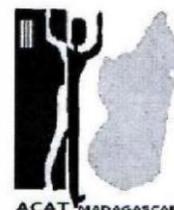




Fédération internationale de l'Action des chrétiens pour l'abolition de la torture
International Federation of Action by Christians for the Abolition of Torture
Federación Internacional de la Acción de los Cristianos para la Abolición de la Tortura



FIACAT and ACAT Madagascar¹ :
Contribution to the second review of Madagascar

Human Rights Council

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¹ ACAT Madagascar is a human rights organisation set up in 1992 and affiliated to FIACAT (International Federation of Action by Christians for the Abolition of Torture) since 2000. FIACAT is an international non-governmental organisation for the defense of human rights which fights for the abolition of torture and the death penalty.

Introduction to the authors of the report

FIACAT

The International Federation for Action by Christians for the Abolition of Torture, FIACAT, is an international non-governmental human rights organisation, set up in 1987, which works towards the abolition of torture and the death penalty. The Federation brings together some thirty national associations, the ACATs, present in four continents.

FIACAT – representing its members in international and regional organisations

It enjoys Consultative Status with the United Nations (UN), Participative Status with the Council of Europe and Observer Status with the African Commission on Human and Peoples' Rights (ACHPR). FIACAT is also accredited to the International Organisation of la Francophonie (OIF).

By referring the concerns of its members working on the ground to international bodies, FIACAT's aim is to encourage the adoption of relevant recommendations and their implementation by governments. FIACAT works towards the application of international human rights conventions, the prevention of torture in places of detention, and an end to enforced disappearances and impunity. It also takes part in the campaign against the death penalty by calling on states to abolish capital punishment in their legal systems.

To give added impact to these efforts, FIACAT is a founding member of several campaigning coalitions, in particular the World Coalition against the Death Penalty (WCADP), the Coalition of International NGOs against Torture (CINAT) and the International Coalition against Enforced Disappearances (ICAED).

FIACAT – building up the capacities of the ACAT network in thirty countries

FIACAT assists its member associations in organising themselves, supporting them so that they can become important players in civil society, capable of raising public awareness and having an impact on the authorities in their country.

It coordinates the network by promoting exchanges, proposing regional and international training events and joint campaigns, thus supporting the activities of the ACATs and providing them with exposure on the international scene.

FIACAT – a network of Christians united in fighting torture and the death penalty

FIACAT's mission is to awaken Churches and Christian organisations to the scandal of torture and the death penalty and convince them to act.

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ACAT Madagascar

ACAT Madagascar, through its parent organisation, FIACAT, benefits from the observer status with the African Commission on Human and Peoples' Rights and the Consultative Status with the United Nations. It was the first Malagasy association to initiate and present an alternative report, a paper presented by Malagasy civil society to the UN Human Rights Committee during the review of the State report on the implementation of the International Covenant on Civil and Political Rights in 2007. ACAT Madagascar was also the only Malagasy association to file a report for the Universal Periodic Review by the Human Rights Council in March 2010. It serves as component entity in several coalitions formed to defend human rights, and particularly the Coalition for the International Criminal Court (CICC).

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Following the 2010 review

This report, drafted by FIACAT and ACAT Madagascar, aims to assess the extent to which the recommendations and commitments undertaken by Madagascar to improve human rights have been implemented since the first Universal Periodic Review (UPR) of the country.

Following the first review of Madagascar in 2010, FIACAT and ACAT Madagascar acknowledge that the transitional government organised discussions with civil society actors who serve on the editorial Committee that produces alternative reports on the implementation of the recommendations Madagascar accepted at the time of the UPR's first cycle.

That said, a great deal remains to be done, particularly for the prohibition of torture, detention conditions, enquiries into human rights violations and the abolition of the death penalty.

I. Prohibiting torture

At the time the first review cycle was launched, FIACAT and ACAT Madagascar were pleased that the Government accepted recommendations made by the United States, France and Chile calling for:

- the introduction into national legislation of a definition of torture consistent with the definition enshrined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ;
- enquiries into all allegations of torture;
- establishing torture as a separate offence ;
- taking effective action to prevent torture;
- limiting the duration of custody and the period of pre-trial detention.

A. *Criminalization of torture*

FIACAT and ACAT Madagascar remind that Madagascar adopted resolution no. 08/2008 of 25 June 2008 on the prohibition and prevention of torture. However, the resolution in question has still not been incorporated into the Criminal Code.

The only reference made to torture in the Malagasy Criminal Code is as an aggravating circumstance; a murder where torture is categorised as assassination by the judge. Hence, under article 303 of the Criminal code "*a criminal shall be deemed guilty of assassination, irrespective of how the crime is classified, if, in carrying it out, he resorts to torture or acts of barbarity*".

