



South Africa

Amnesty International submission to the UN Universal Periodic Review 13th session of the UPR Working Group, May - June 2012

Follow up to the previous review

At the time of its first UPR in April 2008, a number of recommendations were made to South Africa by other States, including on HIV/AIDS, poverty and access to health care;¹ domestic violence and violence against women;² discrimination on grounds of sexual orientation or gender presentation;³ racism and xenophobia;⁴ domestic legislation and international human rights standards;⁵ and ratification of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.⁶

Substantial progress has been made since the last review to expand access to treatment for HIV/AIDS to over 1.4 million people by 2011. Physical and economic barriers to access to health services, however, continue to affect poor and particularly rural households.

Despite the normative framework guaranteeing women's right to equality, discrimination against women and high levels of sexual and gender-based violence persist. Their access to justice, protection and other remedies provided for under progressive statutory law continues to be obstructed by lack of capacity and political will and poor training programs for police and other service-providers.

Similarly, despite the normative framework guaranteeing non-discrimination on these grounds, the persistence of violent, targeted attacks against lesbian, gay, bisexual and transgender individuals remains a serious problem.

The draft National Action Plan on Racism, Racial Discrimination, Xenophobia and Related Intolerance under the Durban Review process is still under development through the Department of Justice and Constitutional Development.⁷ An Inter-Ministerial Committee on xenophobia was established in 2010. Despite President Jacob Zuma denouncing targeted violence against refugees and migrants, serious incidents continue to occur across the country. *Refoulement* remains a problem.

Since its previous review South Africa has not adopted legislative measures to prevent, prosecute and punish acts of torture and other ill-treatment, in line with international standards, or ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In its response to recommendations made during its previous review, delivered on 11 June 2008, South Africa expressed support for a recommendation to ratify the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.⁸ However, at the end of November 2011 this was still under discussion.

Normative and institutional framework of the State

South Africa has an internationally admired Constitution which protects and makes justiciable all the rights it guarantees, including economic, social and cultural rights. Despite some challenges and controversies regarding judicial appointments, the administration of justice remains overall robustly independent and results in jurisprudence which further promotes human rights. However, the circumstances surrounding the dismissal of the then National Director of Public Prosecutions, Vusi Pikoli, raises serious questions about the political manipulation of high level appointments within the justice system. Moreover, while the legal aid system does allow access to justice for indigent accused, access to the courts for adjudication of constitutional rights issues remains difficult for poorer communities, organizations and individuals. Some statutory oversight bodies, such as the Office of the Public Protector, are increasingly robustly investigating and protecting the rights guaranteed under the Constitution.

Promotion and protection of human rights on the ground

HIV/AIDS, poverty, women's rights and the right to health

South Africa has made substantial progress since the last review in improving access to comprehensive treatment, care and support for HIV and AIDS sufferers. By 2011 some 1.4 million people had access to antiretroviral treatment. The cost of this expansion has been largely borne by the government of South Africa. This progress has been made along with an expansion in the availability of Prevention of Mother to Child HIV Transmission treatment and the roll-out of new guidelines allowing earlier beneficial access to antiretroviral treatment, including for HIV-positive pregnant women. The expansion of clinic-level access to antiretroviral treatment and the promotion of models of "down-referral" of patients and "task-shifting" have helped increase access for remote and poor communities.

In late 2011, the country was engaged in an open, co-operative and consultative process across government and non-governmental sectors at national and provincial levels leading to the adoption of a new five-year National Strategic Plan for HIV and AIDS. The new plan, which explicitly takes into account the need to promote and protect human rights and ensure non-discrimination, is scheduled to be launched on World AIDS Day 1 December 2011.⁹

Amnesty International remains concerned that multiple forms of discrimination continue to affect access to HIV-related health services, particularly in rural areas. According to official data in 2011, infection levels have continued to rise in rural areas. There are both physical and economic barriers to access, including the apparent lack of improvement in transport systems and road infrastructure in rural communities over the past three years. Amnesty International's own research and information

from wider consultations indicate that decision-making by people living in poverty regarding seeking or keeping medical appointments remains influenced by factors such as the cost of transport, the poor conditions of subsidiary roads and the infrequency and unreliability of the transport system.¹⁰

Additional circumstances affecting access or adherence to treatment include the lack of availability of adequate food daily. There is a widespread view that antiretroviral drugs can not be taken without food. Arbitrary processes and decision-making regarding eligibility for disability grants appears also to affect adherence to treatment. Such grants continue to be relied upon for the most basic needs in poor rural households affected by HIV and AIDS.

