recent memories of the state of emergency in the 1980s as well as the very volatile period between 1990 and 1994, the calls by politicians for them to act in a particular manner, demonstrating forcefulness did not sound all that unfamiliar. By dehumanising suspects (e.g. barbarians) and several references to a war-like situation fed into the insecurities of a police force that had little experience in or inclination to become public-friendly.

While politicians did not make any significant pronouncements on the prison system *per se* and how suspects and criminal offenders should be treated there, there is little doubt that the general manner in which suspects and offenders were framed in the public discourse rubbed off on the prison system and how the public perceived the treatment of prisoners. During 1994 to 2001 the prison system spiralled into chaos as it was indeed captured by organised labour. Against this background, human rights violations continued as later confirmed by the Jali Commission. This is discussed in more detail below at section 6.7.

At the legislative level a number of amendments were passed by Parliament that rendered further support for a “law and order” approach adopted by government in a self-deceptive belief that more severe punishments would deter would-be offenders from committing crime. Mandatory minimum

¹²⁶Muntingh, L. (2011) *An analytical study of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape, pp. 382-383.

¹²⁷ Faull, A. and Rose, B. (2012) *Professionalism and the South African Police Service. What is it and how can it help build safer communities?* Pretoria: ISS Paper No. 240 at 8 and 9.

¹²⁸ “You must not worry about the regulations. That is my responsibility. Your responsibility is to serve and protect . . . I want to assure the police station commissioners and policemen and women from these areas that they have permission to kill these criminals. I won’t tolerate any pathetic excuses for you not being able to deal with crime. You have been given guns, now use them. I want no warning shots. You have one shot and it must be a kill shot. If you miss, the criminals will go for the kill. They don’t miss. We can’t take this chance. Criminals are hell-bent on undermining the law and they must now be dealt with. If criminals dare to threaten the police or the livelihood or lives of innocent men, women and children, they must be killed. End of story. There are to be no negotiations with criminals. The constitution says criminals must be kept safe, but I say No! I say we must protect the law-abiding people and not the criminals. I say that criminals must be made to pay for their crimes.” Susan Shabangu, Deputy Minister of Safety and Security at an anti-crime rally in Pretoria on 9 April 2008, <http://constitutionallyspeaking.co.za/kill-the-bastards-no-not-politicians/>

sentencing¹²⁹, increases in the sentence jurisdiction of the lower and regional courts¹³⁰, tighter bail laws and increased non-parole periods¹³¹ created a legal framework intent on being extremely punitive. While increased sentence tariffs may have been understandable in respect of selected serious violent crimes, the unintended consequence was that sentence tariffs across the board increased.¹³² The prison system was not left untouched by this and as a result of increased sentence lengths and a burgeoning awaiting trial population, the prison population increased to unprecedented levels.¹³³ While prison overcrowding has been a long-standing problem in South Africa, government did little to decrease prison overcrowding. A particular intolerance towards prisoners, as the embodiment of the crime problem, had set in by the late 1990s and overcrowded prisons found little sympathy from the public and politicians alike.

Seen collectively, official policy emphasising law enforcement (as opposed to seeking a balance with social crime prevention), “getting tough on crime” and political rhetoric portraying a war-like situation in which the enemy is depicted as sub-human provided the environment in which law enforcement agents were able to use force excessively and have little fear of being called to account. The pronouncements by politicians and public sentiment effectively afforded law enforcement with moral protection against their own misdeeds.

5.6 Summary of key points on structural conditions

The central theme emerging from the structural aspects reviewed is that post-1994 governments were not able to undo history and re-invent law enforcement agencies to become reflective of the new constitutional democracy. Instead of institutional reform, a series of crises developed in both the police and prison services. The practices and habits of the police and prison services remained to a large extent unchallenged whilst a number of opportunities to achieve this were presented. Chief amongst which was the lack of prosecutions emanating from the TRC amnesty process; the lack of progress in criminalising torture and poor interaction with CAT; the delay on the promulgation of the Correctional Services Act; get-tough-on-crime inspired legislation, and the slow progress in ratifying OPCAT.

¹²⁹ Criminal Law Amendment Act 105 of 1997 and Criminal Law (Sentencing) Amendment Act 38 of 2007.

¹³⁰ Magistrates Amendment Act 66 of 1998.

¹³¹ Correctional Services Act 111 of 1998.

¹³² Giffard, C. and Muntingh, L. (2006) *The effect of sentencing on the size of the South African prison population*, Cape Town: Open Society Foundation (SA).

¹³³ Giffard, C. and Muntingh, L. (2006) *The effect of sentencing on the size of the South African prison population*, Cape Town: Open Society Foundation (SA).

Leadership, or rather the lack thereof, in addressing human rights violations and ensuring that perpetrators are held to account has been sorely lacking. Law enforcement has indeed defined a new enemy for itself; whilst “communists” and “revolutionary forces” were the enemy in the 1980s, rhetoric espousing “violent criminals” and “ruthless organised crime groups” in a “war-like situation” has served the managers of law enforcement and their political heads equally well to dehumanise the enemy.

6. Functional aspects

The preceding section dealt with structural aspects of impunity and this section will review functional aspects. While important structural advances were made in, for example, setting up oversight structures, their functionality is called into question. Seven functional aspects will be dealt with being: government’s response to allegations of gross rights violations; the performance of the National Prosecuting Authority; the SAHRC’s performance with regard gross rights violations in law enforcement; internal discipline in SAPS and DCS; the performance of designated oversight structures; the role of court decision in addressing impunity, and commissions of inquiry into law enforcement agencies.

6.1 Managing the fall-out

How the political leadership after 1994 has dealt with allegations and exposés about gross rights violations have indeed been telling about its attitude towards impunity. Where it should have accepted the overwhelming body of evidence that there are serious and systemic problems in DCS and SAPS, the political leadership rather opted to downplay and dilute these reports.

A number of recent events implicating police officials in serious rights violations saw the Presidency and Minister of Police responding in a particular way. The first distinguishing factor of these incidents was that the facts were by and large irrefutable. That the police shot dead 34 striking miners at Marikana, or that Andries Tatane was shot dead by the police or that Mido Macia was dragged behind a police vehicle is not up for debate. The visual material leaves little room for doubt in the eyes of the public about what happened. The second factor is that the incidents attracted significant international and domestic media attention. From a political (and thus also economical) perspective these incidents were particularly costly, reflecting extremely negatively on a government (and specifically President) that has continuously been embroiled in scandal and subject to suspicion. In response, the general

approach of government has been to isolate the incidents and not link them to systemic problems in the police force despite overwhelming evidence that SAPS have a pattern of acting outside the law.

Many other suspects and detainees have died at the hands of the police since 1994 and as such the cases of Tatane and Macia were not unique. An analysis of media reporting on torture and allegations of police brutality found numerous reports indicating that torture and other ill treatment has been taking place on a substantial scale since 1994.¹³⁴ One may indeed ask, somewhat cynically, whether the cases of Tatane and Macia would have attracted any attention from senior government officials if it were not for the damning visual recordings. The ICD and its successor the IPID have on numerous occasions reported on the systemic nature of these problems, yet the Presidency and the Minister of Police failed to connect the dots, or were at least not brave enough to pick up the pencil. Admitting that there are indeed fundamental problems in the police service (and DCS) could be regarded as political suicide. However, the frequent high profile incidents showing how criminal suspects and prisoners are treated may also be death to the legitimacy of law enforcement by a thousand cuts. In dealing with these and other incidents as a collective, senior political leaders have demonstrated a remarkable and lasting unwillingness to address its systemic causes. The approach has rather been to manage the media fall-out and minimise the negative impact. Perhaps in some quarters there is a growing realisation that the law and order rhetoric espoused by politicians, which garnered much political support, does come at a price over the time.

6.2 The National Prosecuting Authority

Section 179 of the Constitution established a single National Prosecuting Authority (NPA) headed by the National Director of Public Prosecutions (NDPP). The National Prosecuting Authority Act (32 of 1998) is the enabling legislation providing for the structural and functional arrangements of the NPA. It is not necessary here to describe these arrangements as this has been done elsewhere in detail.¹³⁵ It will suffice to note that the NDPP has wide discretionary powers to prosecute or not, although the decision may be brought under judicial review. It is this wide discretionary power that appears to feed into prosecutorial practices creating an environment of *de facto* impunity with reference to law enforcement.

The focus here will be on the performance of the prosecution service as this has relevance to the question of impunity. Redpath, in her analysis of the performance of the NPA, comes to the conclusion that “[Yet] the performance data above suggests that NPA policy providing for a wide

¹³⁴ Dissel, A., Jensen, S. and Roberts, S. (2009) *Torture in South Africa - Exploring torture and cruel, inhuman and degrading treatment or punishment through the media*, Johannesburg: Centre for the Study of Violence and Reconciliation.

¹³⁵ Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS Monograph No. 186.

discretion being exercised in the decision not to prosecute has been broadly interpreted, making a decision to prosecute the exception rather than the rule.”¹³⁶ For example, of the 517 101 new dockets (of a general criminal nature) the NPA received in 2005/6 from the police, only 14% resulted in prosecutions and in 60% the prosecution declined to prosecute. Redpath further draws attention to the 2010 NPA Code of Conduct which, in her view, “subtly encourages” prosecutors not to prosecute.

The NPA reports, for example in its 2011/12 annual report, that it achieved an 88.8% conviction rate and this is impressive at face value. However, the number of cases prosecuted each year represents only a lesser proportion of dockets passed on to the NDPP each year. In chasing a conviction target (a percentage) the door is thus opened to only pursue cases where there is a high probability of success with the least amount of effort involved. This trend has been observed in other jurisdictions and is therefore not a uniquely South African one.¹³⁷

Given the performance of the NPA in respect of ordinary criminal cases, it is therefore not surprising that it will be less than enthusiastic to prosecute law enforcement officials implicated in human rights violations. Moreover, the NPA does not automatically provide reasons for not prosecuting, therefore leaving the suspicion that a decision not to prosecute a member of SAPS or DCS was motivated by the profile of the alleged perpetrator rather than the lack of evidence. If it is assumed that SAPS and DCS officials will be dismissed if convicted of a criminal offence, such as the assault of a suspect or prisoner, the total number of dismissals per year from these two departments is very low seen against the total number of cases investigated. The annual reports of SAPS and DCS do not provide breakdowns of the reasons why employees are dismissed, but in 2011/12 only 116 police officials were dismissed for misconduct¹³⁸ while IPID concluded 1052 investigations into deaths in police custody and due to police action and a further 2811 cases related to police criminality the previous year (see section 6.5 below for a more in-depth analysis of the outcome of ICD/IPID investigations).¹³⁹ In the case of DCS, only 119 officials were dismissed in 2011/12¹⁴⁰ despite the fact that the JICS recorded 1945 complaints from prisoners alleging that they were assaulted by DCS officials.¹⁴¹ In its 2011/12 Annual Report the JICS reported as follows on prosecutions into deaths in custody where officials are implicated:

“In respect of criminal investigations and disciplinary proceedings, the 2010/2011 Annual Report indicated that a number of homicide cases that year had not yet been finalised. The Inspectorate followed up on these cases. SAPS closed the files in the majority of those cases,

¹³⁶ Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS Monograph No. 186, p. 41.