FIACAT and ACAT-Madagascar welcome publication in 2012 of a "*Guide to the effective implementation of the United Nations Convention and of the national law against torture*" published by the Association for the prevention of torture (APT) in cooperation with the Malagasy Ministry for Justice. In fact, it ranks as one of the instruments the Ministry is concerned to place at the disposal of national actors as an encouragement to effective enforcement of these legal instruments and prevent the occurrence of torture.

However, FIACAT and ACAT Madagascar want to remind that the level of the punishment provided under resolution 2008 is not set for inhuman and degrading treatments; their repartition between crimes and offenses comes within the judge's competence and is prejudicial to the defendant's legal security but also to the principle of offences and penalties being established by law.²

B. The prevention of acts of torture

Notwithstanding the Government's agreement to ratify the OPCAT when it undertook its first review in 2010, FIACAT and ACAT find it regrettable that it has not yet honoured its commitments despite having signed it on 24 September 2003. Yet, Madagascar renewed that commitment in 2011 when its initial report was being reviewed by the United Nations Committee against Torture by declaring that one of its priorities was to "***Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment" that will oblige the Contracting State to authorise visits to all places of detention***"³

To date, no entity has been established to act as a national prevention mechanism (MNP) even if thought was devoted to the idea of setting up a National Human Rights Commission that could discharge the functions assigned to the MNP.

FIACAT and ACAT-Madagascar call on Madagascar to:

- **Revise the Criminal Code and the Code of Criminal Procedure in order to effectively criminalize acts of torture and other cruel, inhuman and degrading treatments ;**
- **Continue offering internal training courses to magistrates, prosecutors, barristers, police officers, penitentiary service officers on the subject of torture and its absolute prohibition ;**
- **Amend the law of 25 June 2008 laying down a scale of penalties for inhuman and degrading treatments;**
- **Ratify the OPCAT as soon as possible;**
- **Create a national prevention mechanism consistent with the provisions enshrined in the protocol.**

II. Prisoners' rights

During the Universal Periodic Review of 2010, Madagascar accepted several recommendations requiring the Government to upgrade the detention conditions. Accordingly, Madagascar has accepted to:

- adopt effective measures to limit the time spent in custody or pre-trial détention (Chile);
- put an end to all searches, arrests, detentions, prosecutions and condemnations which are arbitrary or instituted on political grounds and to free political prisoners (Canada, United Kingdom of Great Britain and Northern Ireland),

² Article 15.1 of the International Covenant on civil and political rights (ICCPR): No one shall be condemned for actions or omissions that did not constitute a punishable offence under national or international law at the time they were committed. Neither shall a more severe penalty be inflicted than that which was applied at the time the offence was committed. If, subsequently, a lesser penalty is handed down, the offender shall qualify for it.

³ Opening address by the Head of the Malagasy delegation delivered in the context of the initial report review on the implementation of the Convention against torture and other penalties or cruel, inhuman and degrading treatment, Geneva 10 November 2011.

- improve considerably its penal institutions, particularly by prohibition forced labour,
- and opening detention centres for minors (Spain).

A Procedural safeguards of detention

Rules governing detention are articulated strictly within the framework of Malagasy criminal law. However, these rules are not systematically respected by judicial police officers (JPO) and magistrates. Their non-compliances are rarely sanctioned by the law. Moreover, ACAT-Madagascar claims that there have been numerous instances of prisoners held in detention even though their legal terms of detention have expired in several penitential institutions over the last years.

1. Custody

In accordance with Article 136 of the Code of Criminal Procedure (CCP), custody must be limited to 48 hours. Article 137 of the CCP provides for additional period and allow in practice the extension of custody to a maximum of 12 days from the moment the person is arrested until he/she appears before the competent magistrate when the arrest took place outside the customary residence of the judicial police officer conducting the enquiry. Nowadays, week-end and legal holidays are taken into account in calculating the time spent in custody: contrarily to the earlier legislation. However, several JPO have not been informed of the change and fail to take account of these days when it comes to calculating time in custody.

The former Code of Criminal Procedure provided for a 15-day period of custody, renewable in case of breach of the national security. This article was omitted from the updated version of the aforementioned Code. However, a number of prosecutors continue using it as if it had never been repealed. Because the Code of Criminal Procedure still refers to breaches of national security, they argue that failure to retain the exceptional period of custody amounts to no more than an inadvertent omission on the the part of the legislator.

In practice, the very small sum of money allocated by the Government to the judicial police means that plaintiffs are obliged to defray OPJ's travelling expenses, for arrests under investigation, for bringing the accused to the public prosecutor's office or for transferring them to prison.