Rural women and girls continue to experience multiple forms of discrimination which increase the risk of HIV infection and their difficulties in accessing and remaining on treatment. Residents of rural areas, in particular black women, are disproportionately represented amongst the poor and unemployed. This economic disadvantage in turn increases the impact of distances and transport costs for their access to services. Moreover, the persistence of patriarchal attitudes affects women's autonomy of decision-making on their sexual and reproductive health. Another manifestation of the problem is seen in context of persistently high levels of maternal mortality in South Africa. According to recent data from the UN no progress has been made in the reduction of maternal mortality in South Africa and the maternal mortality ratio remains at a high of 410 per 100,000 live births.¹¹ 42.5 per cent of these maternal deaths according to the UN were due to HIV.¹²

Discrimination on the grounds of sexual orientation and gender identity

Violent, targeted attacks against lesbian, gay, bisexual and transgender individuals continue to occur and at an apparently increasing level. Despite constitutional guarantees of the right to equality to LGBT individuals and progressive jurisprudence from South African courts, prejudiced, socially conservative and patriarchal attitudes continue to undermine their rights. Similar prejudices on the part of many law enforcement officials create barriers to access to justice for victims and contribute to a climate of impunity for crimes of sexual violence, assault and murder against members of this community. An inadequate legal framework also hampers the effective investigation and prosecution of these crimes in context of the motivations of the perpetrators and the impact of these crimes on the victim and wider community.

Civil society campaigning has led to the establishment of a joint government-civil society "task team" in 2011, to identify and implement solutions. The Department of Justice in late 2010 also began a process of developing a 'hate crimes' legislative framework following the recommendations of a cross-sector civil society hate crimes working group.

Refugee and migrants' rights and xenophobia

Foreign nationals, whether refugees, asylum-seekers or ordinary migrants, continue to be victims of human rights abuses since the large-scale violence in 2008. Despite periodic public denunciations by President Jacob Zuma of targeted violence against refugees and migrants, very serious incidents of targeted violence continue to occur across the country, as well as looting of small businesses and property destruction. In some incidents, the passive or active complicity of law enforcement officials has been evident. In addition, there is a continuing lack of a more systematic country-wide and

effective police response to prevent or de-escalate the violence. This gap persists despite the strenuous efforts of humanitarian and civil society organizations in collaboration with several senior police officials.

While the factors behind specific attacks often have a localised dynamic, taken overall the incidents have common features such as the perpetrators appearing to have targeted the victims on the basis of their actual or perceived nationality or other related characteristics, and a perception of their vulnerability. This aspect is exacerbated by the conduct of the police who sometimes display overt prejudice and effectively refuse to offer assistance, leaving the victim without any access to protection, justice or other remedies. Incidents have happened sometimes on a large-scale and caused substantial losses, for which in the majority if not all of the cases no compensation has been awarded or restitution made.¹³

In a disturbing incident in October 2011 in Nyanga, Cape Town, the police, who allegedly used excessive force while conducting mass arrests of “suspected illegal foreign nationals”, verbally abused them as “unwanted foreigners who should go home”. Those abused included recognised refugees who had documents attesting to their status. The incident happened soon after derogatory comments against foreign nationals reportedly had been made by the national commissioner of police.¹⁴ Some of the victims of the police abuses in Nyanga confirmed to Amnesty International that the local police referred to the national commissioner of police’s comments as an apparent justification for their actions.

The policy of the authorities on access to asylum determination procedures appears also to be becoming more restrictive. The Immigration Amendment Act (no. 13 of 2011), for instance, has reduced to five days the period in which an asylum-seeker entering the country can travel “lawfully” to the nearest Refugee Reception Office (RRO) to apply for asylum. As soon as this period expires, the holder of the five-day visa becomes “an illegal foreigner” and subject to arrest. In 2011, the Department of Home Affairs closed the Johannesburg (Crown Mines) RRO and the RRO in Port Elizabeth in the Eastern Cape. The RRO in Cape Town reportedly will close in 2012 and most likely the RRO in Durban. It appears that the only centres remaining will be in Musina on the border with Zimbabwe and in Pretoria.