¹³⁷ Krischke, S.J. (2010) Absent accountability: how prosecutorial impunity hinders the fair administration of justice in America, *Journal of Law and Policy*, Vol 19, No 1, p.421.

¹³⁸ SAPS Annual Report (2012) p. 216.

¹³⁹ IPID Annual report 2010/11 p. 25.

¹⁴⁰ DCS Annual report 2011/12 p. 186.

¹⁴¹ JICS Annual report 2011/12 p. 43.

and where matters were referred to the National Prosecuting Authority (NPA) for prosecution, the NPA returned a *nolle prosequi* i.e. they declined to prosecute.”¹⁴²

The overall impression gained therefore is, firstly, that the NPA in general declines to prosecute in a very large proportion of ordinary criminal cases. This trend emanates from the wide discretionary powers held by the NDPP and further that there is little transparency when the NDPP declines to prosecute.¹⁴³ Second, where the NDPP does decide to prosecute, it appears to be case of “selecting for success” to achieve conviction rate targets and the more difficult cases, or cases that require more time and efforts are not pursued. Thirdly, where law enforcement officials are implicated in rights violations there appears to be an even greater reluctance to prosecute on the part of the NPA. While the NPA has the authority and the resources¹⁴⁴ to conduct prosecutions, it appears to refrain in general from prosecuting law enforcement officials. This is also the case for the prosecution of police officials, as is outlined in section 6.5 below.

In the final instance, the duty to combat impunity rests with the NPA for it has the sole authority¹⁴⁵ to prosecute suspected perpetrators of crime. Regardless of what obstacles of a structural and functional nature it may encounter, it has this authority and based on what has been outlined above it is failing in a material way to fulfil this duty. There is in fact little that can be identified as material obstacles in this regard. The failure to prosecute therefore relates more to an apparent unwillingness to prosecute state officials, or perhaps the deliberate protection of law enforcement officials against prosecution. It is increasingly clear that the unfettered discretion held by the NDPP is used irresponsibly and in a manner that is not only to the detriment of general law enforcement but also in bringing to account law enforcement officials implicated in gross human rights violations. The effect is that the force of constitutionally enshrined rights is being eroded since violators do not suffer any consequences.

6.3 South African Human Rights Commission

The SAHRC, as established by section 184 of the Constitution, has a broad mandate to promote and protect human rights. To this end it has the powers to, amongst others, investigate and report on the observance of human rights, to take steps to secure redress where human rights have been violated and to conduct research.¹⁴⁶ Despite this extensive mandate there is little in the SAHRC’s

¹⁴² JICS Annual report 2011/12 p. 53.

¹⁴³ Krischke, S.J. (2010) Absent accountability: how prosecutorial impunity hinders the fair administration of justice in America, *Journal of Law and Policy*, Vol 19 No 1.

¹⁴⁴ Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS Monograph No. 186.

¹⁴⁵ There is one exception in the sense that private prosecutions are possible, as enabled by section 7 of the Criminal procedure Act. This option is, as far as could be established, rarely used and has been met with little success.

¹⁴⁶ s 184(2)(a-b) of the Constitution.

documentation to indicate that it has paid particular and sustained attention to issues such as torture and police brutality,¹⁴⁷ or even the lack of prosecutions against state officials implicated in gross human rights violations. Activities undertaken by the Commission relating to torture focussed on submissions to Parliament on UNCAT, OPCAT and draft legislation, attending a number of high-level meetings relating to the prevention of torture and establishing a thematic committee on torture.¹⁴⁸ While these activities are generally supportive of its promotional mandate, there is little to indicate that it is responding to its protective mandate and the decisions from the Commission have not dealt with the issue of impunity or torture or other violations perpetrated by law enforcement agencies, with the exception of the Tatane matter¹⁴⁹ for which it was berated by the Portfolio Committee on Justice and Constitutional Development.¹⁵⁰

While information from IPID (and its predecessor, the ICD) and JICS indicate that these institutions have reported, since their establishment, serious rights violations taking place in prisons and at the hands of the police in a widespread manner, the SAHRC has remained somewhat aloof to these facts and appear to have left it to the JICS and IPID to deal with the problems. The Commission's focus on systemic issues (e.g. ratification of OPCAT) is somewhat understandable as this can bring long-term benefits. However, the Commission's silence and inaction on the general lack of prosecutions against state officials assaulting and torturing persons in their custody is puzzling. As the foremost structure to promote and protect human rights, it is suitably positioned to address these problems with the NPA. By placing it on the agenda and, at least, enquiring from the NPA as to the reasons for the lack of prosecutions against law enforcement officials implicated in rights violations will be an important step. The SAHRC must therefore also bear some responsibility for the situation of impunity.

6.4 Internal disciplinary processes

The way in which organisations, such as DCS and SAPS, enforce their own disciplinary codes is an important barometer of the steps taken and general attitude of senior management to instil a culture of accountability. In the discussion below, statistics from DCS and SAPS are presented and a number of general conclusions drawn. The overall impression is that while there are serious allegations in notable quantities, code enforcement is erratic. In the case of DCS a more recent trend points to a staff corps being over-disciplined but in the case of SAPS under-disciplined.

¹⁴⁷ There is one recent decision from the Commission on police brutality concerning the death of Mr. Andries Tatane at the hands of police during a public protest (FS/2011/0009).

¹⁴⁸ SAHRC Annual Reports

¹⁴⁹ *Council for the Advancement of the Constitution v SAPS*, SAHRC FS/2011/0009.

¹⁵⁰ PMG report on the meeting of the Portfolio Committee on Justice and Constitutional Development of 30 April 2013, <http://www.pmg.org.za/report/20130430-south-african-human-rights-commission-strategic-and-annual-performance-plans-2013> Accessed 7 June 2013.

6.4.1 Prisons

After the DCS demilitarised in 1996, it was not equipped to deal with the influence of unions or the demands of the new democratic order.¹⁵¹ This opportunity was seized by unionised labour, in particular the Police and Prisons Civil Rights Union (POPCRU), to take control of the DCS and its processes and distort them for its own purposes. This was achieved through Operation Quiet Storm¹⁵² and similar activities. With the unions exerting so much control over the Department's day-to-day operations, it became impossible to enforce any decisions regarding employees' conditions of employment (e.g. performance and disciplinary matters) as these would only end up being frustrated by union sympathisers higher up in the management hierarchy of the Department.¹⁵³ The appointment and promotion of staff based on union patronage as opposed to skills and competence saw the rapid erosion of the disciplinary system. The Jali Commission found that the majority of DCS Heads of Prison in 2001 belonged to either POPCRU or the Public Servants Association (PSA),¹⁵⁴ and it was therefore hardly surprising that disciplinary action was seldom taken. Even when instituted, it was frequently manipulated or resulted in disproportionately light sanctions.¹⁵⁵

With the disciplinary system in shambles, it was relatively easy for opportunists to exploit the situation and engage in a wide range of corrupt and criminal activities.¹⁵⁶ Ultimately, the consequences of Operation Quiet Storm ran away from the POPCRU leadership, resulting in the beneficiaries of Operation Quiet Storm abusing their ill-begotten authority to benefit themselves and their families even further. The collapse of order and discipline should also be seen against the background of poor administrative, financial and asset control systems.¹⁵⁷ The weaknesses of these systems created a legion of opportunities for corrupt officials to benefit financially and otherwise. The collapse of order and discipline, and the descent into a malaise of corruption and maladministration, saw the DCS forsaking the reform of the prison system. The new Constitution had, by the time the Jali Commission started its work, little impact on reforming governance and human rights in the prison system.

¹⁵¹Muntingh, L. (2011) *An analytical study of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape, pp. 160-161.

¹⁵² Operation Quiet Storm was a covert programme initiated by a faction within POPCRU to ensure that its sympathisers were appointed to key positions. A key tactic was the physical removal of persons from their offices and a general approach to make the Department ungovernable.

¹⁵³ Jali Commission, p. 98.

¹⁵⁴ Jali Commission, p. 110.

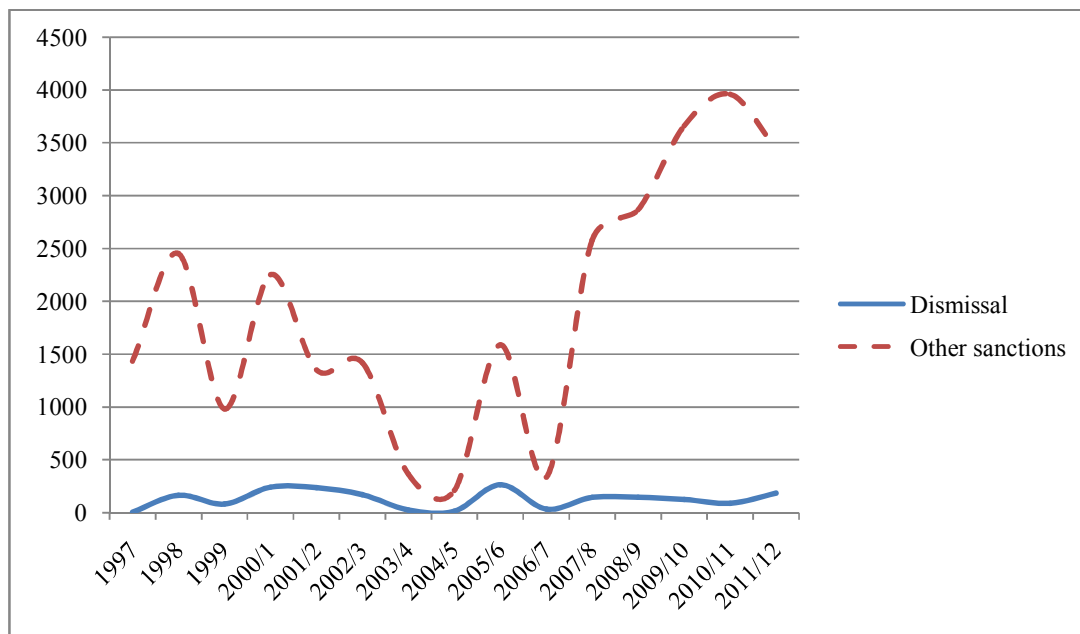
¹⁵⁵ Jali Commission, pp. 762-763.

¹⁵⁶Muntingh, L. (2011) *An analytical study of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape, pp. 160-161.

¹⁵⁷ Department of Public Service and Administration (1999), pp. 1-2.