By virtue of the management and governing powers he/she wields over PPJ's activities, the State Prosecutor is obliged to supervise the extent to which detention is legal and regular throughout the period offenders⁴ are held in custody. In practice, this supervision of legality is rarely undertaken, particularly in rural areas. Reports drafted while detainees are in custody are sent to the Prosecutor directly which means that ill-treated victims or their lawyers cannot access them; therefore they can't in practice challenge its regularity.

2. Pre-trial detention

The Code of Criminal Procedure, as amended by law no.2007-01 of 30 July 2007, modified the legislation governing pre-trial detention to reinforce its exceptional nature by specifying that "*pre-trial*

⁴ Cf. article 155 of the Code of Criminal Procedure

detention is an exceptional measure"⁵. Under the provisions of the aforementioned Code, pre-trial detention in Madagascar is of six months for minor offences and eight months for major offences. Exceptionally, this detention may be extended by three months, renewable once, for minor offences and by six months, renewable once, for major offences.⁶ The decision to maintain the person in pre-trial detention must be "*pecially motivated*". Therefore, pre-trial detention may not exceed one year for minor offences and 18 months for major offences.

Prior to the enactment of law no.2007-021 of 30 July 2007 amending legislation governing pre-trial detention, the Criminal Code provided that those accused of the "*theft of cattle*" could be imprisoned indefinitely. The 2007 Act repealed that provision and the judicial and prison authorities had 3 months, from 5 May 2008, to settle the cases of those accused of cattle theft who had already served a 15- month of pre-trial detention and whose cases were under review by the investigating judge⁷. Defendants who were the object of an order for committal for a term exceeding the 30 months stipulated under the new law should be brought to trial within one year as from May 2008. Because of the fact that prisons are overcrowded and that judges are overworked, several offenders accused of cattle theft are still in prison.

In practice, recourse to pre-trial detention is almost systematic. In fact, of the 19,870 prisoners in Madagascar in June 2012, an estimated 53% were there pending trial.

The 2007 Act has also inserted a new provision into the Code of Criminal Procedure relating to the liability of the agents who fail to observe the time limits of pre-trial detention. Hence, under article 614 of the CPP, "*magistrates, clerks and officials, who failed to comply with the time limits laid down in this Code in particular those applicable to pre-trial detention, whether voluntarily or through negligence, can be held liable*". In practice, liability of agents who have failed to comply with these time limits has never been recorded.

FIACAT and ACAT-Madagascar call on Madagascar to:

- *Provide a better legal and deontological training given to judicial police officers and improve awareness on the principle of legality ;*
- *Tighten the control wielded by the Public Prosecutor over the procedural safeguards governing custody ;*
- *Ensure that all offenders are given a fair and equitable trial within reasonable time limits ;*
- *Grant immediate release to all those still in detention and whose time in custody or in pre-trial detention has expired and who, in fact, are being detained arbitrarily ;*

⁵ Cf. article 333 of the CCP

⁶ Cf. Article 334 bis of CPP

⁷ In accordance with the circular of 25 April 2008 (circular implementing the provisions of law 2007-021)

- *Fight against all forms of illegal detention or outside the time limit, with a special emphasis on the liability of agents in compliance with article 614 of the Code of Criminal Procedure.*

B. Conditions governing imprisonment

According to the Ministry for Justice, there are 82 prisons in Madagascar, split into three categories: a high security prison in Tsiafahy, theoretically confined to dangerous criminals who have already been sentenced and inmates sentenced to the death; prison units attached to every Court of First Instance and remand centres located in more isolated areas.

Prison conditions in Madagascar are catastrophic and could be assimilated to cruel, inhuman and degrading treatment. Overcrowding is endemic. Prisoners are not separated according to their status and there is no access to health. Food is extremely limited while the possibility of recourse to justice in the event of ill-treatment is negligible.

The European Union has ceased financing the Ministry for Justice directly since the crisis began in 2009, with special emphasis on those categories intended to reconfigure the prison reform programme. The prison situation has deteriorated quite markedly since then. As things stand now, the administration of the prison system prioritises the management of security and reinserting offenders into society.

1. Overcrowding in prisons

According to a report published by the Malagasy authorities in June 2012, the number of people imprisoned nationwide stood at 19,870 in establishments known to accommodate a maximum of 10,319, i.e. an occupancy rate of 193%. When FIACAT and ACAT-Madagascar visited the country in July 2011, the high security prison in Tsiafahy was holding 670 detainees in an institution designed to cater for 110 inmates, i.e. a rate of 610%. A partial explanation for overcrowding in Madagascar is the country's widespread use of pre-trial detention.

Several of Madagascar's prisons were built during the colonial period and have not been refurbished much since then except for work done by a number of NGOs and the CICR. They are in a state of serious disrepair and becoming more inhabitable by the day owing to the unacceptably high occupancy rate.