The prevention and investigation of torture and extra-judicial executions

Despite constitutional guarantees of the right to life and the right not to be subjected to torture, these rights continue to be violated by law enforcement officials and at an increasing scale. The police oversight body, the Independent Complaints Directorate, for instance, reported that from April 2009 to March 2010 it had received five direct complaints of torture and 920 complaints of assault with intent to cause grievous bodily harm. The Independent Complaints Directorate reported 860 deaths in custody and “as a result of police action” between April 2009 and March 2010.

The context is primarily the “war against crime”, with the abuses being committed particularly by the police “organized crime” and other specialized units. It is a matter of concern also that a climate of impunity has been fostered by public statements by senior politicians and officials, including national commissioners of police over the last three years. Although the statutory oversight body responsible

for investigating allegations of torture and unlawful killings by police has now been re-established on the basis of its own independent legislation, Amnesty International is concerned that it is still not sufficiently independent and under-resourced in relation to the scale of abuses to be investigated.¹⁵

The inclusion in the new legislation of an explicit obligation to investigate allegations of torture, in addition to the existing obligation to investigate all incidents of deaths in custody and as a result of police actions, is an important and welcome step. However, torture is still not criminalized under statutory law, due to slow progress in bringing the 'criminalization of torture' bill before Parliament. South Africa has also not ratified the Optional Protocol to the Convention against Torture, despite the matter being under discussion with statutory and non-governmental civil society bodies for a number of years.¹⁶

Threats and harassment of human rights defenders and infringements of freedom of expression

There is increasing harassment or criminalization of the activities of human rights defenders and government critics. They include individuals, journalists, the staff of statutory human rights bodies and also community-based organizations promoting access to economic and social rights, such as the Abahlali baseMjondolo (shackdwellers) movement.

The Protection of State Information Bill, which in November 2011 was passed by the lower house of Parliament, will criminalize the possession or publication of classified information. Amnesty International is concerned that the bill does not include an explicit public interest defence in relation to the offences created under the bill. It provides for prison sentences from five to 25 years and a wholly opaque and uncertain remedy to the reclassification of documents intended to prevent public knowledge of official corruption or other maladministration. The bill also further shields the state security establishment from scrutiny and accountability.

Recommendations for action by the State under review

Amnesty International calls on the government of South Africa:

HIV/AIDS, poverty, women's rights and the right to health:

- To remove discriminatory barriers to access to prevention, treatment and care for HIV;
- Ensure that all government departments, including the Department of Transport, are involved in developing and implementing plans aimed at reducing physical and cost barriers to access to HIV-related health services in rural areas;
- To facilitate the collection of data, disaggregated on the basis of gender and other groups identified as facing discrimination, to assist identification of discriminatory factors affecting a person's ability to access and remain on treatment;
- To ensure that the work of community-level home-based carers, who assist the most marginalized individuals in rural areas, is recognized and strengthened through training, capacity-building, risk management and linking them to the formal health system;
- To ratify the International Covenant on Economic, Social and Cultural Rights and its Optional

Protocol allowing the right of individual petition, and opting into the inquiry mechanism under that Protocol.

Discrimination on the grounds of sexual orientation and gender identity:

- To unambiguously denounce crimes of violence targeting members of the LGBT community as a violation of their right to equality and other rights;
- To ensure sufficient resources to conduct comprehensive public awareness campaigns on homophobia, and on the rights of lesbian, gay, bisexual and transgender individuals to equality, non-discrimination and the right to be free from torture and inhumane or degrading treatment;
- To rapidly develop monitoring capacity and legislation to enhance the prevention, investigation and prosecution of crimes of violence against individuals on the grounds of their sexual orientation or gender identity;
- To ensure that the police and the prosecution service are adequately trained to investigate and prosecute hate crimes on the basis of sexual orientation and gender identity.