It took the DCS several years to re-establish the disciplinary system. Trends in disciplinary sanctions imposed (see Figure 1)¹⁵⁸ illustrate how the disciplinary system went into decline and the number of disciplinary action only started increasing from 2004/5.¹⁵⁹ The most obvious trend is the see-saw figure in total disciplinary sanctions imposed, from more than 2600 in 1998, dropping to 1061 in the following year but climbing to just below 2500 in 2000/1. The high number of disciplinary actions during 1997 and 1998 were the result of the investigations undertaken by the Public Service Commission (PSC) and the Department of Public Service and Administration (DPSA). The spike in 2001-3 can be attributed to the early work of the Jali Commission and the SIU. During the first three years of the SIU's involvement in the DCS (2002-2005), the total number of disciplinary actions did, however, drop to a meagre 224 cases in 2004/5. The fruits were nevertheless harvested the following year when disciplinary sanctions imposed climbed to 1850, the highest level since 1998. These were cases primarily related to medical aid and social grant fraud. Dismissals, however, remain a rare event in the DCS. The highest number of dismissals was 264 in 2005/6, or 14% of total disciplinary sanctions imposed.

Figure 1 Total disciplinary actions and dismissals in DCS



¹⁵⁸The graph below and accompanying summary originally appeared in: Muntingh, L. (2008) The struggle continues - The fight against corruption in prisons, *SA Crime Quarterly*, No. 25, September 2008, pp. 17-23. The figures were updated for the purposes of this article.

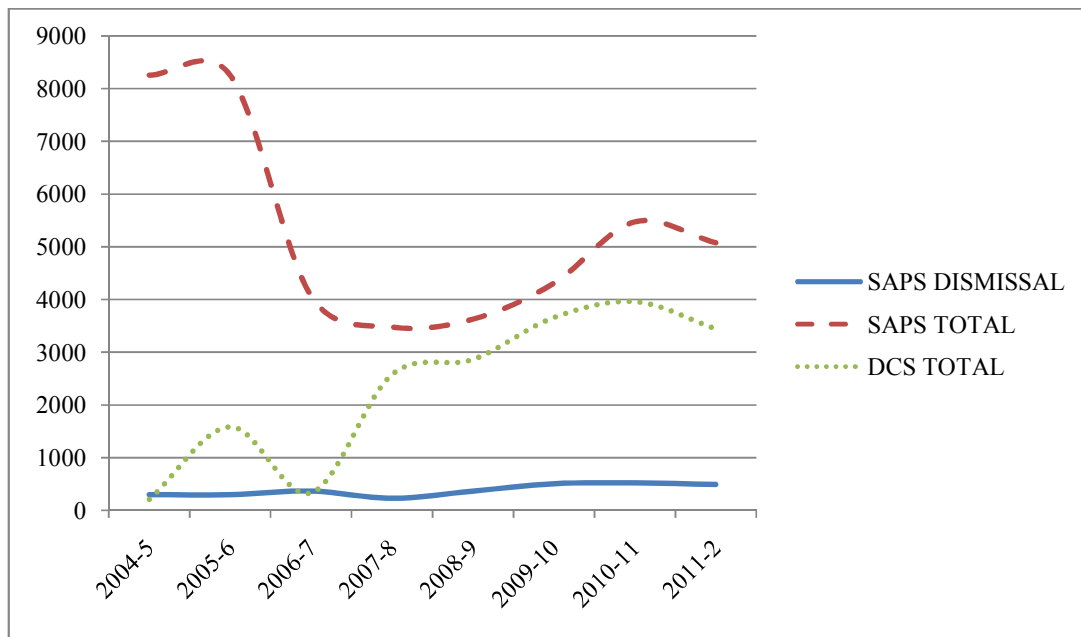
¹⁵⁹The data used in Figure 1 was extracted from the various annual reports of the DCS of the period covered. It should be noted that the report for 2000/1 covers a 15-month period when the Department changed its reporting period from a calendar year to a financial year.

The see-sawing in the number of disciplinary actions taken against employees of the Department, may reflect an attitude by DCS management, or even a decision, that the ‘SIU and Departmental Investigations Unit (DIU) will take care of discipline’. If this is indeed the case, it is extremely unfortunate. The two investigating units are there to support the DCS management with specialist skills and knowledge and to provide comprehensive forensic solutions, but they do not replace the day-to-day duty of every manager in the Department to enforce the disciplinary code and promote good performance. Enforcement of the disciplinary code by every operational manager also lends sustainability to the achievements of the investigations in addressing corruption, maladministration and rights violations by making compliance with prescripts and codes part of organisational culture.

6.4.2 Police

Compared to the DCS, SAPS is a much larger employer; nearly 200 000 employees, compared with DCS at approximately 42 000. It should therefore follow that SAPS would discipline substantially more employees on an annual basis. This is, however, not the case, as shown in Figure 2 below. From 2005/6, the total number of disciplinary actions instituted in SAPS fell sharply from more than 8000 to roughly 3500, after which it increased again to roughly 5500. Expressed as a per 10 000 ratio it means that by 2010/11, the year that both departments instituted the highest number of disciplinary actions, 943/10 000 DCS officials were subject to a disciplinary process compared to 282/10 000 in SAPS; more than three times more in DCS than in SAPS. The data from SAPS also show great fluctuation from more than 8000 cases in 2005/6 to roughly 3500 in 2007/8.

Figure 2 Total disciplinary actions in SAPS and DCS, and SAPS dismissals



The above figures allude to a number of worrying trends in the manner discipline is enforced in SAPS. First, it is not consistent and has resulted in significant increases and decreases during the period under review. The reasons for this require further investigation, but it can nonetheless be concluded that it reflects a particular lack in focus on the part of management to enforce the disciplinary code consistently and over time down-manage, or at least stabilise the number of disciplinary actions. Secondly, it may also be, as noted already, that Commissioner Jackie Selebi abolished the police's internal anti-corruption unit in 2002, despite it being regarded as effective, and thus contributing at least to the sharp decline in disciplinary actions. Thirdly, the number of disciplinary actions has also not reflected the growing employment force of SAPS. Expressed as a per 10000 ratio, it declined from 750/10000 in 2004/5 to 260/10000 by 2011/12. It is therefore clear that other factors are influencing the manner in which SAPS management holds its employees accountable. Fourth, similar to DCS, dismissal is a rare occasion and is generally the result in less than 10% of disciplinary actions instituted. This is confirmed by ICD statistics examined in the next section. Fifth, it can be concluded that disciplinary actions are under-utilised in SAPS and as a consequence of this, accountability and transparency are not being advanced as organisational values internally nor externally. Earlier research has indeed identified the inefficiency of the SAPS internal disciplinary process as an area of concern.¹⁶⁰

¹⁶⁰ Newham, G. and Faull, A. (2012) *Protector or predator? Tackling police corruption in South Africa*, Pretoria: ISS Monograph No. 182 at 50 and 52.

6.5 Designated oversight structures

This section deals with designated oversight structures over the police and prison system. Indeed, oversight structures should be set up through relevant legislation (i.e. structural dimension of impunity) but should most importantly be functional and effective, so as to ensure strong accountability of those officials they are mandated to oversee.¹⁶¹ An important part of this architecture is Parliament of which the Constitution requires that the executive must account to Parliament¹⁶² for its actions, policies, expenditure etc. More specifically, “Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.”¹⁶³ Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at monitoring the executive.¹⁶⁴ It is indeed the case that while accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing.¹⁶⁵

6.5.1 Prison system

This section will review the performance of two oversight structures, being the JICS and the Parliamentary Portfolio Committee on Correctional Services. It is noted that judges, magistrates and certain Members of Parliament also have the authority to visit prisons in their individual capacities,¹⁶⁶ but this will not be the focus here as the emphasis is place on overall trends.

6.5.1.1 Judicial Inspectorate for Correctional Services

The Judicial Inspectorate for Prisons (renamed as the Judicial Inspectorate for Correctional Services in 2008)¹⁶⁷ was formally established with effect from 1 June 1998 in terms of section 25 of the

¹⁶¹ Newham, G. and Faull, A. (2012) *Protector or predator? Tackling police corruption in South Africa*, Pretoria: ISS Monograph No. 182 at 38 to 42.

¹⁶² Section 55(2)

¹⁶³ Corder, H., Jagwanth, S. and Soltau, F. (1999) *Report On Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town.

¹⁶⁴ Corder, H., Jagwanth, S. and Soltau, F. (1999) *Report On Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town.

¹⁶⁵ Muntingh, L. (2012) The state of civil society participation in Parliament, *Law, Democracy & Development*, Vol 16.

¹⁶⁶ s 99 Correctional Services Act (111 of 1998).

¹⁶⁷ Act 25 of 2008.

Correctional Services Act (8 of 1959)¹⁶⁸ and is headed by an Inspecting Judge.¹⁶⁹ The lack of transparency of the pre-1994 prison system and the limitations imposed by the 1959 Prisons Act on judicial oversight¹⁷⁰ necessitated the creation of a structure that would give prisoners a right of access to complain to an independent body. Notwithstanding certain limitations in the mandate of the Office of the Inspecting Judge, the Inspecting Judge can still make a number of binding decisions and in principle renders status, independence and impartiality to the external complaints mechanism implemented through the Independent Visitors.¹⁷¹

While the JICS records hundreds of thousands of complaints from prisoners annually¹⁷² and submit numerous recommendations¹⁷³ to the Minister of Correctional Services, this has had little effect to improve good governance in correctional facilities and compliance with human rights standards. Its powers are largely limited to making recommendations and it does not have search and seizure powers similar to that of IPID. At best it can conduct its own investigations and make recommendations to the NPA on the prosecution of DCS officials implicated in rights violations.

Over time it has also become clear that the Minister of Correctional Services and the Department's senior management effectively ignore recommendations coming from JICS. This became apparent in November 2010 when the DCS briefed the Portfolio Committee on Correctional Services on its "high-level action plan"¹⁷⁴ in respect of the Inspectorate's Annual Reports.¹⁷⁵ The proposed measures were indeed telling of what the Department's attitude and actions had been to date. A senior official explained that that management would address the "disregard by the Department of Judicial Inspectorate reports". However, the "high-level action plan" confirmed what has long been suspected,

¹⁶⁸ The Correctional Services Act (8 of 1959) was amended to provide for the establishment of the Judicial Inspectorate on 20 February 1997 by proclamation of the Correctional Services Amendment Act (102 of 1997). This legislation was further amended on 19 February 1999 by proclamation of sections 85 to 94 of the Correctional Services Act (111 of 1998).

¹⁶⁹ Office of the Inspecting Judge (2000) *Annual Report of the Judicial Inspectorate of Prisons 1999*. Cape Town: Office of the Inspecting Judge, p. 2.

¹⁷⁰ The 1959 Act abolished the prescription that prisoners must be visited regularly by judges and boards of visitors. (Van Zyl Smit, D. (1992), p. 31.)