2. Separation of detainees

Prisoners in pre-trial detention and convicted prisoners are not separated systematically. In the majority of prison establishments, men and women have been separated successfully. By contrast, the separation of adult males from male minors is not successful for infrastructural reasons. The separation of adult women from female minors has been ineffective nationwide. Moreover, several female inmates are imprisoned with their own very young children.

3. Political prisoners

In Madagascar, the majority of inmates are common law prisoners. There are also inmates known as "security" prisoners, a name used to refer to people arrested during the Malagasy political crisis that flared up in the first six months of 2002.

Several dozen opponents of the High Transitional Authority have been detained without trial. Dozens more members of the armed forces, police constables, colonels, civil "militiamen" were arrested in the capital or in the provinces between June and August 2009.

FIACAT and ACAT-Madagascar call on Madagascar to :

- *Comply with the Standard Minimum Rules for the Treatment of Prisoners ;*
- *Take urgent action to fight against overcrowding in prison by giving priority to alternative measures to detention, particularly in the case of people sentenced for minor offences ;*
- *Ensure that adults are successfully separated from minors and the prisoners in pre-trial detention from convicted prisoners ;*
- *Free political prisoners immediately.*

III. The death penalty

FIACAT and ACAT-Madagascar found it regrettable that Madagascar had not replied clearly, in the course of its review in 2010, to recommendations **74**, proposing the adoption of a *de jure* moratorium on recourse to the death penalty with a view to its abolition (Italy), **75** requesting the abolition of the death penalty (Norway), **76**, calling for the introduction of a *de jure* moratorium on the death penalty and the adoption of legislation prohibiting this form of punishment (Sweden) and **77** requesting that the abolition of the death penalty be written into law (Spain).

The latest execution in Madagascar took place in 1958 during the colonial era. Yet, the death penalty is still in the Malagasy criminal law. In 2006, the Government brought in a Bill in favor of its abolition. During the UPR in 2010, Madagascar underlined that the conditions for abolishing capital punishment immediately were not yet met. A significant segment of the population and most of the members of Parliament argue that retaining capital punishment acts as a deterrent and is still useful for combatting insecurity. Members of parliament in the south of the country oppose the death penalty's abolition more vehemently owing to the upsurge in zebu theft (*Dabalo*). Even now, a case is being made for reintroducing the death penalty for the rape of minors.

However, Madagascar signed the Second Optional Protocol relating to the ICCPR at the opening session of the General Assembly of the United Nations on 24 September 2012.

On the basis of a nationwide assessment, the Ministry of Justice reported that 56 inmates had received death sentences as of July 2011. Most criminals were being held in the high security prison

in Tsiafahy (23 according to statistics for 2011) and the remainder in various prison units throughout the country.

Again, according to the Ministry of Justice, prisoners in this category are known to be held in low security prisons for short sentences (“Maisons de sûreté”) such as in Bealanana (one convict) or in Mahabo (one convict). ACAT-Madagascar claims that the number of individuals sentenced to death is much higher than the figure released by the Ministry of Justice. The reason for the disagreement on the number of those sentenced to death stems from the fact that death sentences in Madagascar are automatically commuted to hard labour for life. Numerically, ACAT-Madagascar reported that, on 5 October 2010, there were 185 prisoners condemned to hard labor for life in the Antanimora prison unit alone, located in Antananarivo.

Generally speaking, in Madagascar prisoners sentenced to death are treated like other prison inmates and not isolated. Most of them are held in the high security prison in Tsiafahy located at an estimated 20 kms. outside Antananarivo. Conditions there resemble those found in a "collective dungeon". It is seriously overcrowded and the overcrowding as of 610% when FIACAT visited the entity in July 2011. The units have no electricity and scarcely any running water. The flow of water from taps is so weak that inmates find it difficult to have enough to drink or wash themselves. They are forced to leave the tap running all night over a barrel in order to have sufficient water for the day. It has been estimated that prisoners have less than one litre of water per person per day to cover drinking and hygiene requirements. The buildings are full of insects, evidenced by the blood-stained walls. Prisoners are not given soap. This must be supplied by the family. Geographic isolation adds another difficulty for the inmates since their families, most of whom live in other provinces, cannot help improve their daily food ration and hygiene. Moreover, those sentenced to death, as the prisoners serving long sentences, are considered social pariahs and are not always supported by their close friends or family. Many do not qualify for visits and have no access to additional food rations. The vast majority suffer from profound psychological stress.

FIACAT and ACAT-Madagascar call on Madagascar to:

- **Adopt the de jure moratorium as soon as possible;**
- **Abolish the death penalty in the national legislation; and incorporate its prohibition in the Malagasy Constitution ;**
- **Ratify the Second Optional Protocol relating to the International Covenant on Civil and Political Rights that aims to abolish the death penalty;**
- **Commute death sentences into a fair sentence and proportionate to the offence committed.**