Refugee and migrants' rights and xenophobia:

- To fulfill its international, regional and domestic legal obligations to protect the rights of refugees, asylum-seekers and migrants, including the right without distinction as to national origin to security of the person and to protection by the state against violence or bodily harm from either public or private sources;
- To ensure, in collaboration with civil society, implementation of legislation, plans and directives which increase the prevention, investigation and prosecution of property destruction and crimes of violence against refugees, asylum-seekers and migrants;
- To urgently reconsider the plans to close the majority of refugee reception offices which will substantially reduce access to asylum determination in South Africa;
- To ensure that no actions, direct or indirect, lead to a violation of the principle of *non-refoulement*, including with respect to Zimbabweans.

Torture and extra-judicial executions:

- To make rapid progress towards bringing a comprehensive 'criminalization of torture' bill before Parliament by 2012 and to ensure its implementation once signed into law;
- To take all necessary steps towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by 2012;
- To ensure that investigators involved in investigating alleged incidents of torture, extra-judicial executions and related abuses are able to conduct their work without intimidation and receive full co-operation from law enforcement officials;
- To publicly and unambiguously denounce acts of torture and extra-judicial executions as human rights violations unjustified under any circumstances.

Threats and harassment of human rights defenders and infringements of freedom of expression:

- To ensure that human rights defenders are allowed the space to undertake their non-violent advocacy, campaigning, reporting and investigative work without fear of harassment, threats, raids, arbitrary arrest or criminalization of their activities;
- To urgently reconsider the Protection of State Information Bill and to allow for wide public consultation on its purpose and content.

¹ Report of the Working Group on the Universal Periodic Review on South Africa, 23 May 2008 (A/HRC/8/32), recommendation 67.12 (Canada), recommendation 67.13 (Romania), recommendation 67.14 (Algeria) and recommendation 67.17 (Mauritania).

² A/HRC/8/32, recommendation 67.4 (The Netherlands), recommendation 67.5 (Switzerland), recommendation 67.6 (Canada) and recommendation 67.11 (Canada).

³ A/HRC/8/32, recommendation 67.20 (United Kingdom), recommendation 67.21 (Belgium) and recommendation 67.22 (Belgium).

⁴ A/HRC/8/32, recommendation 67.19 (Jordan) and recommendation 67.9 (Canada).

⁵ A/HRC/8/32, recommendation 67.1 (Slovenia).

⁶ A/HRC/8/32, recommendation 67.7 (Romania, Germany, Zimbabwe and South Africa).

⁷ The Action Plan had not been circulated for public discussion by November 2011.

⁸ Consideration and adoption of the outcome of the UPR of South Africa in the Human Rights Council plenary, 11 June 2008. See the report of the eighth session of the Human Rights Council, A/HRC/8/52, paragraph 575.

⁹ National Strategic Plan for HIV, STIs and TB, 2012-2016, South Africa, which will be publicly launched on 1 December 2011.

¹⁰ See Amnesty International, *"I am at the lowest end of all": Rural women living with HIV face human rights abuses in South Africa* (Index: AFR 53/001/2008); *South Africa: Human rights concerns in South Africa: Memorandum sent to the South African government*, August 2009 (AFR 53/008/2009); Amnesty International submission to the South African National AIDS Council on Draft Zero of the NSP, September 2011; *"Hidden from view": Community carers and HIV in rural South Africa* (AFR 53/005/2011).

¹¹ WHO, UNICEF, UNFPA and The World Bank, *Trends in Maternal Mortality 1990-2008*, 2010, Annex 1.

¹² *Trends in Maternal Mortality 1990-2008*.

¹³ See Amnesty International, *South Africa: "Talk for us please": Limited Options Facing Individuals Displaced by Xenophobic Violence* (Index: AFR 53/012/2008); *South Africa: Human rights concerns in South Africa: Memorandum sent to the South African government*, August 2009 (AFR 53/008/2009); *South Africa: Grave concern at continuing violence against refugees and migrants* (Index: AFR53/004/2010); *South Africa: Police failure to protect human rights activist Jean-Pierre Lukamba is symptomatic of wider failure to respect the rights of refugees* (Index: AFR 53/002/2011).

¹⁴ In an unrelated development, the national commissioner was later suspended from his duties pending the outcome of an investigation into alleged corruption.

¹⁵ The body was previously established under statutory law as part of the South African Police Services Act 1995.

¹⁶ See Amnesty International Report on South Africa: 2009, 2010 and 2011; and Memorandum sent to the South African government, August 2009 (AFR 53/008/2009).