¹⁷¹ Jagwanth, S. (2004) *A review of the Judicial Inspectorate of Prisons of South Africa*, CSPRI Research Report No. 7, Bellville, Community Law Centre. Gallinetti, J. (2004) *Report on the evaluation of the Independent Prison Visitors (IPV) system*, CSPRI Research Report No. 5, Bellville, Community Law Centre. Muntingh, L. (2007 b) *Prisons in the South African constitutional democracy*, Johannesburg: Centre for the Study of Violence and Reconciliation, p. 9.

¹⁷² In 2011/12 JICS recorded 424 717 complaints from prisoners (JICS Annual Report 2011/12 p. 43)

¹⁷³ The Correctional Services Act obligates the Inspecting Judge to submit an annual report as well as a report on each inspection undertaken to the Minister of Correctional Services and to Parliament (S 90(3-4) of the Correctional Services Act (111 of 1998). The requirement that the inspection reports should also be submitted to Parliament was added through an amendment to the Act, the Correctional Services Amendment Act, 25 of 2008.

¹⁷⁴ The issues to be addressed in the plan included: complaints registered with JICS Independent Visitors (IVs) would be taken more seriously; concern about Heads of Prisons reports on natural/unnatural deaths, and the reluctance of management to deal with officials implicated in prisoner deaths; research into the effect of long sentences on costs, overcrowding and gang activity; the efficiency of parole boards; lack of briefing to officials on high-risk prisoners; the persistence of solitary confinement despite it being prohibited by law; the majority of complaints by inmates remained unresolved, with transfers away from families as punishment ranking as the most common complaint; infrastructure challenges that compromised human dignity during imprisonment; improved utilisation of vocational workshops; the incremental provision of rehabilitation programmes; attention to conditions of detention for remand detainees; and the increased use of plea bargaining to avoid imprisonment for minor offences.

¹⁷⁵ PMG Report on meeting of the Portfolio Committee on 24 November 2010, <http://www.pmg.org.za/report/20101124-meeting-finalisation-department-public-works-department-correctional>- Accessed 22 October 2011.

namely that the DCS essentially ignored the recommendations made by the Inspectorate, especially when they were critical of how the Department and its officials dealt with human rights issues.

The limitations in JICS's mandate were already noted by the Jali Commission several years earlier, although the focus of inquiry there related to the investigation of corruption. The Jali Commission did not have much hope for the Inspectorate and concluded that it had been rendered ineffective and appeared to be reluctant to investigate corruption.¹⁷⁶ The Commission made a number of recommendations, focusing on amendments to the Correctional Services Act to strengthen its independence and grant it more powers, but still believed that this was not sufficient.¹⁷⁷ It consequently recommended the creation of another national agency called the Prison Ombudsman with powers similar to that of the ICD to investigate corruption, maladministration and dishonest practices.¹⁷⁸

The net result is a situation where JICS is unable, due to the limitations in its mandate, to hold officials accountable or place sufficient pressure on the NPA to affect prosecutions. Moreover, it has little hold over the DCS and with a few exceptions cannot compel it to do anything, even request DCS to explain why it accepts or rejects certain recommendations. Under Judge Fagan, the longest serving Inspecting Judge to date (2000-2006), JICS focussed almost exclusively on prison overcrowding. This was indeed a comfortable approach for DCS, as it by implication supported its own view that overcrowding was the root of all their problems, but more importantly that it was the victim of an inefficient court system and a host of other causes of prison overcrowding. The DCS was keen to be regarded as a victim of overcrowding while in fact it was crowded by its own misdeeds, in the form of corruption, maladministration, human rights violations and poor management.¹⁷⁹

The weakness of JICS created a façade of oversight that DCS has been effective in ignoring. Even at a systemic level, senior management ignores JICS recommendations, fostering a perception amongst lower ranks that DCS is untouchable.

6.5.1.2 Portfolio Committee on Correctional Services

The history of the Portfolio Committee on Correctional Services can be divided into three periods: 1994 to 2003, during which the Committee played a lesser role; 2004 to 2009, when the Committee

¹⁷⁶ Jali Commission, p. 589.

¹⁷⁷ Jali Commission, pp. 590-593.

¹⁷⁸ Jali Commission, p. 614.

¹⁷⁹ Muntingh, L. (2012) *An analysis of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape, p. 219.

re-asserted itself; and 2009 to present, where the work methods of the Committee can be characterised as a stern and methodical approach to oversight, one building on the foundation laid in the preceding period.¹⁸⁰

After some initial activity under Carl Niehaus (ANC) as chairperson, the Portfolio Committee became by and large inactive. Bearing in mind that the years 1996 to 2003 were deeply troubling times for the DCS, the overall impression gained is that the Committee lacked strategic direction and generally reacted to issues presented by the DCS or reported in the media instead of following a proactive and inclusive approach. There was equally little follow-up on issues raised with the DCS on which feedback or additional information was being sought.¹⁸¹ Whilst corruption was rife in the DCS and numerous allegations were being made, as well as investigations being instituted by other state agencies,¹⁸² the Portfolio Committee had very little to say about corruption during this period. This can equally be said about rights violations during the period 1994 to 2003.

From 2004 onwards the Portfolio Committee took a far more engaged and assertive approach under the leadership of Dennis Bloem (ANC) and later Vincent Smith (ANC). The focus remained, however, on addressing governance, administration and general performance. Dealing with the Jali Commission's findings, the uncovering of large-scale corruption in the awarding of tenders and the long-running saga of prison construction consumed most of the Committee's time. The poor performance of the DCS was also frequently defended in Parliament by the then minister of Correctional Services, Ngconde Balfour. The relationship with the Minister would ultimately suffer irreparable harm, making it extremely difficult for the Portfolio Committee under Dennis Bloem to hold the DCS to account.¹⁸³

It was only by 2012 that the Committee called for submissions from civil society on torture, deaths and violence in prisons¹⁸⁴, and strengthening the mandate of JICS. Over the course of nearly 20 years, it was duly reported to Parliament by the DCS¹⁸⁵ and JICS in their annual and other reports that numerous assaults were taking place and that this frequently had fatal results. However, the

¹⁸⁰ Muntingh, L. (2012) *An analysis of prison reform in South Africa after 1994*, Unpublished PhD thesis, University of the Western Cape, pp. 414-430.

¹⁸¹ Dissel, A. (2003) *A Review of Civilian Oversight over Correctional Services in the Last Decade*, CSPRI Research Report No. 4. Bellville: Community Law Centre, pp. 21-22.

¹⁸² PMG Report on the meeting of the Portfolio Committee on Correctional Services of 14 April 2000, <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services> Accessed 22 October 2011.

¹⁸³ In its handover report, the Bloem Committee remarked as follows: "The Committee's relationship with the entity and the department it oversees was generally very good. Unfortunately the relationship with the DCS' Executive Authority was less so. The extent of the breakdown in the relationship between the Committee and that authority is starkly illustrated by the latter's neglect to inform the Committee of the re-deployment of the former National Commissioner in November 2008" (Portfolio Committee on Correctional Services (2009) *Overview Report of the Oversight Activities of the Portfolio Committee on Correctional Services (2004-2009)*, Parliament of the Republic of South Africa, Cape Town, p.3).

¹⁸⁴ PMG Report on the meeting of the Portfolio Committee on Correctional services of 30 November 2011, <http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres>, PMG Report on the meeting of the Portfolio Committee on Correctional services of 7 March 2012, <http://www.pmg.org.za/report/20120307-judicial-inspectorate-correctional-services-its-sept-dec-2011-quarter> Accessed 7 June 2013.

¹⁸⁵ All natural and unnatural deaths are reported in the DCS annual reports. From 2000, JICS also reported on these cases in its annual reports.

successive Portfolio Committees on Correctional Services did not regard this as a systemic issue and rather prioritised matters of governance, administration and to some extent the problem of prison overcrowding. While these are ultimately strategic choices, serious questions must also be asked about them when assessed against non-derogable rights in the Constitution, i.e. the right to life, the right to bodily and physical integrity and the right to be free from torture and other ill treatment. Moreover, the Correctional Services Act (111 of 1998) is clear that safe custody under conditions consonant with human dignity is one of the three objects of the prison system.¹⁸⁶ There is little doubt that a more overt focus by the Portfolio Committee on human rights violations and holding the National Commissioner accountable for such violations would have made an important contribution to countering the culture of impunity prevalent in the Department. Leadership on this issue at parliamentary level would have demonstrated that constitutional guarantees are indeed important in the prison system and that violations will not be tolerated.

6.5.2 Police

This section will review the performance of the four oversight structures over the police, namely the ICD and its successor IPID, the Civilian Secretariat for Police, the Portfolio Committee on Police and provincial oversight. The legal framework regulating the ICD/IPID and the Civilian Secretariat were examined in section 5.3.

6.5.2.1 ICS and IPID

As outlined in section 5.3.2, the ICD, and its successor the IPID, are mandated to receive complaints and investigate allegations of gross misconduct by the police. The outcomes of its investigations are then forwarded to SAPS or to the NPA, either for disciplinary action or for prosecution.

The institution of the ICD was criticised from the outset on three main issues hampering its ability to exercise its mandate effectively. First, it was pointed out that the ICD lacked independence from the SAPS. Second, the ICD lacked the necessary powers to ensure that SAPS would cooperate with the oversight body and act upon its recommendations. Third, the ICD lacked sufficient capacity and resources to fulfil its mandate, in particular to conduct quality investigations on all complaints received, and in particular on all deaths in custody and as a result of police action.¹⁸⁷

¹⁸⁶ Section 2 The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by . . . (b) detaining all prisoners in safe custody whilst ensuring their human dignity;

¹⁸⁷Berg, J. (2013) "Civilian oversight of police in South Africa: from the ICD to the IPID" *Police Practice and Research*, 1 at 3 to 5.

The data presented below provide an analysis of the complaints received and the investigations conducted by the ICD in the period 2007-2012. Figure3 outlines the number of complaints received annually by the ICD. Figures4 and Table 1 outline the result of cases investigated by the ICD, the number of cases referred to SAPS for disciplinary action and their outcome, and the number of cases referred to the NPA and their outcome. Since the IPID has been operational since 2012 only, figures on the number of complaints received and cases investigated by the IPID will only be available from September 2013, when it publishes its first annual report.

Figure 3 Total number of complaints received by the ICD

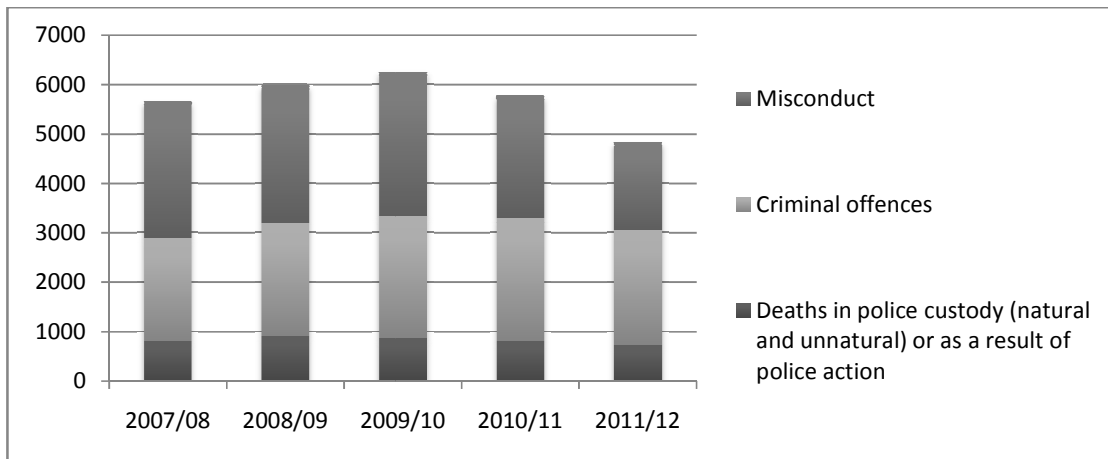


Figure 4 Total number of cases completed by the ICD and outcome.

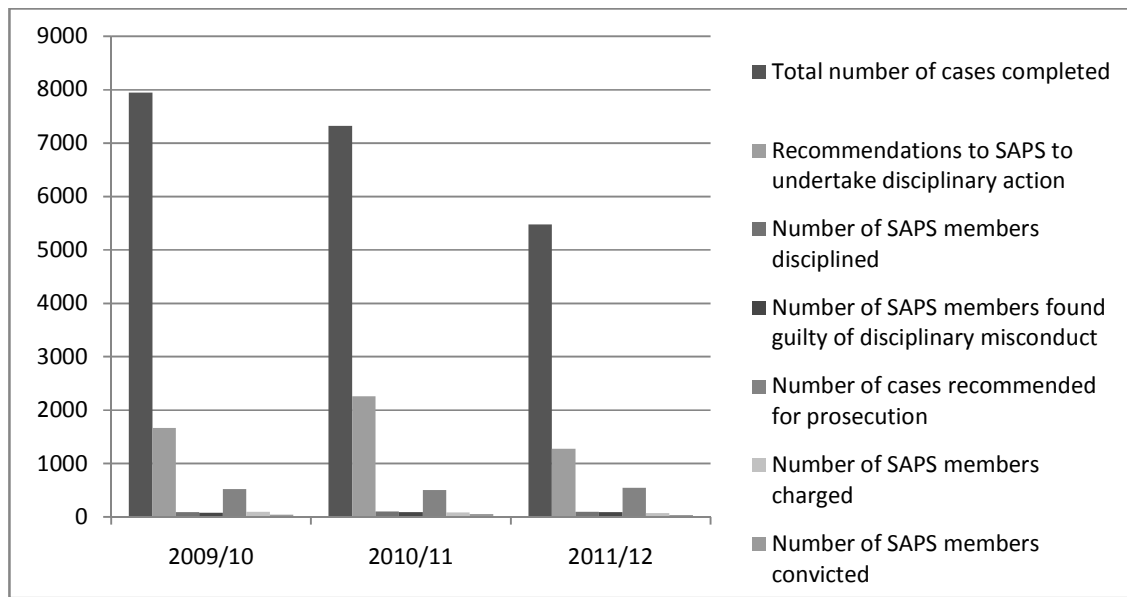


Table 1 Total number of cases completed by the ICD and outcome.

ICD recommendation and outcome	2009/10	2010/11	2011/12
Recommendations to SAPS to undertake disciplinary action	1666 (100%)	2261 (100%)	1276 (100%)
Number of SAPS members disciplined	91 (5.5%)	102 (4.5%)	95 (7.4%)
Number of SAPS found guilty of disciplinary misconduct	77 (4.6%)	88 (3.9%)	90 (7%)
Number of SAPS members dismissed ¹⁸⁸	9 (1 of which suspended) (0.5%)	6 (2 of which suspended) (0.2%)	10 (0.8%)
Number of cases recommended for prosecution ¹⁸⁹	526 (100%)	501 (100%)	545 (100%)
Number of SAPS members charged	96 (18.2%)	87 (17.3%)	74 (13.6%)
Number of SAPS members convicted	47 (8.9%)	59 (11.7%)	36 (6.6%)
Number of SAPS members sentenced to imprisonment without the option of a fine	19 (3.6%)	23 (4.6%)	9 (1.6%)

¹⁸⁸ Section 6.4.2. analysed the number of disciplinary actions taken by SAPS, whether on its own initiative or after having received a complaint from the ICD/IPID. This data only analyses the complaints initiated by the ICD/IPID.

¹⁸⁹ Recommendations for prosecution only relate to allegations of deaths in police custody or as a result of police action, or to allegations of criminal offences.

The data in Figure 3 show that the number of complaints has remained relatively stable over the years (roughly 5500), indicating that, despite the existence of the ICD, the (high) number of instances in which SAPS members has disregarded the law remain the same. But the constant high number of complaints must also be read against the outcome of ICD investigations. A number of key conclusions can be drawn from the data contained in Figure 4 and Table 1. First, the fact that the ICD has made a recommendation to SAPS that disciplinary action should be instituted has little bearing on what SAPS actually does, since this recommendation was followed in less than 7.5% of cases.¹⁹⁰ Second, as is the case with DCS, dismissal is a rare event; occurring in less than 1% of cases. Third, where the ICD has recommended criminal prosecutions, there is a similar attrition rate of roughly 85%. It simply appears as if the NPA does not prosecute cases against police officials even when a recommendation to this effect has been made by a statutory oversight structure. Fourth, even when convicted, SAPS members are sentenced to imprisonment in less than half of cases.

Reasons for these low conviction rates have not been provided by the ICD, SAPS or the NPA. However, as mentioned above, some allege that the SAPS would simply ignore the ICD recommendations, whereas others claim that the investigations conducted by the ICD were of low quality and did not allow further action.¹⁹¹ As for the NPA, if one considers national statistics, it finalises on average 28.5% of all cases it accepts;¹⁹² the average number of SAPS members it charges (roughly 15%) is therefore much lower than the national average.

The perceived lack of action by the SAPS and the NPA in response to ICD investigations is one reason that prompted the adoption of new legislation to reinforce the mandate of the oversight mechanism.¹⁹³ Several measures aimed at reinforcing the mandate of the IPID, and ultimately ensuring that action is taken following its investigations, were outlined in section 5.3.2. The IPID has been in operation for just over a year. In the current transition period, it is difficult to assess the successes and remaining challenges of the revamped oversight structure. However, considering the lack of openness and transparency traditionally encountered within the police, it is unclear whether SAPS will be complying with the obligation to systematically report abuse to the IPID, and whether the IPID has any means to control whether it received reports of alleged offences when these have not been brought to its attention through complaints or media reports. It is also unclear whether SAPS will systematically report on the outcome of disciplinary action taken. As for the NPA, although it must

¹⁹⁰ Recommendations for disciplinary action relate to all categories of cases dealt with by the ICD, i.e. deaths in police custody or as a result of police action, criminal offences, misconduct and non-compliance with the DVA.

¹⁹¹ William Saunderson-Meyer, "SAPS' rogue cops hide behind a faltering watchdog", *Mail & Guardian* 20 October 2012, at <http://www.thoughtleader.co.za/williamsaundersonmeyer/2012/10/20/saps-rogue-cops-hide-behind-a-faltering-watchdog/> (accessed 7 June 2013) and Berg, J. (2013) "Civilian oversight of police in South Africa: from the ICD to the IPID" *Police Practice and Research*, at 4 and 5.

¹⁹² Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS Monograph No. 186, p. 28.

¹⁹³ "New law to bolster police watchdog", 3 June 2011, at <http://www.southafrica.info/services/rights/ipid-030611.htm#.UZeG9xxZpgo> (accessed 7 June 2013).

only notify the IPID of the cases it has decided to prosecute, it need not notify the IPID of its decision not to prosecute, and there is no timeframe within which the NPA must inform the IPID of its intention to prosecute.¹⁹⁴ Without a policy shift, the likelihood of improved prosecution and conviction rates of rogue police officers appears therefore unlikely.

Another criticism made against the ICD was that it had neither the financial resources nor the necessary capacity or the investigative skills required to conduct its mandate efficiently.¹⁹⁵ It is unclear whether these two challenges will be addressed by the IPID, as it appears that its new mandate focuses more on reinforcing its powers than addressing these challenges.¹⁹⁶ Its budget, half of which is devoted to its investigations, has grown in alignment with the SAPS budget, and has represented, on average over the past five years, 0.23% of the total SAPS budget. This figure is low, but cannot be the only explanation for the low conviction rates against the number of cases investigated.

The ICD staff has also increased over recent years, from a total staff of 229 in 2007/08 (representing a ratio of one ICD staff member per 756 SAPS employees) to a total of 279 in 2011/12 (representing a ratio of one ICD staff member per 714 SAPS employees). In 2007/08, it had 100 investigators, compared with 144 in 2011/12. However, the number of cases the ICD has completed over the years has steadily decreased (see Figure 4 and Table 1), despite the increased capacity, from an average of 93 cases completed per investigator per year in 2007/08 to an average of 38 cases completed per investigator per year in 2011/12. The IPID also does not appear to embark into a massive recruitment process in the near future. Faull suggests that the IPID will only be able to fulfil its new mandate if it refers the 'majority of complaints on to other agencies such as the Special Investigating Unit (SIU), Human Rights Commission (HRC) or to the SAPS and Metro police themselves'.¹⁹⁷

It is important to note that, with the new IPID mandate compelling it to investigate all allegations of serious criminal offences (which were optional under the ICD mandate, save for deaths), the workload of the IPID might increase in the future, if not in quantity, at least in "quality" or complexity. In particular, it is suspected that there will be an increased workload from the obligation resting on all station commanders (who face criminal sanctions if they fail to do so) to report all offences falling under the IPID's mandate as soon as they become aware of its commission. It is unclear whether the IPID will have the necessary capacity to investigate all these allegations thoroughly.

¹⁹⁴ IPID Act, sections 7(4) and 7(5).

¹⁹⁵ "Is new police watchdog facing old problems?", Corruption Watch, 28 March 2012, at

<http://www.corruptionwatch.org.za/content/new-police-watchdog-facing-old-problems> (accessed 7 June 2013).

¹⁹⁶ Faull, A. (2011) *Oversight agencies in South Africa and the challenge of police corruption*, Pretoria: ISS Paper No. 227 at 5; Berg, J. (2013) "Civilian oversight of police in South Africa: from the ICD to the IPID" *Police Practice and Research* at 6.

¹⁹⁷ Faull, A. (2011) *Oversight agencies in South Africa and the challenge of police corruption*, Pretoria: ISS Paper No. 227 at 5.

Finally, contrary to the JICS, which can visit all correctional centres, neither the ICD nor IPID were or are mandated to visit police cells.¹⁹⁸ However, unannounced visits to places of detention have been recognised as one of the most effective means to prevent torture and other ill-treatment. Allowing the police oversight mechanism to conduct unannounced visits to police cells all over the country would therefore reinforce accountability and prevent abuse at the hands of police officials. The Civilian Secretariat for Police, examined below, can visit police stations, but does not focus on monitoring conditions of detention. The Western Cape Community Safety Act, discussed below, also aims at filling this gap in the current legislation, but only in that province.

6.5.2.2 Civilian Secretariat for Police

The new legal framework outlined in section 5.3.2 aims at addressing certain gaps that were faced by the Secretariat. These gaps included, internally, a “lack of strategic direction and planning; ...lack of performance...; lack of capacity; lack of leadership...;lack of quality assurance, [and the]need to define and clarify relations between the SAPS and the Secretariat”; and external challenges included the “lack of seriousness with which the Secretariat was taken; need to recapture the role of civilian oversight, [and the] need to define and clarify relations between the SAPS and the Secretariat”.¹⁹⁹ Indeed, there appears to be limited engagement between the Minister and the Civilian Secretariat on the issues researched by the Civilian Secretariat. Furthermore, despite the fact that investigating systemic violence and abuse at the hands of the police would squarely fall within the mandate of the Civilian Secretariat, it has not produced research on the topic yet, and does not appear to intend to do so in the near future.²⁰⁰ These challenges are, to a certain extent, recognised by the Civilian Secretariat itself. It is in the process of setting up a ‘compliance forum’ composed of the Secretariat and SAPS ‘to evaluate the implementation of recommendations’ the Secretariat has made; that it receives directives from the Minister and Parliament on the issues it should research or oversee, and that it does not have the capacity to handle all complaints it has received relating to efficient service delivery and complaints systems within SAPS.²⁰¹

¹⁹⁸ Although the ICD attempted to conduct unannounced visits to police stations in Gauteng, it received ‘a strong negative reaction’ from the SAPS and had to stop this activity: Berg, J. (2013) “Civilian oversight of police in South Africa: from the ICD to the IPID” *Police Practice and Research*, at 4 and 5.

¹⁹⁹ APCOF and the Civilian Secretariat for Police, *Reorganising the Secretariat of Police: Consultations with Civil Society in January and February 2010*, p. 5.

²⁰⁰ The 2011/12 Annual Report of the Civilian Secretariat indicates that it has revised the White Paper on Safety and Security, and has conducted research or developed policy related to community safety forums, police station boundaries, violent crime, public order policing (policy was later approved by the Minister), the national DNA database (served to draft legislation), the reservist police, and the policy surrounding the Directorate for Priority Crime Investigation (the Hawks), following the Glenister judgment. The Minister mandated some of these projects: Civilian Secretariat for Police, *Annual Report 2011/12*, p. 18. During a 2010 consultation with civil society on redefining the role of the Secretariat, police abuse not identified as a priority research area: APCOF and the Civilian Secretariat for Police, *Reorganising the Secretariat of Police: Consultations with Civil Society in January and February 2010*, p. 10.

²⁰¹ Civilian Secretariat for Police, *Annual Report 2011/12*, p. 10.

As noted above, the Secretariat is also authorised to conduct visits to police cells.²⁰² In the financial year 2011/12, it had visited 155 police stations, but these visits focused on assessing service delivery and conducting general audits of stations, rather than monitoring conditions of detention.²⁰³ It is unclear whether the Secretariat has the authority, capacity or political support to conduct regular and unannounced visits to police stations.

6.5.2.3 *Portfolio Committee on Police*

In order for the Portfolio Committee on Police to provide effective oversight, it receives regular reports from the SAPS, the IPID, the Civilian Secretariat and the Minister of Police. It has examined issues of police brutality and police corruption on some occasions. However, it does not appear to hold SAPS to account in strong terms on these matters, or to highlight that a culture of impunity prevails within the police. Although issues of rights violations by the police are regularly discussed by the Portfolio Committee on Police, it is mostly done through its interactions with the IPID, and less so through those with the SAPS.

The Portfolio Committee on Police has had the most strongly-worded interactions with the IPID (and its predecessor, the ICD) and has over the years on a recurrent basis highlighted its systemic challenges, the most important ones for this discussion on impunity being the low quality of its investigations and the fact that SAPS does not engage, or has very limited engagement, with IPID recommendations.²⁰⁴ The Portfolio Committee on Police appears to strongly emphasise IPID's responsibility in the lack of outcome from its investigations, having insisted that it must play a more proactive role in identifying cases needing investigations, and highlighting the need for its staff, in particular its investigative staff, to receive adequate training.²⁰⁵

Notably, the Portfolio Committee on Police has only rarely highlighted the fact that referrals to the NPA resulted in such low conviction rates. This can be explained by the fact that the Portfolio Committee on Justice and Constitutional Development oversees the NPA, and that the Portfolio

²⁰² Civilian Secretariat Act, section 9(a).

²⁰³ Civilian Secretariat for Police, *Annual Report 2011/12*, p. 9 and 21; Civilian Secretariat for Police, *2011-14 Strategic Plan*, p. 17.

²⁰⁴ See PMG report on the meeting of the PCP of 17 April 2012 <http://www.pmg.org.za/report/20120417-south-african-police-service-saps-their-strategic-plan-annual-perform> (accessed 7 June 2013); PMG report on the meeting of the PCP of 23 April 2013 <http://www.pmg.org.za/report/20130423-independent-police-investigative-directorate-strategic-and-annual-performance-plan-2013> (accessed 7 June 2013); PMG report on the meeting of the PCP of 10 October 2012 <http://www.pmg.org.za/report/20121010-independent-complaints-directorate-annual-report-2012-closing-issues> (accessed 7 June 2013); PMG report on the meeting of the PCP of 16 April 2012 <http://www.pmg.org.za/report/20120416-briefing-independent-police-investigative-directorate-their-strategic> (accessed 7 June 2013); PMG report on the meeting of the PCP of 21 February 2012 <http://www.pmg.org.za/report/20120221-independent-complaints-directorate-all-their-lease-agreements> (accessed 7 June 2013).

²⁰⁵ See PMG report on the meeting of the PCP of 23 April 2013 <http://www.pmg.org.za/report/20130423-independent-police-investigative-directorate-strategic-and-annual-performance-plan-2013> (accessed 7 June 2013); PMG report on the meeting of the PCP of 16 April 2012 <http://www.pmg.org.za/report/20120416-briefing-independent-police-investigative-directorate-their-strategic> (accessed 7 June 2013).

Committee on Police therefore considers it not to be within its mandate to engage on this issue. However, *de facto* impunity within the police must be seen holistically, and can be reflected by the outcome of both disciplinary actions by SAPS and prosecutorial actions by the NPA. There is little doubt that in order to address impunity in the police, closer cooperation between these two Portfolio Committees is required.

The Portfolio Committee on Police has been less critical of the Civilian Secretariat for Police. While discussing the challenges the institution faces, such as staffing issues and limited impact, it hasn't been as vocal as towards the IPID. Interestingly, the Portfolio Committee on Police does not have a clear position on who, between the IPID and the Secretariat, should look into systemic problems of police (mis)conduct. It has stated that "the function of the ICD is to change police misconduct",²⁰⁶ but has also reminded the Secretariat to use IPID data to monitor police conduct.²⁰⁷ It has never called on the Secretariat to conduct policy research on the systemic causes behind police brutality or on the *de facto* situation of impunity prevailing within the police.

The Portfolio Committee on Police would be the ideal forum for it to relay its concerns regarding the work of the IPID and the Civilian Secretariat, and more specifically to the lack of outcome and effectiveness of IPID investigations, to the SAPS. However, whereas it questions the IPID as to why SAPS does not engage with its recommendations, it does not question SAPS on the same issue.²⁰⁸ Therefore, it could be said that Parliament, as a central oversight body over the police, fails to hold the police accountable for not engaging with another oversight body, the IPID, thereby misplacing its oversight focus. Indeed, the two oversight bodies have a much more robust relationship with each other on the issue of police misconduct than one oversight body with the body it oversees, in this case SAPS.

One exception is a debate that the Portfolio Committee on Police held on police brutality in March 2013, following a series of media reports on police brutality, highlighted above.²⁰⁹ Whereas the police recognised that its recruitment process, human rights training and disciplinary regime needed to be reinforced, it refused to recognise that there were any systemic problems with the police culture, and that the issue remained with a few "rogue" police officials, who would be prosecuted. A few days before this debate, President Zuma had denied that there was a need to set up a judicial commission of

²⁰⁶PMG report on the meeting of the PCP of 10 October 2012 <http://www.pmg.org.za/report/20121010-independent-complaints-directorate-annual-report-2012-closing-issues> (accessed 7 June 2013).

²⁰⁷PMG report on the meeting of the PCP of 20 April 2012 <http://www.pmg.org.za/report/20120420-secretariat-police-their-strategic-plan-and-budget-201213> (accessed 7 June 2013) and PMG report on the meeting of the PCP of 28 October 2011 <http://www.pmg.org.za/report/20111028-police-budgetary-review-and-recommendation-report-201011-civilian-sec> (accessed 7 June 2013).

²⁰⁸ The same observation has been made about the PCP's interaction with the ICD, and lack of interaction with SAPS, on police corruption: Faull, A. (2011) *Oversight agencies in South Africa and the challenge of police corruption*, Pretoria: ISS Paper No. 227 at 10.

²⁰⁹PMG report on the meeting of the PCP of 26 March 2013 <http://www.pmg.org.za/report/20130326-police-brutality-ministerial-briefing-saps-strategic-plan-input-iss> (accessed 7 June 2013).

inquiry into the causes of police brutality, and denied any systematic nature in a possible abuse of force at the hands of the police.²¹⁰ Again, the Presidency was more concerned about public image than the problem at hand.

A possible explanation to the limited engagement of the Portfolio Committee on Police with SAPS on the issues of police misconduct and the lack of accountability would be the executive interference in the work of the Portfolio Committee on Police. Two examples come to mind to support this observation. First, despite the Marikana incident constituting the worst single event of police violence since the end of apartheid, which would ordinarily have required swift engagement by an oversight body such as Parliament, the chairperson of the Portfolio Committee on Police has on at least two occasions publicly refused to debate the matter at this forum.²¹¹ Secondly, Sindisiwe Chikunga, the former chairperson of the PCP, strongly criticised the SAPS top management and its apparent involvement in serious misconduct (including allegations against the Head of Crime Intelligence, Richard Mdluli, and the KZN Head of the Hawks, Johan Booyesen) at a Portfolio Committee on Police hearing in April 2012.²¹² Two months later, she was appointed Deputy Minister of Transport. While it was never publicly acknowledged that there was a link between the two sets of events, some have pointed to it.²¹³ Chikunga has indeed been vocal in criticising the executive, even when she was a member of the Portfolio Committee on Correctional Services and clashed on a number of occasions with the then Minister of Correctional Services, Ngconde Balfour.

6.5.2.4 Provincial oversight

Provinces are constitutionally mandated to ‘monitor police conduct’, ‘oversee the effectiveness and efficiency of the police service’, ‘promote good relations between the police and the community’, ‘assess the effectiveness of visible policing’, and liaise with the Minister of Police on the policing situation in their province.²¹⁴ Provinces may conduct investigations and appoint commissions of inquiry into ‘complaints of police inefficiency or a breakdown in relations between the police and any community’, and must subsequently make recommendations to the Minister of Police.²¹⁵ Each

²¹⁰ Emsie Ferreira, “No need to probe police brutality”, IOL News, 20 March 2013, at http://www.iol.co.za/news/crime-courts/no-need-to-probe-police-brutality-1.1489720#_UaOC7BxZpgo (accessed 7 June 2013).

²¹¹ See PMG report on the meeting of the PCP on 28 August 2012 (<http://www.pmg.org.za/report/20120828-briefing-south-african-police-service-saps-all-specialized-training-a>) and PMG report on the meeting of the PCP on 5 September 2012 (<http://www.pmg.org.za/report/20120905-detective-dialogue---topics-include-role-detectives-fight-against-cri>).

²¹² Davies, R. “Top cops under fire at Parliament briefing”, IOL News, 17 April 2013, at <http://www.iol.co.za/news/politics/top-cops-under-fire-at-parliament-briefing-1.1278090?ot=inmsa.ArticlePrintPageLayout.ot> (accessed 7 June 2013).

²¹³ Underhill, G. “Promotion of MP leaves police committee ‘rudderless’”, *Mail & Guardian*, 15 June 2013 at <http://mg.co.za/article/2012-06-14-promotion-of-mp-leaves-police-committee-rudderless> (accessed 7 June 2013).

²¹⁴ Constitution of South Africa, section 206(3).

²¹⁵ Constitution of South Africa, section 206(5).

province has a Department of Community Safety,²¹⁶ and each province must set up a Provincial Secretariat for Police, which has a mandate similar to that of the Civilian Secretariat for Police.²¹⁷

The Western Cape Province has recently attempted to strengthen its oversight role over the police, by adopting the Western Cape Community Safety Act (3 of 2013) and appointing a Commission of Inquiry into police-community relations in Khayelitsha, a large township in the Cape metro.²¹⁸ In the case of the Commission of Inquiry the Minister of Police is contesting its constitutionality and the matter is heading for the Constitutional Court.²¹⁹ The Western Cape Community Safety Act provides for a provincial oversight mechanism, granting powers to the MEC for Safety and Security to monitor the work of the (national and municipal) police services and govern community safety initiatives,²²⁰ creates a Provincial Police Ombudsman who can receive and investigate complaints of police inefficiency or a breakdown in relations between the police and a community,²²¹ and allows the MEC for Community Safety to request the Provincial Commissioner, appointed by the National Commissioner and ultimately answerable to the national government, to report directly at provincial level on all policing matters and to ultimately institute proceedings if the Provincial Cabinet has lost confidence in the Provincial Commissioner.²²² Therefore, the Act provides ‘very limited decision-making powers’ to the province.²²³ Nevertheless, the National Minister of Police has been extremely critical of this legislation, which might highlight police inefficiency, corruption and disregard for the rule of law, and has vowed to challenge it in the Constitutional Court.²²⁴ However, the Democratic Alliance governs the Western Cape Province and not the ANC, and this Act as well as the Commission of Inquiry both indicate a process of politicising oversight over law enforcement, which will find their way to the Constitutional Court. According to de Visser, the outcome of the constitutional challenge in respect of the Act is not guaranteed to be in favour of the opposition.²²⁵

²¹⁶Constitution of South Africa, section 206(4).

²¹⁷ Civilian Secretariat for Police Act, sections 16 to 18.

²¹⁸ Commission of Inquiry into allegations of police inefficiency in Khayelitsha and of a breakdown in relations between the community and the police in Khayelitsha (the O’Regan –Pikoli Commission), Government of the Western Cape, Proclamation 2012.

²¹⁹ ‘Minister of Police and SAPS Appeal to Constitutional Court to Stop O’Regan/Pikoli Inquiry - Wasteful Abuse of Public Money’ *NGO Pulse*, 14 February 2013, <http://www.ngopulse.org/press-release/minister-police-and-saps-appeal-constitutional-court-stop-o-regan-pikoli-inquiry-wastef> Accessed 26 July 2013.

²²⁰ Western Cape Community Safety Act, sections 3 and 4. Under the new legislation, the powers of the MEC include accompanying the police in order to monitor how they perform their mandate and how they interact with the communities and visit police stations in order to assess conditions of detention.

²²¹ Western Cape Community Safety Act, sections 10 and 15 to 18.

²²² Western Cape Community Safety Act, sections 19 and 20.

²²³ Jaap de Visser, ‘The W-Cape Community Safety Act: Is Zille pushing her luck?’, 13 May 2013, at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=376431&sn=Detail> (accessed 7 June 2013).

²²⁴ ‘Zille, Mthethwa battle looms’, *City Press*, 4 April 2013, at <http://www.citypress.co.za/politics/zille-mthethwa-battle-looms/> Accessed 16 June 2013.

²²⁵ Jaap de Visser, ‘The W-Cape Community Safety Act: Is Zille pushing her luck?’, 13 May 2013, at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=376431&sn=Detail> (accessed 7 June 2013).

6.6 Court decisions

6.6.1 Domestic

The Constitution permits any person to take a dispute to a relevant tribunal to be settled.²²⁶ It is therefore not uncommon that victims of rights violations sue the relevant government minister for corrective measures and monetary compensation for losses and damages suffered at the hands of security officials. In the case of the Ministers of Police and Correctional services, this has not been insignificant. For example, in 2011/12 the Minister of Correctional Services paid out R2.5 million in claims originating from assaults committed by DCS officials.²²⁷ In 2011/12 the Minister of Police paid out R37 million in court settlements and a further R55 million in out of court settlements.²²⁸

Despite the number of claims brought against these two ministers and the quantum of compensation paid, it seems to have had little effect on overall performance in these two departments and the systemic implications of similar types of violations do not appear to have been taken to heart. For example, even though there are a significant number of cases against the Minister of Police for excessive use of force, a recent amendment to section 49 of the Criminal Procedure Act saw the threshold for minimum use of force effectively lowered, creating further grey areas where and when the police can use force (see section 5.3.2. above). Furthermore, no information has been forthcoming on whether the security officials responsible for these violations, and who caused the two ministers (and ultimately the tax payer) to pay out these amounts, were investigated, charged, dismissed, faced prosecution and were ultimately required to pay back some or all of these amounts to the National Treasury.

Instead of regarding the claims against these two ministers as symptomatic of systemic problems in these two departments, and thus a valuable management tool to reduce the risk of exposure to litigation, it appears rather that each case is regarded individually and contested as such. While individual claimants may obtain relief, the impact of civil litigation on addressing impunity appears to have been negligible.

²²⁶ Section 34

²²⁷ Written reply by the Minister of Correctional Services to Parliamentary question 527 (2013).

²²⁸ “10 552 claims for R7.1bn instituted against SAPS in 2011/12” - Nathi Mthethwa <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=370333&sn=Detail&pid=71616> (accessed 7 June 2013). In a later question to the Minister of Police it was reported that R108 million were paid out.” Courts ordered payouts of R108m against SAPS in 2011/12 - Nathi Mthethwa” <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=382592&sn=Marketingweb+detail&pid=90389> Accessed 16 June 2013.

6.6.2 International

Only one relevant matter has been taken to an international body and will be the focus here.²²⁹

Post-1994 governments have had a lukewarm, if not disrespectful, relationship with the UN treaty monitoring bodies as well as with the African Commission on Human and Peoples' Rights (ACHPR). As at the end of 2012, South Africa was late with submitting its periodic reports to all the treaty monitoring bodies with the exception of CEDAW. South Africa's disregard for international oversight was nowhere better illustrated than in the McCallum decision. Following a brutal mass assault of prisoners at St Alban's prison in 2005, McCallum lodged a complaint with the UN Human Rights Committee (HRC) alleging a violation of article 7 of the International Covenant on Civil Political Rights, prohibiting torture and other ill-treatment. After inviting the South African government on five occasions to respond to the allegations but with no response forthcoming, the HRC ultimately made a decision finding in favour of McCallum in 2010. Government in general or the DCS in particular did not respond to this decision. Nearly a year later, the SAHRC brought the matter to the attention of the Portfolio Committee on Correctional Services, which then made some enquiries. The response from DCS was to place an advertorial in a number of national newspapers, claiming that the finding of the HRC may have been different if the government (i.e. DCS) was given an opportunity to respond. It ignored entirely the fact that the South African government was invited on five occasions to respond to the allegations. For DCS, the mass assault of prisoners had become a media problem to manage, as opposed to a gross rights violation of a most egregious nature.

6.7 Commissions of inquiry

The Jali Commission is the only judicial commission of inquiry that has been instituted to investigate any of the Departments in the justice and security cluster in a comprehensive manner. Other more focussed judicial commissions of inquiry were established such as the White Commission²³⁰ and more recently the Farlam Commission²³¹ into the Marikana incident. A commission similar to the Jali Commission has not been established in respect of SAPS, although some have argued that such an investigation is indeed sorely needed.²³² In the Western Cape, the initiative by the provincial government to establish a commission of inquiry into police-community relations in Khayelitsha is

²²⁹ Two other letters of appeal were submitted but did not result in decisions (A/HRC/18/51 and A/HRC/19/44 – P).

²³⁰ Formerly the Browde Commission, it was tasked to investigate irregularities in promotions in the public service and dealt with a significant number of complaints from DCS (Auditor General of South Africa (1999) RP 173 1999).

²³¹ Government Gazette 35680, No. 50.

²³² Burger, J (2013) *The Case for a Judicial Commission of Inquiry into the South African Police Service*, ISS: Pretoria, <http://www.issafrica.org/iss-today/the-case-for-a-judicial-commission-of-inquiry-into-the-south-african-police-service> Accessed 30 May 2013. 'DA calls for police brutality commission of inquiry' *Mail and Guardian*, 14 April 2013, <http://mg.co.za/article/2013-04-14-da-calls-for-police-brutality-commission-of-inquiry> Accessed 30 May 2013.

being challenged by the Minister of Police and will head to the Constitutional Court. The focus here will therefore be on the Jali Commission as it was comprehensive in its scope, focussing on both good governance and human rights standards.

6.7.1 The Jali Commission

In 2000, President Mbeki appointed the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services headed by Judge Jali (hereafter the Jali Commission).²³³ The appointment was requested by then Minister of Correctional Services, Mr. Ben Skosana (IFP), following the assassination of a whistle blower. There was, however, a history preceding the appointment of the Jali Commission and the Commission found evidence of 20 previous investigations into allegations of corruption, maladministration and poor management. The Jali Commission was most dissatisfied with how DCS had in the past responded to general and specific recommendations made by agencies such as the Department of Public Service and Administration (DPSA) and the Public Service Commission (PSC) concerning recruitment, overcrowding, merit awards, the parole system and corruption in general. The Commission concluded that in failing to implement important recommendations made by the DPSA, PSC and other agencies, the DCS had shown it had no regard for the taxpayer's money.²³⁴ Even prior to the Jali Commission started its work, it was clear that there already existed an entrenched culture of impunity within DCS, at least in respect of addressing governance and corruption. The Commission expressed great dissatisfaction with the fact that DCS officials implicated in rights violations and other improper action were not called to account, enabling them to continue their misconduct with impunity.²³⁵

In respect of SAPS investigations into complaints lodged by prisoners, the Jali Commission identified three major areas of concern: continuous interference by DCS staff in investigations; investigations not being done in confidence due to the presence of DCS officials and their knowledge of the prisoner and the complaint, and intimidation of witnesses and victims by DCS officials.²³⁶

While the Jali Commission's 1800-page report made numerous recommendations, supported by interim reports, the overall impression gained is that ultimately few of these recommendations were adopted by DCS, and even if nominally adopted, their implementation appears to have been half-hearted in many instances.²³⁷ In September 2011, DCS reported to the Portfolio Committee on Correctional Services on the implementation of the Jali Commission's recommendations. The 97-page

²³³Proclamation No.135 of 2001.

²³⁴ The Jali Commission Report p. 905.

²³⁵*Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - "the Jali Commission"*(2006) p. 333.

²³⁶*Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - "the Jali Commission"*(2006) p. 424-425

²³⁷PMG report of the meeting of the Portfolio Committee on Correctional Services of 7 September 2011,

<http://www.pmg.org.za/report/20110907-department-correctional-services-progress-made-implementation-jali-re> Accessed 30 May 2013.

report appears at face value to be detailed but a closer examination reveals that many of the responses provided are evasive and deals with the recommendation superficially. For example, the Commission recommended that the assault of a prisoner by a DCS official should be a dismissible offence in the disciplinary code. The response by the Department to this recommendation is that “the current Disciplinary Code and Procedure accommodated almost all the recommendations made by the Commission”.²³⁸ The Department did not explain whether assaulting a prisoner is a dismissible offence and if it is not, the reasons thereto.

The problems facing the prison system have been remarkably constant relating to governance and human rights violations. Perhaps few incidents illustrate the Department’s response to the Jali Commission as well as the St Alban’s mass assault. The assault took place a few months after the Jali Commission completed its work and would ultimately result in the *McCallum* decision. If the Department took the recommendations from the Commission seriously as well as its obligation to hold its officials accountable, it would have done so in the St Alban’s case. This did not happen and all implicated officials are still in their positions.²³⁹

The major impact of the Jali Commission was that it laid bare the toxic environment that the DCS had become by the early 2000s. It was from this that the SIU were contracted in to investigate the high level corruption taking place in DCS and this has had significant positive results. However, the DCS has not been as focussed on addressing human rights violations as it has been in addressing corruption and maladministration.

6.8 Summary of issues

The above analysis of the functional aspects of impunity raises a number of thematic areas to be found in respect of both the police and DCS. The first concerns the workload of designated oversight structures such as JICS and ICD/IPID. Both institutions receive large volumes of complaints, but simply do not have the human resources capacity to conduct prompt and thorough investigations into all the cases. At best they can investigate only the most serious cases and consequently create a fairly high threshold of what constitutes behaviour attracting the attention of the designated oversight structure. Second, in both the DCS and SAPS it is the case that internal disciplinary procedures are applied erratically. The fluctuations in the enforcement of the disciplinary code would make it difficult to establish clear norms and standards across both organisations, both of which are complex and employing large numbers of officials. A more desirable situation is where there is a consistent

²³⁸ Department of Correctional Services (2011) *Department of Correctional Services implementation of the recommendations of the Jali Commission of Inquiry on Systems and Policies – Section A*, Report presented to the Portfolio Committee on Correctional Services on 7 September 2011, p. 74.

²³⁹ ‘Minister taken to court for brutality in SA jails’ *IOL*, 9 November 2012
<http://www.iol.co.za/the-star/minister-taken-to-court-for-brutality-in-sa-jails-1.1420141#.Uacm7djm7bg> Accessed 30 May 2013.

enforcement of the disciplinary code supported by proactive measures preventing disciplinary infractions in the first place. Third, political leadership has also been lacking in respect of functional aspects of impunity. This applies to both political heads and the accounting officer, as well as in respect of Parliament. In all three these spheres, little has been done to demonstrate clearly to the rank and file of these two departments that human rights violations are unacceptable and perpetrators will be called to account. Related to this is the fact that political heads and their senior management have in general been defensive in the face of criticism, including exposés in the media, and not acknowledging that there are indeed systemic problems in both departments where it concerns rights violations. Fourth, the NPA has clearly not shown leadership by prosecuting without fear or favour. The few law enforcement officials that are ultimately convicted and sentenced to imprisonment stand in sharp contrast to the number of cases recommended for prosecution, with specific reference to the police.

7. Conclusion

Recent high-profile incidents have again drawn attention to the manner in which the police and to some extent the prison service conduct themselves. The above has also shown that whilst oversight institutions receive large volumes of complaints, very few are thoroughly investigated and even less result in criminal convictions and appropriate punishments. While the legislation provides for holding state officials criminally responsible for human rights violations, this happens so rarely that the current situation can only be described as one of *de facto* impunity. The probability that law enforcement officials are held accountable for gross rights violations is indeed very low, and the reasons for this were unpacked in the above analysis. It has been demonstrated that there is no single reason for the current situation but rather that a myriad of factors, structural and functional, contribute in a greater or a lesser degree to the current situation. It would, in our view, be an inaccurate and superficial depiction to lay the blame at the door of only one institution for it would ignore the effect of other factors. Moreover, the problem of rights violations and concomitant impunity is widespread and pervasive, and for this reason it is increasingly unconvincing for government to explain such cases at the hand of the few rotten apples response.

The law enforcement agencies inherited by the GNU posed significant problems in the light of what was expected by the new constitutional democracy. The transformative mission imposed by the Interim and 1996 Constitutions required state institutions to undergo deep-rooted changes that would not only be reflective of who is employed, but also how decisions are made and, more importantly, how state institutions function on a day-to-day basis. This had to be compatible with the values of the Constitution by, in particular, adhering to the principles of transparency and accountability. What has, however, happened is that the police and prison service did not embrace transparency and

accountability and opted rather to resist openness and outside influences that was not compatible with dominant thinking in the two departments. In both departments governance and corruption became significant parallel problems together with human rights violations. This is indicative of internal disciplinary systems not being enforced and impunity growing from the inside outwards. The overall impression gained is that the transformative mission did not get off the ground where it pertains to human rights, accountability and transparency in these two departments.

Understanding impunity in post-apartheid South Africa requires recognising the lost opportunities of the past 20 years. It was shown that there were indeed key moments that transparency and accountability should have been strengthened through, for example, effective prosecutions (following the TRC), law and policy reform, effective oversight and so forth, but failure to recognise the problem and its medium to long term consequences resulted in inaction and dereliction of constitutional obligations. Both SAPS and DCS went through high level policy reform processes (e.g. green and white papers), but these did not result in a particular focus to address impunity and human rights violations. Both departments also underwent law reform processes to bring their principle legislation in line with the Constitution. In addition to this they were assigned specialised oversight agencies. Despite these advances in law reform, the new legislation did not bring about the desired results, namely to ensure that perpetrators of rights violations are held accountable. This situation poses serious questions about the ability (and willingness) of the executive to be directed by legislation, and of law reform itself as an instrument of and means to transformation.

Understanding impunity cannot ignore the high violent crime rate in South Africa and the effect this has had on the general discourse and the rhetoric of politicians. It would also be naive to ignore the levels of violence that ordinary police officers and prison officials encounter, or risk encountering on a daily basis. Whether SAPS and DCS improved their recruitment practices and training to ensure that officials are indeed properly prepared for such a work environment is open for debate. However, politicians and political leaders capitalised on the high crime levels to gain political support through an emphasis on “get tough on crime” and depicting offenders as something less than human. For reasons that are not based on knowledge, tougher law enforcement and harsher punishment were presented and accepted across the political spectrum as the solution. For this to happen law enforcement officials should, the argument would go, not be as constrained by constitutional precepts since it appears that criminals now have more rights than victims of crime. There was therefore a sense of resentment by some political leaders and the public about the Constitution and the standards of performance it requires in respect of criminal suspects and prisoners.

Although it was noted that the blame cannot be laid at the door of one institution, the role of the NPA cannot be ignored. It is because it has the sole authority to prosecute perpetrators of rights violations and the means to do so, that its failure to effectively prosecute state officials implicated in rights

violations has had such a significant impact on impunity post-1994. The data presented showed that in respect of general crimes, the NPA declines to prosecute in the majority of cases. With reference to law enforcement officials, the situation is even worse. Ultimately, the message communicated by the NPA, through the low number of prosecutions, is that police and prison officials can and do get away with it. Compounding the problem is the situation that the NPA has itself not been called to account about the low number of prosecutions and what appears to be a general trend that law enforcement officials are seldom prosecuted for rights violations.

The consequences of engrained impunity over the last 20 years have been significant. It would not be an over-exaggeration to say that the quality of police-community relations and the level of trust that the public has in the police are at an all-time low. This has not been helped by on-going service delivery protests often leading to violent confrontations between protesters and the police. It is difficult to gauge the trust and confidence that prisoners have in their custodians, but there is reason to believe that it has at least not improved significantly in recent years. Recent unrest in a number of prisons (e.g. Groenpunt and St Alban's) point to a frustrated prison population that has only very rarely resorted to violent protest action in the past. On both these fronts the situation points to a deepening legitimacy crisis in law enforcement, where neither the public nor the prison population have trust that the officials of these two departments will act within the bounds of the Constitution and implement subordinate legislation correctly.

A further consequence of impunity is that victims of rights violations (dating back to the TRC) have lost faith in the ability of the State and its institutions to provide victims with redress. Redress should be understood in its fullest meaning and not merely financial compensation, which is of itself a route littered with obstacles. The extent to which the designated oversight structures (IPID and JICS) are still regarded as a legitimate route for victims of rights violations is increasingly called into question.

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